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Routes and Roadblocks: State Controls on Hazardous Waste Imports

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INTRODUCTION

In an effort to conserve their chemical waste[1] disposal capacity and reduce environmental and health risks associated with hazardous waste disposal, some states have attempted to restrict their disposal facilities to those wastes generated by industry located within the state.[2] The federal courts, however, have overturned these restrictions[3] in decisions based upon the commerce clause of the Constitution.[4] The Supreme Court has

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1. Hazardous waste is defined, for the purposes of this discussion, as

> a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may—
>
> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5) (1976). Solid waste is defined 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, mining and agricultural operations, and from community activities, but does not include [domestic sewage or discharges authorized under the Federal Water Pollution Control Act or the Atomic Energy Act].

42 U.S.C. § 6903(27) (1976). Hazardous wastes are listed by the EPA Administrator by rules promulgated under authority of Section 3001 of the Resource Conservation and Recovery Act of 1976. 42 U.S.C. § 6921 (1976). The regulations are published at 40 C.F.R. § 261 (1982).

2. *See, e.g.*, DEL. CODE ANN. tit. 16, § 1701 (Michie Supp. 1981); 1973 La. Acts 78, (repealed and replaced by The Louisiana Environmental Affairs Act, LA REV. STAT. ANN. § 30:1051-1150 (West Supp. 1983)); ME. REV. STAT. ANN. tit. 17, § 2253 (1983); N.H. REV. STAT. ANN. § 147-A, B, C & D (Supp. 1981); N.J. STAT. ANN. § 13:119-1110 (West 1979), *repealed by* L. 1981, c. 78, § 1 (West Supp. 1983); OKLA. STAT. ANN. tit. 63, § 2764 (West 1973), *repealed by* L. 1981, c. 322, § 17 (West Supp. 1983); R.I. GEN. LAWS § 23-18.9-6 (1979)(refuse imports prohibited)(hazardous waste managed under a licensing statute, R.I. GEN. LAWS § 23-19.1-1 to -21 (1979)).

3. City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); Hardage v. Atkins, 619 F.2d 871 (10th Cir. 1980). *See* Washington St. Bldg. & Constr. Trades Council v. Spellman, 518 F. Supp. 928 (E.D. Wash. 1981), *aff'd*, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1891 (1983) (radioactive waste import ban unconstitutional under commerce clause and supremacy clause). *But see* Hybud Equip. Corp. v. Akron, 654 F.2d 1187 (6th Cir. 1981), *vacated*, 455 U.S. 931 (1982) (municipal ordinance monopolizing garbage collection only incidentally affects interstate commerce and is constitutional).

4. U.S. CONST. art. I, § 8, cl. 3, "The Congress shall have the power to . . . regulate commerce . . . among the several states."

repeatedly held that a state is without the power to prevent privately owned articles of trade from being shipped and sold in interstate commerce because the state wishes to isolate itself from the national economy or because the goods are needed by the people of the state.[5] The Court has rejected the argument that hazardous waste import restrictions are a legitimate means by which states may reduce risks to public health and safety arising in the disposal of hazardous materials.

Despite these rulings, however, there are several sound policy reasons why hazardous waste import restrictions should be allowed: they will help to mitigate public opposition to new hazardous waste facilities[6] by assuring that the benefits of a facility will accrue to those bearing the risk; they will encourage the development of more facilities serving a localized market, thereby expanding the total national pool of approved facilities and reducing the incentive for illegal disposal;[7] and they may help contain the costs of waste disposal by encouraging development of more facilities and more efficient use of existing disposal capacity.[8]

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5. Foster Fountain Packing Co. v. Haydel, 278 U.S. 1, 12–13 (1928). *See infra* text accompanying notes 57–60. Commerce may be defined as "the commercial intercourse between nations, and the parts of nations." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189–90 (1824). To be covered by the commerce clause, hazardous waste must first be an article of commercial intercourse. Although waste is not traditionally so considered, the situation is changing. One of the purposes of the Resource Conservation and Recovery Act of 1976 is to promote trade in waste materials. 42 U.S.C. § 6951 (1976).

6. *See infra* text accompanying notes 26–31. *See also* COMPTROLLER GENERAL OF THE UNITED STATES, HOW TO DISPOSE OF HAZARDOUS WASTE—A SERIOUS QUESTION THAT NEEDS TO BE RESOLVED (1978) (reviews growing effectiveness of public opposition to hazardous waste facility siting decisions); Wolf, *Public Opposition to Hazardous Waste Sites: The Self-Defeating Approach to National Hazardous Waste Control Under Subtitle C of the Resource Conservation and Recovery Act of 1976*, 8 B.C. ENVTL. AFFS. L. REV. 463 (1980).

7. Improper, negligent and reckless hazardous waste disposal, carried out in many cases by "midnight dumpers," was recognized as one of the principal obstacles to regulating hazardous waste disposal. House Comm. on Interstate & Foreign Commerce, Report to Accompany H.R. 7020, H.R. Rep. No. 1016, 96th Cong., 2nd Sess. 17, *reprinted in* 1980 U.S. Code Cong. & Admin. News 6119–30 [hereinafter cited as House Report on 7020]. Some of the problems involved in such midnight dumping are vividly illustrated in a 1979 Philadelphia Inquirer series, *Poison at Our Doorsteps*, Philadelphia Inquirer, Sept. 23, 1979, at 1, col. 1. Additional examples are given in House Report on 7020 *supra*, at 18–20. Problems with midnight dumping was one of the primary reasons Congress insisted upon joint liability in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, also known as "Superfund". Pub. L. No. 96-510, 94 Stat. 2767 (1980) (to be codified as 46 U.S.C. §§ 9601–9657). The joint liability provisions of Section 107 and the financial responsibility provisions of Section 108 were designed to ensure that illegal dumpers or their sources of waste material would be held financially accountable for damages. House Comm. on Merchant Marine and Fisheries, Report to Accompany H.R. 85, H.R. Rep. No. 172, 96th Cong., 2nd Sess. 42–47, *reprinted in* 1980 U.S. Code Cong. & Admin. News 6187–92. *See generally* Environmental Law Institute, Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (unpublished report prepared for the Environmental Protection Agency 1981).

8. In the recently fashionable "anti-regulatory" environment, it may appear anomolous to advocate increased opportunities for regulation as a means to reduce the ultimate costs of hazardous waste disposal. The difficulty arises when one limits the analysis to a national disposal system comprised

This article, therefore, explores three means by which states may restrict hazardous waste imports. First, the narrow remaining ground for a direct, unilateral import restriction is discussed in light of the decisions in *City of Philadelphia v. New Jersey*[9] and lower federal court cases.[10] Second, the article considers interstate compacts, which are authorized under the Solid Waste Disposal Act.[11] Finally, state ownership of hazardous waste facilities is discussed with reference to recent Supreme Court decisions. The analysis concludes that although obstacles exist, state ownership of hazardous waste facilities provides the best means for states to impose hazardous waste import restrictions in the near future.

HAZARDOUS WASTES: NATURE OF THE PROBLEM

Off-site hazardous waste disposal is a large and growing industry. The Environmental Protection Agency (EPA) has documented increases in the disposal industry's gross revenues of more than 20 percent per year in the last half of the 1970s, reaching an estimated $300 million annually in 1980.[12] Each year, American industry generates approximately 41.2 million wet metric tons (WMT) of hazardous waste, and in 1981 over nine million WMT of such waste were disposed of at sites removed from the site of generation.[13] Moreover, much of this off-site waste disposal takes place outside the state where the waste was generated. In Maryland, for example, 20 percent or 50,000 WMT per year of the waste disposed

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of already established sites. In such a case, increased regulation by states may have an inflationary effect. If, however, the problem is viewed as one of siting additional facilities, the real economic issue emerges. Space to locate sites is a rare commodity eagerly sought after by site developers. Regulatory measures that will enhance the probable success of disposal facility siting attempts are a cost-reduction measure increasing the overall economic efficiency of the waste disposal system.

Similar issues have arisen in the siting of other public facilities. *See, e.g.*, Blitch, *Airport Noise and Intergovernmental Conflict: A Case Study in Land Use Parochialism*, 5 ECOLOGY L. Q. 669 (1976); Deal, *The Durham Controversy: Energy Facility Siting and the Land Use Planning and Control Process*, 8 NAT. RESOURCES LAW 437 (1975); Farkas, *Overcoming Public Opposition to the Establishment of New Hazardous Waste Disposal Sites*, 9 CAP. U. L. R. 451 (1980); Joskow & Yellin, *Siting Nuclear Power Plants*, 1 VA J. NAT. RESOURCES L. 1 (1980); Susskind & Cassella, *The Dangers of Preemptive Legislation: The Case of LNG Facility Siting in California*, 1 ENVTL. IMPACT ASSESSMENT REV. 9 (1980); Wolpert, *Regressive Siting of Public Facilities*, 16 NAT. RES. J. 103 (1976); Note, *Energy Facility Siting in North Dakota*, 52 N.D.L. REV. 703 (1976).

9. 437 U.S. 617 (1978). Further discussion of the case may be found in *State Embargo of Solid Waste: Impermissible Isolation or Rational Solution to a Pressing Problem?*, 82 DICK. L. REV. 325 (1978).

10. Hardage v. Atkins, 619 F.2d 871 (10th Cir. 1980); Washington St. Bldg. & Constr. Trades Council v. Spellman, 518 F. Supp. 928 (E.D. Wash. 1981), *aff'd*, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1891 (1983).

11. 42 U.S.C. § 6904(b) (1976)

12. U.S. Environmental Protection Agency, Hazardous Waste Generation and Commercial Hazardous Waste Management Capacity (SW-894), at V-2 (1980) [hereinafter cited as U.S. EPA].

13. *Id.* at III-2, III-6

of away from the generation site is imported from neighboring states.[14] Virginia, on the other hand, lacks any offsite hazardous waste disposal capability, and must export all wastes not disposed of by the generator at its plant site.[15]

Nationwide, eighty-nine firms, three municipalities, and one quasi-public state agency operate 127 commercial hazardous waste sites.[16] In addition, thousands of hazardous waste sites have been illegally created and abandoned, and an unknown number of municipal landfills have been used for hazardous waste disposal.[17] These sites pose immediate or potential environmental or public health threats as a result of wastes contaminating land or surface and ground waters.[18]

Disposal of toxic materials in surface impoundments or landfills has been identified as one of the most significant sources of groundwater pollution.[19] One survey has revealed more than 25,000 industrial waste surface impoundments located throughout the country.[20] More than 70 percent of these sites are unlined and more than 30 percent contain hazardous wastes.[21] In every state, wastes leaking from disposal sites have contaminated groundwater supplies with toxic, carcinogenic or otherwise hazardous chemicals.[22] A House Oversight Subcommittee found that this

14. MARYLAND ENVIRONMENTAL SERVICES, HAZARDOUS WASTE QUANTITIES AND FACILITIES NEEDS IN MARYLAND: INITIAL ASSESSMENT 1 (Document No. 85486) (1980). The remainder of Maryland's hazardous waste stream is dominated by materials from the Allied Steel Co. located in Baltimore. The state owns and operates a landfill site for diversified hazardous wastes at Sparrow's Point, Md. *Id.* The Maryland Environmental Service is actively seeking additional sites to serve both Allied Steel and the general hazardous waste market. Interview with William Sloan, Secretary of the Maryland Environmental Service, in Annapolis (Jan. 23, 1981).

15. Interview with Wladimir Gulevich, Division of Solid and Hazardous Waste, Virginia Department of Health, in Richmond (Jan. 28, 1981). Virginia has not studied future hazardous waste site needs nor made any plans to acquire sites within the state although Virginia statute authorizes state ownership and operation of such facilities. VA. CODE §§ 32.1-178(A)(11),(12) (Michie Supp. 1981). No site permit applications from private parties are pending or are anticipated in the near future. Telephone interview with Jackie Williams, Solid and Hazardous Waste Division, Virginia Department of Health, Richmond (Aug. 28, 1981).

16. U.S. EPA, *supra* note 12, at V-1.

17. Estimates on the total number of such sites vary. In 1979, an EPA financed study placed the number of hazardous waste sites at over 54,000. Fred C. Hart Associates, Preliminary Assessment of Clean-Up Costs for National Hazardous Waste Problems, (EPA Contract No. 68-01-5063 1979).

18. STAFF OF HOUSE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS, COMM. ON INTERSTATE AND FOREIGN COMMERCE, 96th Cong., 1st Sess., HAZARDOUS WASTE DISPOSAL 1 (Comm. Print 1979) [hereinafter cited HAZARDOUS WASTE DISPOSAL].

19. U.S. Environmental Protection Agency, Groundwater Protection (SW-886), at 7 (1980).

20. COUNCIL ON ENVIRONMENTAL QUALITY, CONTAMINATION OF GROUND WATER BY TOXIC ORGANIC CHEMICALS 9 (1981).

21. *Id.*

22. *Id.* at 10. Examples include carbon tetrachloride at 18,700 parts per billion in domestic wells as a result of waste dumping outside Memphis, Tenn.; the discovery that Niagara Falls residents were drinking water containing toxic chemicals at levels four times that recommended by EPA as a minimum safe limit; 54 Long Island public water supply wells serving over 100,000 people contaminated by assorted chemicals; and the discovery of a dump in Charles City, Iowa that was found

contamination has led to higher rates of miscarriage and birth defects, respiratory problems, urinary tract disease, cancer, or central nervous system disorders in surrounding populations.[23]

Such health and environmental consequences of improper hazardous waste disposal can be ameliorated only if adequate provisions are made for properly designed and operated disposal facilities. Yet, the EPA has estimated that major industrial areas of the country would face significant regional shortages of suitable commercial hazardous waste disposal capacity in 1981 and beyond. The Great Lakes states, the Northern Plains, and the Northwest encountered a total deficiency in off-site disposal capacity of more than one million WMT in 1981.[24] In theory, excess capacity in other regions of the country might mitigate the impact of these shortages to some extent,[25] but high transportation costs and the possibility of mishaps in transit make large-scale transfers over long distances an unattractive substitute for adequate local disposal capacity.

Further, without a radical improvement in the success of hazardous waste facility siting attempts,[26] potential new entrants into the field or innovative waste treatment technologies are not expected to expand the available capacity to any significant degree.[27] Therefore, it is likely that under the existing circumstances, serious deficiencies in regional hazard-

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to be polluting groundwater serving 300,000 people with arsenic and orthonitroaniline. This is only a partial listing of the cases in EPA files. *Hazardous and Toxic Waste Disposal: Hearings Before the Subcomms. on Environmental Pollution and Resource Protection of the Senate Comm. on Environment and Public Works*, 96th Cong., 1st Sess. 85 (1979) (statement of EPA Assistant Administrator Thomas C. Jorling).

23. HAZARDOUS WASTE DISPOSAL, *supra* note 18, at 15–18. In the Love Canal incident, studies by the New York State Health Department's Rosewell Park Memorial Institute found miscarriages in women moving into the area rose from 8.5% to 25%. Children born to families closest to the site suffered birth defects 20% of the time as opposed to 6.8% of the time in removed areas. Urinary disease incidence increased by a factor of 2.8, and asthma increased by a factor of 3.8. *Hazardous and Toxic Waste Disposal: Hearings Before the Subcomms. on Environmental Pollution and Resource Protection of the Senate Comm. on Environment and Public Works*, 96th Cong., 1st Sess. 140–61 (1979) (statement of Dr. B. Paigen).

24. U.S. EPA, *supra* note 12, at IX-4.

25. U.S. EPA, *supra* note 12, ch. IX.

26. A recent study of hazardous waste facility siting attempts in EPA Regions IV and VI revealed that only 30% and 50%, respectively, of the permit applications for a hazardous waste facility in those regions are approved. Public opposition, rather than any technical, economic, or regulatory compliance problem, is the principal reason for permit denial. D. Davis, P. Reed, & E. Yang, Assessment of Problems Related to Siting Hazardous Waste Management Facilities in EPA Regions IV and VI (1980) (unpublished study for the U.S. Environmental Protection Agency) [hereinafter cited as Davis].

EPA Region IV is comprised of the states of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee. 40 C.F.R. § 1.21(b)(4) (1981). EPA Region VI is comprised of the states of Arkansas, Louisana, New Mexico, Oklahoma, and Texas. 40 C.F.R. § 1.21(b)(6) (1981). These states were selected for study because industrial growth in these states, and therefore the demand for hazardous waste disposal capacity, is expected to grow the fastest of any region in the country. *See generally* U.S. EPA, *supra* note 12.

27. U.S. EPA, *supra* note 12, at VI-1.

ous waste disposal capacity can be expected to persist and grow in the remainder of the decade.[28]

The Public Opposition Factor

Public opposition is the single most significant factor restricting the growth of the number of hazardous waste sites.[29] Regardless of the quality of the facility, its environmental controls, or the restrictions imposed upon its operation, the public today often refuses to accept a hazardous waste disposal facility near their homes.[30]

Studies of public opposition to the siting of facilities have detected a number of factors contributing to the public's unwillingness to accept the new hazards such facilities represent. Included among the reasons for opposition are a distorted perception of the risk posed by the facility, a great disparity between the perceived risk and the off-setting benefits the community would receive from the facility, distrust of government's competence to ensure safe operation of the facility, and a sense that the community is powerless to affect the siting decision or its consequences.[31] Most important among these factors is the high degree of perceived risk posed by such facilities. When the risk and benefits are dissociated, the perceived level of risk is much greater, and the public is less willing to accept *any* risk, regardless of its real or imagined magnitude.[32] Conversely, to the extent the affected public perceives a direct relationship between the risk posed by the facility and some immediate off-setting community benefit, resistance to siting will be reduced.

State Import Controls

State governments are faced with conflicting forces in managing hazardous waste issues. On one hand, they are faced with growing, successful public opposition to the siting of new hazardous waste facilities. On the

28. *Id.*

29. *Id. See also supra* note 6.

30. The need for new, safe facilities is recognized by the public. A 1980 public opinion survey conducted by the Council on Environmental Quality found that a majority of respondents endorsed a new, secure, regularly-inspected hazardous waste facility—but only if it was located over 100 miles from their homes. COUNCIL ON ENVIRONMENTAL QUALITY, PUBLIC OPINION ON ENVIRONMENTAL ISSUES 31 (1980).

31. Davis, *supra* note 26. Chapter II provides a useful review of the corpus of the siting literature, and Appendix A presents a thorough annotated bibliography.

32. *See* R. Burt, Resolving Community Conflict in the Nuclear Power Issue: A Report and Annotated Bibliography (May, 1978) (unpublished report prepared for the U.S. Department of Energy, Office of Waste Isolation); E. Peele, Community Impacts of Energy Production (June 1, 1979)(prepared for the Sociopolitical Resources Group of the Risk/Impact Panel, Committee on Nuclear and Alternative Energy Systems, National Research Council, Oak Ridge National Laboratory); Peele, *Mitigating Community Impacts of Energy Development: Some Examples for Coal and Nuclear Generating Plants in the U.S.*, 44 NUCLEAR TECHNOLOGY 132 (1979); U.S. ENVIRONMENTAL PROTECTION AGENCY, SITING HAZARDOUS WASTE MANAGEMENT FACILITIES AND PUBLIC OPPOSITION (SW 809)(1979).

other, they are confronted with the likelihood that major industrial segments of their economies will be adversely affected if their state disposal capacity cannot be conserved or expanded. As a consequence, several states have attempted to limit access to sites within their borders to those wastes generated by industry located within the state.[33]

Theoretically, there are several political and economic reasons to allow states to restrict the importation of hazardous wastes from outside generators. In a given state, import restrictions would extend the capacity available for wastes produced by industry located within that state. To the extent that such production is linked to the availability of waste disposal services, the maintenance of industrial capacity or the opportunity to expand industrial production would confer direct off-setting benefits on the population at risk in the form of increased employment, tax revenues, secondary and supplier growth opportunities, and other similar advantages.[34] Citizens would not be asked to accept a risk in situations where the benefits would be conferred upon the distant residents of another state. With a more direct link between risks and benefits, siting attempts would have greater chances of success.[35] The resulting nationwide increase in disposal capacity would provide a material national benefit in the form of lower environmental and public health risks from improper hazardous waste disposal and the consequent cost savings.

In addition, the creation of state import controls would force those states lacking adequate hazardous waste disposal facilities to develop them, consequently expanding the nationwide hazardous waste disposal capacity. The increase in total capacity should create market factors that will contain the costs of proper waste disposal. Further, with the development of more sites, transportation of wastes over long distances would be reduced, saving energy and other transportation costs.[36]

33. *See* note 2 *supra*.

34. Legislators enacting hazardous waste management licensing statutes refer to the relationship between disposal capacity and economic growth. *See e.g.*, LA. REV. STAT. ANN. §§ 30:1132(A)(1),(2) (West Supp. 1983) (chemical industry makes significant contribution to economy of the state and produces dangerous wastes needing prudent treatment).

35. *See* note 32 *supra*.

36. Reduced long-distance transportation also has the benefit of reducing the probability of major transportation mishaps and the related emergency response, environmental, and public health costs. The costs of transporting hazardous wastes from the site of generation to one of the approved disposal sites may run from three to as much as ten times the cost of the disposal itself. *E.g.*, interview with Robert Stillwell, President of SCA Chemical Services, in Pinewood, S.C. (Jan. 30, 1981); interview with Richard Cook, Director of Occupational and Environmental Safety, Dupont de Nemours Company, in Richmond, Va. (Jan 28, 1981); interview with Holmes Brown, Energy and Natural Resources program, National Governors' Association, in Washington, D.C. (Jan 21, 1981). Since most hazardous waste disposal is handled on a competitive bid basis in the private market place, disposal site operators will not reveal their actual operating costs. *Id.* Most operators quote prospective customers composite figures which include a varying ratio of transportation to disposal cost depending upon the specific waste involved, the disposal process required, transportation risks and liabilities, and locations of the generator and disposal site. *Id.*

Finally, restriction of out-of-state imports may encourage greater economic efficiency in the development of hazardous waste facilities. A state with the ability to limit waste imports could also agree to accept specified wastes in exchange for a neighboring state's acceptance of other types of wastes requiring a different treatment process. Such interstate agreements would foster greater interstate cooperation in all aspects of waste management. More importantly, they would promote efficient economies of scale in the development and utilization of specific types of highly capitalized waste treatment facilities, thereby reducing inefficient levels of redundancy in the total national hazardous waste management system.

Therefore, the following section will explore the limited remaining ground for traditional state imposed hazardous waste import controls, as well as two other potentially more fruitful means by which states may exercise control over the source of wastes placed in existing or planned hazardous waste disposal facilities located within their jurisdictions.

NEW JERSEY'S IMPORT CONTROL STRATEGY

In 1973, New Jersey enacted a Waste Control Act[37] authorizing the New Jersey Commissioner of Environmental Protection to prohibit the importation of wastes into New Jersey from other states.[38] The statute was subsequently amended,[39] and rules were promulgated prohibiting the importation of any wastes destined for New Jersey landfills rather than for recycling or reclamation.[40]

37. N.J. REV. STAT. ANN. § 13:1I-1 to -10 (West 1979).

38. Under the Act,

> [t]he Commissioner shall have the power to formulate and promulgate, and amend and repeal orders, rules and regulations prohibiting, conditioning and controlling the incineration or landfill of solid waste and the treatment or disposal of liquid wastes within the State which originated or were collected outside the territorial limits of the State.

Id. § 13:1I-4(a).

39. The amendment states:

> No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State . . . until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this state.

Id. § 13:1I-10

40. (a) No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This section shall not apply to:

> 1. Garbage to be fed to swine in the State of New Jersey;
> 2. [any separated waste material destined for a waste recycling facility];
> 3. Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility . . .
> 4. Pesticides, hazardous waste, chemical waste . . . which is to be treated, processed or recovered in a solid waste disposal facility which is registered with the Department for such treatment, processing or recovery, other than disposal on or in the lands of this state.

N.J. ADMIN. CODE § 7:1-4.2 (Supp. 1979).

The legislature stated that the purpose of the Act was to protect the public health, safety, and welfare from the dangers created by the treatment and disposal in New Jersey of wastes that had been generated in other states.[41] New Jersey was also experiencing difficulties in locating adequate landfill space for its own wastes.

City of Philadelphia v. New Jersey

The City of Philadelphia, which had contracts with New Jersey landfill operators for the disposal of large quantities of Philadelphia wastes,[42] sued New Jersey challenging the validity of the waste import restrictions. The Supreme Court of New Jersey upheld the statute.[43] On appeal, the United States Supreme Court reversed, finding that the New Jersey law unconstitutionally violated the commerce clause.[44]

The reasoning employed by the Court in *City of Philadelphia v. New Jersey* indicated that it will be difficult for states to design waste import laws that will pass constitutional muster. The commerce clause is not only an authorization for the Congress to regulate commerce between the states but also a restriction on state regulation of such commerce.[45] The Supreme Court has used this latter restriction repeatedly to strike down state regulations impeding interstate commerce.[46] State regulation in a particular field may be either explicitly or implicitly preempted by Congressional action.[47] In fields where Congress has abstained from reg-

41. The Legislature finds and determines that since the enactment of [§ 13:1I-1 to -8] the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited.

N.J. STAT. ANN. § 13:1I-9 (West 1979).

42. *See* City of Philadelphia v. State, No. L.-15068 P.W. (Super. Ct. N.J. Mar. 25, 1975); Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth., 127 N.J. Super. 160, 316 A.2d 711 (1974).

43. The New Jersey Supreme Court reasoned that "substances injurious to the public health" were not "articles of commerce" within the meaning of the commerce clause, 68 N.J. 451, 467, 348 A.2d 505, 513 (1975), and were therefore subject to quarantines. *See* notes 60–63 & accompanying text *infra*. The court also found that the statute was designed to preserve the environment, a valid use of the police power, and that the effect on interstate commerce was slight. 68 N.J. at 472–78, 348 A.2d at 516–19.

44. 437 U.S. 617, 629 (1978). Justice Rehnquist, joined by Chief Justice Burger, dissented. *See* Dister & Schlesinger, *State Waste Embargoes Violate the Commerce Clause: City of Philadelphia v. New Jersey*, 8 ECOLOGY L. Q. 371 (1979).

45. Chief Justice Marshall understood the clause to prohibit any state regulation of interstate commerce. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 92 (1824). Later readers interpreted the clause as permitting state regulation until superceeded by congressional measures. *See* The License Cases, 46 U.S. (5 How.) 504, 590 (1847).

46. *But see* Cooley v. Board of Wardens 53 U.S. (12 How.) 299 (1851) (in upholding state regulations which had minimal affect on interstate commerce, the Court said states are free to regulate those aspects of interstate commerce so local in nature as to demand diverse treatment).

47. *See* H.P. Hood & Sons v. DuMond, 336 U.S. 525, 543-44 (1949).

ulating an aspect of interstate commerce, however, such as in the field of hazardous wastes,[48] state regulation is permissible even though it imposes burdens on interstate commerce, provided the state regulation passes certain tests.[49] Generally these tests have two elements: (1) the state statute must be evenhanded in that it applies to residents and nonresidents in a nondiscriminatory fashion; and (2) the statute must serve a valid local purpose and not merely isolate the state economy or further protectionist interests.[50] In cases where the statute is evenhanded, and particularly in matters concerning the environment,[51] the Court has been liberal in granting states authority to impose regulations resulting in substantial burdens on interstate commerce.[52] Where the statute is discriminatory, however, little room has been given for state regulation. "[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected."[53]

In *City of Philadelphia v. New Jersey,* the Supreme Court refused to accept the New Jersey Legislature's assertion[54] that its primary purpose was to protect public health and safety as an accurate characterization of the state's intent.[55] Writing for the majority, Justice Stewart reasoned that because the New Jersey law imposed the full burden of conserving the state's remaining landfill space upon out-of-state commercial interests, it was clearly protectionist legislation of the kind prohibited by the com-

48. The Court, in discussing the Solid Waste Disposal Act, 42 U.S.C. §§ 6901–87 (1976) said, "we find no 'clear and manifest purpose of Congress' [citations omitted] to preempt the entire field of interstate waste management or transportation, either by express statutory command [citations omitted], or by implicit legislative design . . ." 437 U.S. 617, 620 n.4 (1978).

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

> [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 the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

50. *Id.*

51. For a more detailed discussion of the development of the commerce clause as applied to state environmental statutes *see* Note, *State Environmental Protection Legislation and the Commerce Clause,* 87 HARV. L. REV. 1762 (1974).

52. *E.g.,* Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960). The Supreme Court upheld a local ordinance controlling smoke emissions from vessels carrying out interstate and foreign trade on the Detroit River. The ordinance effectively prohibited use of certain boilers previously allowed by the federal government and resulted in substantial costs to shippers. This local burden on interstate commerce was allowed because it was evenhanded and effectuated a valid local purpose.

53. 437 U.S. 617, 624 (1978).

54. *See* note 41 *supra.*

55. The Court declined to resolve the question of ultimate legislative purpose, remarking that the evil of protectionism can reside in legislative means as well as legislative ends. "But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." 437 U.S. 617, 626-27 (1978).

merce clause.[56] Relying upon previous decisions that had prohibited "anti-competitive" legislation[57] and those that had overturned measures giving state citizens preferred access to natural resources located within the state,[58] the Court found that New Jersey had attempted to isolate itself from a problem common to many states by erecting unconstitutional barriers against interstate trade.[59]

The Court acknowledged that it has upheld protectionist, discriminatory regulations such as quarantines and other health protective measures.[60] The Court distinguished its support for quarantines, however, by reasoning that the very movement of contagions such as diseased livestock across state borders endangered public health. Therefore, although the statutes had an indirect effect on out-of-state business, their incidental burden on interstate commerce was constitutional because they served a legitimate local purpose in protecting public health.[61]

Thus, the decision holds, in effect, that it is constitutional for a state to prohibit the movement of articles into a state where such movement is adverse to its interest in protecting public health. It is unconstitutional,

56. "The New Jersey law at issue in this case falls squarely within the area that the Commerce Clause puts off limits to state regulation." 437 U.S. 617, 628 (1978).

57. 437 U.S. 617, 627 (1978)(citing Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1934); Foster Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928)). *See also* H.P. Hood & Sons v. DuMond, 336 U.S. 525 (1949).

58. 437 U.S. 617, 627 (1978) (citing Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229 (1910)).

59. 437 U.S. 617, 628 (1978).

60. Quarantines violate the generally applied commerce clause tests. They are clearly discriminatory, applying only to goods attempting to enter the state from beyond its borders. They may also serve to protect economic interests, the economic interest in livestock for example, as well as public health. Asbell v. Kansas, 209 U.S. 251 (1907); Reid v. Colorado, 187 U.S. 137 (1902). The protection has even been extended to such non-health matters as consumer fraud. Plumley v. Massachusetts, 155 U.S. 461 (1894).

The Court noted in *Reid* that a state quarantine statute prohibiting the importation of diseased cattle was *not* discriminatory because Colorado citizens as well as citizens of other states were equally constrained in importing the prohibited article. 187 U.S. at 152. Compare this reasoning to that applied in *Philadelphia* which focuses the analysis of discrimination on the articles of commerce rather than on the identity of the importer. It should also be noted that the original plaintiff in *City of Philadelphia* included both Pennsylvania and New Jersey residents. *See* note 42 *supra*.

61. The quarantine cases themselves do not rest on a public health protection rationale. That interpretation has apparently been provided by the Court in reaching the *Philadelphia* decision. The quarantine cases themselves rest instead on a recognition of a state's right to exercise the police power evenhandedly against citizens and non-citizens alike to effectuate a local interest not proscribed by act of Congress. *See e.g.*, Asbell v. Kansas, 209 U.S. 251, 254–56 (1908); Reid v. Colorado, 187 U.S. 137, 151–52 (1902).

The reasoning of the quarantine decisions sounds remarkably similar to that employed in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). The reaffirmation of the quarantine decisions in the context of *Philadelphia* is consistent with the test of constitutionality outlined in *Pike*. It thus becomes reasonable to inquire whether *Pike* now demands an "evenhanded" statute before employing the balancing test. The Court avoids the issue by seizing on a distinction between the dangers of transporting a hazardous article and those involved in its disposal. *See infra* text accompanying note 63.

however, for a state to prohibit the disposal of those materials even if such disposal poses similar risks to health and safety.[62]

In dissent, Justice Rehnquist, joined by Chief Justice Burger, seized upon this apparent inconsistency in the application of the commerce clause. He contended that the majority strained the commerce clause by distinguishing between the dangers involved in transporting a material and the equally grave hazard it represents once placed in a landfill. Justice Rehnquist found the quarantine cases dispositive of the *City of Philadelphia v. New Jersey* dispute:

> I do not see why a State may ban the importation of items whose movement risks contagion, but cannot ban the importation of items which, although they may be transported into the State without undue hazard, will then simply pile up in an ever increasing danger to the public's health and safety. The Commerce Clause was not drawn with a view to having the validity of state laws turn on such pointless distinctions.[63]

Thus, while the minority's view may reflect a more pragmatic understanding of the dangers inherent in the hazardous waste disposal industry, the Court has clearly reiterated the unconstitutionality of state hazardous waste regulations which discriminate against out-of-state wastes or are motivated by protectionism.

Since *City of Philadelphia v. New Jersey,* lower federal courts have overturned attempts by states to control hazardous waste imports on several occasions. In *Hardage v. Atkins,*[64] the United States Court of Appeals for the Tenth Circuit held that an Oklahoma law prohibiting the importation of hazardous wastes from other states (unless the exporting state had hazardous waste regulations similar to those in effect in Oklahoma) was an unconstitutional attempt to force its own legislation on other states

62. The majority asserts, correctly, that the primary dangers in hazardous waste management arise in the disposal rather than the mere movement of wastes, but the distinction begs the question. The recognition of a state's right to impose quarantines upon such articles as diseased livestock arose in light of a realization that their very presence in the channels of commerce endangered public health. The quarantine statutes constitutionally mitigated this specific threat. With hazardous waste, the public health threat arises at a different point in commerce, primarily at disposal. The New Jersey statute attempts to mitigate this specific health risk by limiting the exposure of New Jersey residents to ever larger quantities of wastes in local landfills. The majority's decision in City of Philadelphia v. New Jersey rests squarely upon a purely legal distinction drawn between these two sets of circumstances: the hazard of transportation versus the hazard of disposal.

63. 437 U.S. 617, 632-33 (1978) (Rehnquist, J. dissenting). Justice Rehnquist cites no independent authority for his view. He points out that quarantine laws have been permitted in spite of the fact that they were directed against out-of-state commerce. Noting that the majority's distinction between the quarantine cases and the present case was "unconvincing" he said, "Solid waste which is a health hazard when it reaches its destination may in all likelihood be an equally great health hazard in transit." *Id.* at 632.

64. 582 F.2d 1264 (10th Cir. 1978), *aff'd on rehearing,* 619 F.2d 871 (10th Cir. 1980).

under the threat of a protectionist ban on waste imports.[65] In *Washington State Building & Construction Trades Council v. Spellman,*[66] the United States District Court for the Eastern District of Washington found that a public initiative to ban the importation of radioactive wastes into the state violated the commerce clause because the initiative discriminated on its face against commerce on the basis of its origin. The court noted that such facial discrimination could, regardless of the state's purpose, be sufficient basis to invalidate the statute.[67]

More recently, in *Illinois v. General Electric Co.*,[68] the Court of Appeals for the Seventh Circuit barred enforcement of an Illinois statute[69] which prohibited the importation of spent nuclear fuel for storage at the only operating commercial spent fuel storage site in the United States.[70] The statute did not prohibit transportation or the storage of spent fuel from Illinois reactors. The court held that *City of Philadelphia,* rather than the quarantine cases, governed because the state's hostility was not directed toward spent nuclear fuel itself, but only toward fuel originating outside the state.[71] The statute was therefore discriminatory and violated the commerce clause.[72]

States' Power to Restrict Imports after City of Philadelphia v. New Jersey

The power of states to enforce quarantines upon the transportation of wastes into the state has theoretically been left intact by the *City of Philadelphia* decision, provided the state is able to distinguish between probable harms arising from an out-of-state waste shipment as opposed to those arising from wastes generated and moved solely within the state.[73]

65. The court also relied on Great Atlantic & Pacific Tea Co., Inc. v. Cottrell, 424 U.S. 366 (1976) (Mississippi statute excluding milk imports from another state unless that state accepted Mississippi milk on a reciprocal basis is unconstitutional).

66. 518 F. Supp. 928 (E.D. Wash. 1981), *aff'd,* 684 F.2d 627 (9th Cir. 1981), *cert. denied,* 103 S. Ct. 1891 (1983).

67. *Id.*

68. 683 F.2d 206 (7th Cir. 1982), *cert. denied,* 103 S. Ct. 1891 (1983).

69. ILL. ANN. STAT. ch 111 1/2, § 230.1–.24 (Smith-Hurd Supp. 1983). The statute provides that "[n]o person may dispose of, store, or accept any spent nuclear fuel which was used in any power generating facility located outside this State, or transport into this State for disposal or storage any spent nuclear fuel which was used in any power generating facility located outside this State." *Id.* at § 230.22.

70. 683 F.2d at 208

71. *Id.* at 214.

72. *Id.* The court also held that the Illinois statute was preempted by the pervasive regulatory scheme embodied in the Atomic Energy Act, 42 U.S.C. § 2011, which provided for a federal license for the operation of the storage facility. 683 F.2d at 215. *See also* Browing-Ferris, Inc. v. Anne Arundel Cty., 438 A.2d 269 (Md. Ct. App. 1981)(municipal ordinance restricting transportation and disposal of hazardous waste generated extraterritorially voided under per se rule).

73. "[The quarantine laws] did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin." 437 U.S. 617, 629 (1978). *See* notes 60, 61, *supra.*

As a practical matter, however, traditional import restrictions comprehensive enough to be effective will be barred by the commerce clause. A state must be able to overcome the difficult hurdle of establishing a qualitative difference between imported and domestic wastes, and be able to demonstrate an additional public hazard as a result of that difference.[74]

Moreover, state restrictions on transportation of hazardous materials is further restricted by federal statute. Congress has granted the Secretary of Transportation authority to regulate the transportation of hazardous materials under the Hazardous Materials Transportation Act of 1975.[75] This statute preempts all state and local regulations which are inconsistent with federal statute or regulations.[76] A state may, however, apply to the Secretary of Transportation for authority to enforce a regulation affording a greater level of protection, as long as that regulation "does not unreasonably burden commerce."[77] The Supreme Court has not as yet had occasion to decide whether an exclusionary-type state control regulation could survive an attack under the statute as unreasonably burdensome to commerce.[78]

States will not succeed in limiting hazardous waste imports under a New Jersey-type prohibition based upon health and safety. Such attempts are construed as fostering economic isolation rather than as attempts to reduce the threat to public health and safety arising out of the rapid

74. Whether a state could impose quarantines on the *disposal* of wastes rather than the transportation of such materials is a closer question. Provided a state relied on qualitative differences between domestic and imported wastes, rather than on quantitative differences as New Jersey attempted, some ground for a quarantine argument could perhaps be identified. With the exception of a limited number of waste streams, however, involving small quantities of material, the hazardous wastes of concern are reasonably homogeneous from state to state. It would be extremely difficult, if not impossible, for a state to prove that there were qualitative differences between the probable harms produced by imported wastes as opposed to those generated within the state. Making the required distinctions would pose a virtually insurmountable technical and legal obstacle. Moreover, even should a state be successful in limiting the import of certain, carefully defined waste streams under the quarantine exception recognized by the Supreme Court, such a limitation would have to be quite specific and narrow. As a practical matter, therefore, the quarantine-based restrictions would have little consequence when viewed in the context of a nine million ton per year off-site hazardous waste disposal industry. Consequently, the quarantine theory is not a fruitful avenue for further exploration.

75. 49 U.S.C. §§ 1801–1812 (1976).

76. *Id.* § 1811(a). In City of New York v. Department of Transportation, 539 F. Supp. 1237 (S.D.N.Y 1982), the court held that the state statute need not impose a greater burden than its federal counterpart to be preempted, it need only be inconsistent. Section 3003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6923, gives EPA the responsibility for promulgating hazardous waste transportation standards, not to conflict with those of the Department of Transportation under the HMTA, but to create a uniform manifest system. EPA's regulations, 40 C.F.R. § 263, were published February 20, 1980, 45 Fed. Reg. 39, 12722 (1980) and amended on December 31, 1980. 45 Fed. Reg. 252, 86966 (1980). EPA incorporated DOT's rules by reference. 40 C.F.R. § 263.10 (1980).

77. *Id.* § 1811(b)(2).

78. *See also* Comment, *Hazardous Waste at the Crossroads: Federal and State Transit Rules Confront Legal Roadblocks*, 12 ENVTL. L. REP. (ENVTL. L. INST.) 10075 (1982).

depletion of suitable hazardous waste disposal capacity. The quarantine alternative apparently left open by the courts is not a practical substitute.[79]

OTHER ALTERNATIVES FOR CONTROLLING INTERSTATE HAZARDOUS WASTE DISPOSAL

The Exclusionary Compact

Congress has the authority to regulate interstate commerce, and, therefore, may authorize the states to form binding agreements which restrict the flow of commerce in interstate transactions.[80] Under the color of the compact clause of the Constitution,[81] such authority is usually granted on a case-by-case basis through the passage of a joint resolution or act of Congress approving the terms of a specific interstate agreement.[82] Such authority may also be conveyed to the states through the passage of generic authorization to create compacts or agreements covering a given subject matter.[83] Recent "consent-in-advance" statutes, however, have stipulated that any agreement or compact developed under the statute must receive the consent of Congress before it becomes binding. Therefore, the original statute is merely an invitation to the states to begin the process of negotiation and agreement that precedes the formation of a binding compact.[84]

Congress has invited the states to negotiate and execute binding agreements or compacts with respect to the management of hazardous wastes. In the Solid Waste Disposal Act,[85] amended by the Resource Conservation

79. *See* Note, *The Commerce Clause and Interstate Waste Disposal: New Jersey's Options After the Philadelphia Decision*, 11 RUT. CAM. L. J. 31 (1979) (rejecting taxes and municipal ordinances in favor of unspecified regional co-operation).

80. Congress may authorize the states individually to exercise constraints on interstate commerce that would otherwise violate the commerce clause if Congress finds it in the national interest to do so. *See* H.P. Hood & Sons v. DuMond, 336 U.S. 525, 542 (1949). Earlier, the Court had held that the power of Congress to regulate commerce could be exercised without reference to coordinated action of the states. But the Court also noted that Congress could, at its discretion, exercise its power in conjunction with coordinated state action. Prudential Insurance Co. v. Benjamin, 328 U.S. 408, 434 (1946).

81. U.S. CONST. art. I, § 10, cl. 3, "No State shall, without the consent of Congress . . ., enter into any Agreement or Compact with another State or a foreign power."

Congressional consent is required whenever a state enters into an agreement with another state that tends to "the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States." United States Steel Corp. v. Multistate Tax Commission, 434 U.S. 452, 471 (1978).

82. *E.g.*, The Colorado River Compact, 43 U.S.C. § 617l (1976); the New York Port Authority Compact, Pub. Res. No. 67-17, 42 Stat. 174 (1921).

83. *E.g.*, Airport Development Compacts, 49 U.S.C. § 1743 (1976); Crime Control Compacts, 4 U.S.C. § 112 (1976).

84. For a full discussion of the history and uses of interstate compacts, see F. ZIMMERMAN & M. WENDELL, THE INTERSTATE COMPACT SINCE 1925 (1951).

85. 42 U.S.C. §§ 6901–87 (1976) *as amended by* Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2796 (originally enacted as Solid Waste Disposal Act, tit. II, § 201, 79 Stat. 997). The entire amended Act may also be cited as the Resource Conservation and Recovery Act. Pub. L. No. 94-580, § 1, 90 Stat. 2795.

and Recovery Act of 1976,[86] Congress authorized states to develop compacts for cooperative effort and mutual assistance in hazardous waste management and related law enforcement.[87] No such agreement is binding upon the affected states, however, unless all parties to the compact have accepted its terms and it has been approved by the Administrator of the EPA and the Congress.[88] So far, no compacts have been executed under this provision of the federal hazardous waste law.

A more recent example of such an authorization to the states is found in the passage of the Low-Level Radioactive Waste Policy Act,[89] which encourages the states to develop restrictive agreements covering low-level radioactive waste materials in interstate commerce. Unlike the similar provisions in the Solid Waste Act,[90] this legislation was actively sought by the states.[91] It provides that states may: (1) execute regional agreements or compacts governing the disposal of low-level nuclear waste within the region; (2) agree upon the location of a low-level nuclear waste site within one or more states within the region; and, (3) after obtaining the consent of Congress, exclude low-level wastes generated outside the region from disposal at the regional facility.[92]

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86. *See Id.*

87. 42 U.S.C. § 6904(b)(1976).

> Consent of Congress to Compacts—The consent of the Congress is hereby given to two or more States to negotiate and enter into agreements or compacts, not in conflict with any law or treaty of the United States, for—
>
> (1) cooperative effort and mutual assistance for the management of solid waste or hazardous waste (or both) and the enforcement of their representative laws relating thereto, and
>
> (2) the establishment of such agencies, joint or otherwise, as they may deem desirable for making effective such agreements or compacts.
>
> No such agreement or compact shall be binding or obligatory upon any State a party thereto unless it is agreed upon by all parties to the agreement and until it has been approved by the Administrator and the Congress.

88. *Id.*

89. Low-level Radioactive Waste Policy Act, Pub. L. No. 96-573, 94 Stat. 3347 (1980) (to be codified at 42 U.S.C. § 2021b).

90. 42 U.S.C. § 6904(b) (1976).

91. *See, e.g.*, National Governors' Association, Policy Positions 1979 (1979).

92. Pub. L. No. 96-573, § 4(a)(1)

> It is the policy of the Federal Government that—
>
> (A) each State is responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders . . .
>
> (2)(A) To carry out the policy set forth in paragraph (1), the States may enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste.
>
> (B) A compact entered into under subparagraph (A) shall not take effect until the Congress has by law consented to the compact. . . . After January 1, 1986, any such compact may restrict the use of the regional disposal facilities under the compact to the disposal of low-level radioactive waste generated within the region.

Such legislation, at least with respect to low-level radioactive wastes, provides a legal framework for establishing restrictive importation agreements among states. Since the passage of the Act, five agreements have been reached.[93] Others are expected before the January, 1986 deadline established by the Act.[94] The absence of analogous state compacts under the Solid Waste Disposal Act is attributable to several factors. Part of the answer lies in the character of the waste stream itself. Radioactive wastes are generated in small volumes, and they are expensive to manage because they demand sites with high development and licensing costs. Transportation costs, however, are small because of the small volume of material involved. Thus, the total waste stream can be handled at a few sites located throughout the country.[95] Hazardous chemical wastes, on the other hand, are generated in volumes several orders of magnitude greater than those which must be handled in the low-level radioactive waste system, and large quantities are generated in each state. Consequently, with the exception of a few low-volume, extremely hazardous materials, most of the economic factors which make regional management attractive for radioactive wastes do not apply to the hazardous chemical waste problem. From an economic point of view, it is therefore more desirable to have sites in each state handling the waste generated by that state's industry.

When the regulatory environment governing hazardous waste disposal was more relaxed, sites of one sort or another were available in nearly every state. Only recently, with the emergence of stricter regulatory standards[96] and successful public opposition to siting,[97] has the problem of finding disposal sites begun to appear.[98] Waste generators may be forced to resort to long distance transport of waste materials, largely as a result of the regulatory environment or public opposition to local sites rather than the demands of economic efficiency. In the context of nuclear waste, the economic factors provide an incentive for regional cooperation and

93. Omang, *States Are Juggling A-Waste Disposal Like Hot, ah, Potato*, The Washington Post, March 2, 1983, at A3, col. 1.

94. *Id.*

95. At present, there are only three commercial low-level nuclear waste sites operating in the United States: Barnwell, South Carolina; Hanford, Washington; and Beatty, Nevada. Even under a fully implemented regional compact program, it is anticipated that only six to eight sites will be needed throughout the United States. A larger number would not be cost effective. Task Force on Low-Level Radioactive Waste Disposal of the National Governors' Association, Low-Level Waste: A Program for Action (1980).

96. The Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6987 (1976), established standards for the handling and disposal of hazardous wastes. Technical standards for hazardous waste treatment and disposal facilities are authorized under § 6924 and have been promulgated by the EPA as 40 C.F.R. §§ 264-65 (1982).

97. *See* Davis, *supra* note 26.

98. *Id.*

a limited number of sites whereas in the context of hazardous waste, the economic incentives tend to favor the development of more sites in each state serving a local market.

In such an environment, exclusionary compacts are unlikely to receive much attention. It is doubtful that a state wishing to limit its hazardous waste imports would find surrounding, exporting states eager to enter into agreements which would force those exporting states to cease out-of-state disposal. Those states that are major exporters today are in that situation largely because they have been unable to establish the necessary, and economically desirable, in-state sites. Foreclosing waste exports from those states would, in the absence of alternative capacity within the exporting state, adversely affect that state's industrial economy. Under such circumstances, state officials are unlikely to find it in their interests to enter into restrictive or exclusionary compacts with surrounding states which possess disposal facilities.

Apart from the economic deterrents for regional compacts in hazardous waste, the lack of interest in such agreements expressed by state officials to date also stems in some measure from a generalized prejudice against restrictions in interstate commerce. State officials initially opposed restrictions on the traffic in low-level radioactive wastes.[99] Only when governors of the three waste site states threatened to close the sites, did exporting states agree to begin to accept some of the disposal burden and endorse the compact system.[100]

The current hazardous waste disposal situation is somewhat analogous to the nuclear waste situation prior to 1978. There are sites available for wastes, though at an unnecessarily high cost, and figures regarding the approaching capacity deficit are too recent to have had a substantial effect on state policymakers. If local and state governments follow the low-level nuclear waste experience model, interest in compacts will increase as the alternatives for disposal become more limited.

Exclusionary compacts do, therefore, provide a legal option for states seeking to limit hazardous waste imports. By their nature, import restrictions under compacts would probably involve an exchange of risks and benefits between participating states. It is clear that under a compact, states could agree to accept certain classes of wastes for disposal in

99. The author was Special Assistant to the Governor of Michigan from 1975–80 and participated in numerous multistate task force and committee meetings on the subject of low-level nuclear waste disposal policy. Many of the views expressed in this section are the result of that experience.

100. Interview with David Reid, Executive Assistant to the Governor of South Carolina, in Columbia, S.C. (Jan. 30, 1981). This view, while perhaps somewhat biased by the fact that South Carolina was one of the low-level nuclear waste site states threatening closure, is supported by staff of the National Governors' Association. Interview with Holmes Brown, Energy and Natural Resources Program, National Governors' Association in Washington, D.C. (Jan. 21, 1981).

exchange for the right to export other wastes to sites in surrounding states. This intracompact exchange of wastes, over reasonable distances, could result in a cost-effective and risk-equitable disposal system. It is equally clear, however, that the advantages of such exchanges have not been explored: in the five years since the Congressional invitation to develop interstate hazardous waste compacts was issued, none have been approved by the Congress.[101]

Unlike the New Jersey model discussed previously or South Dakota model which follows, the barriers to import restrictions under compacts are primarily political and economic rather than constitutional. Until such time as site capacity deficits and the resulting need to transport wastes over long distances becomes much more expensive, compacts will not be actively explored.[102] Because states with sites and those without must find common interests, negotiate an agreement, and then survive a difficult Congressional ratification process, the compact's utility as a practical device to restrict hazardous waste imports is probably limited in the near term.

The State Ownership Model

The traditional commerce clause analysis, such as was used by the Court in *City of Philadelphia,* involves a three step analysis: 1) whether the subject of the state regulation is an article of commerce, 2) whether the state restriction poses an impermissible burden on interstate commerce, and 3) whether Congress has granted the states permission to impose regulations which would otherwise violate the clause.[103] In *City of Philadelphia,* the Supreme Court applied this traditional analysis and held that a state is without the power to prevent privately owned articles of trade from being shipped to and disposed of in the state on the ground that the state wishes to isolate itself from the national economy or because the goods are needed by the people of the state.[104] The Court carefully

101. Nor are any such agreements awaiting Congressional ratification.

102. To date, exclusionary measures have been actively opposed by such national state organizations as the National Governors' Association, while they remain neutral with respect to the desirability of developing compacts. *See* Subcommittee on the Environment of the National Governors' Association, Siting Hazardous Waste Facilities 10 (1981).

103. *See* Sporhase v. Nebraska, 102 S.Ct. 2456 (1982); Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 (1981).

104. 437 U.S. 617, 627 (1978). In *Philadelphia,* the Court, without explanation, found that a landfill was a similar natural resource. *Id.* This is remarkable in two ways: First, unlike previous natural resource hoarding cases, New Jersey was not attempting to halt the export of any article of commerce. Rather, it was attempting to control the use, albeit selectively, of land within the borders of the state. Holes in the earth have apparently achieved the status of articles of commerce. Second, there is nothing "natural" about a landfill. Modern landfills are closely regulated, extensively engineered facilities involving substantial capital investments. Waste treatment facilities involving chemical neutralization or incineration are even more distantly removed from any common sense definition of "natural resource." *See* 40 C.F.R. §§ 264–67 (1981).

distinguished, however, between a state's attempt to regulate interstate transactions in privately owned goods, and the state's power to restrict out-of-state access to *state-owned* resources where the state is acting as a market participant.[105] In fact, the Court expressly noted that it was not deciding the latter question in the context of the *City of Philadelphia v. New Jersey* opinion.[106]

Once the determination is made that the state is participating in the marketplace as a market participant, rather than simply regulating the private marketplace, the commerce clause analysis becomes irrelevant.[107] In such a case, there is only one determination to be made: is the challenged program "direct state participation in the market."[108] In *Reeves, Inc. v. Stake,*[109] a case involving a cement plant owned and operated by the State of South Dakota, the Court affirmed its reasoning in an earlier decision[110] and held in very broad terms that nothing in the commerce clause prohibits a state from participating in the marketplace, and in so doing exercising the right to favor its own citizens.[111]

Reeves, Inc. v. Stake and Its Progeny

The facts in *Reeves* have interesting parallels to those found in more recent disputes involving hazardous waste disposal capacity shortages. In 1919, the State of South Dakota built a cement plant to supply cement for construction projects in the state during a period of cement shortage. Between 1919 and the late 1970s, the production of the plant exceeded the state's own demands, and much of the excess production was sold to out-of-state buyers. In 1978, a national cement shortage again devel-

105. *Id. See also* Note, *A State Acting in a Proprietary Capacity as an Interstate Seller Is Not Restricted by the Commerce Clause and May Therefore Reserve its Products for Its Own Citizens,* 13 GA. L. REV. 1086 (1979).

106. *Id.* at 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 [citations omitted] or New Jersey's power to spend state funds solely on behalf of state residents and businesses . . ."

107. White v. Massachusetts Council of Construction Employers, 103 S. Ct. 1042 (1983).

108. 447 U.S. 429, 436 n.7 (1980).

109. 447 U.S. 429 (1980)

110. Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976)

111. 447 U.S. 429, 436-39. The majority in *Reeves* quickly dismissed Reeves' arguments by stating, "The basic distinction . . . between States as market participants and States as market regulators makes good sense and sound law." *Id.* at 436. The Court similarly dismissed Reeves' detrimental reliance argument by noting that such a holding would seriously interfere with a State's ability to "structure relations exclusively with its own citizens." *Id.* at 441. The potential issue of resource hoarding, previously rejected by the Court as an unconstitutional exercise of state regulatory power, was avoided by declaring cement an "end-product" rather than a natural resource. *See* note 45 *infra.* An attack based upon "economic protectionism" was deflected with the Court's note that "The State's refusal to sell to [out-of-state buyers] is protectionist only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve." 447 U.S. at 442. For a further discussion of the *Reeves* decision, see 16 LAND & WATER L. REV. 85 (1981).

oped. The state-owned facility refused to sell to out-of-state customers in light of domestic demands which were consuming the plant's entire production. A former Wyoming-based buyer sued, claiming South Dakota had violated the commerce clause by restricting its sales to in-state customers.[112]

The essential difference distinguishing the facts of this case from the protectionist practices complained of in *City of Philadelphia v. New Jersey,* according to the Court, was that South Dakota owned the facility in question and sold its product in the marketplace as a market participant.[113] Historically, the commerce clause was intended to limit state taxes and regulatory measures impeding free private trade in the national marketplace.[114] Nevertheless, Justice Blackmun, writing for the majority, said there was "no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market."[115] Further, this freedom of the state to enter the marketplace, in favor of its own citizens, exists even though by so doing it may impose substantial burdens upon the free flow of interstate commerce.[116]

The *Reeves* decision is consistent with the Supreme Court's earlier holding in *Hughes v. Alexandria Scrap Corp.*[117] in which a Virginia scrap metal dealer sued the State of Maryland over a legislatively enacted "bounty" program creating financial incentives for the recovery and reclamation of abandoned automobiles. The bounty program offered cash incentives to scrap metal dealers who accepted the abandoned automobiles as part of a Maryland effort to eliminate the eyesore created by abandoned cars. Although state subsidies were offered to scrap dealers on terms

112. 447 U.S. 429, 430–34 (1980).

113. There are several grounds for the distinction. The most significant is the requirement that courts consider the issue of state sovereignty and the "subtle, complex politically charged" nature of assessments which will evade traditional commerce clause analysis. *Id.* at 439. Thus, the Court concludes, Congress is better suited to the adjustment of interests in such cases. *Id.*

For an alarmist view of this decision, see Note, *Concrete Development Chips Away at Commerce Clause Analysis,* 14 CREIGHTON L. REV. 629 (1981).

114. 447 U.S. 429, 437 (1980).

115. *Id.*

116. What is remarkable about the *Reeves* decision is that it was the first to ignore the tests generally applied to commerce clause questions. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), and the test therein, is never discussed. Once a state is found to be behaving as a private market participant, the precedent found in Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), is applied, and the extent to which a state action burdens interstate commerce is irrelevant. This analysis was confirmed in White v. Massachusetts Council of Construction Employers, 103 S. Ct. 1042 (1983). The more difficult question is to define the breadth of the umbrella created by state market participation. *Construction Employers* broadened the scope of the state power to include not only the state's freedom to deal or not to deal with whomever the state chose, but the power to require that the state's private customers *also* deal only with those whom the state found acceptable. This expansion of *Alexandria Scrap* and *Reeves* was severely criticized in the dissent by Justice Blackmun. 103 S. Ct. 1049 (Blackmun, J. dissenting).

117. 426 U.S. 794, 814 (1976).

which virtually excluded out-of-state dealers from participating in the program, the Court concluded that such discrimination did not violate the commerce clause. The Court stated that in the absence of a Congressional prohibition there was nothing in the purposes animating the commerce clause which would forbid a state from participating in the private marketplace or electing to favor its own citizens over those of other states.[118]

Viewed another way, the Court has refused to single out state enterprises for special consideration under the commerce clause when they choose to act as private market participants. The state government's ability to produce its own supplies and to deal with whom it pleases when engaged in the private marketplace is not, as a Constitutional matter, distinguished from that of private individuals and businesses.[119]

The distinction between the state as a private market regulator and the state as a market participant has been reaffirmed and expanded by the Court in *White v. Massachusetts Council of Construction Employers*.[120] In *Construction Employers*, the Court held that a mayor's executive order requiring all construction projects funded by city money be performed by a work force at least half of whom were city residents was not violative of the commerce clause. The Court wrote that *Alexandria Scrap* and *Reeves* "stand for the proposition that when a state or local government enters the market as a participant it is not subject to the restraints of the commerce clause."[121] Once the state is a market participant, there are no barriers to the conditions which it may impose upon those with whom it does business.[122] Indeed, these restrictions may have effects which reach beyond the parties directly involved in the transaction.[123]

State market participation is apparently rare, and the instances of state action which provokes a commerce clause suit are limited.[124] As the

118. *Id.* at 810.

119. *Id.*

120. 103 S. Ct. 1042 (1983).

121. *Id.* at 1044.

122. *Id.* at 1046. Note that as a market participant, the effect of the state's conditions on out-of-state residents is irrelevant. Such an analysis would only be material to a commerce clause analysis which is inapplicable here. *Id.*

123. "[W]e think the Commerce Clause does not require the city to stop at the boundry of formal privity of contract." *Id.*, n.7.

124. Aside from *Alexandria Scrap, Reeves* and *Construction Employers*, the only other instance was a Connecticut home mortgage program. Fidelity Guarantee Mortgage Corp. v. Connecticut Housing Finance Auth., 532 F. Supp. 81 (D. Conn. 1982) (state funded mortgage guarantee program could require three years of previous experience in state to participate in program). *Contra* Tangier Sound Watermen's Assoc. v. Douglas, 541 F. Supp. 1287 (E.D. Va. 1982) (state may not require residence as prerequisite for crabbing license, state regulation of private commerce not covered by *Reeves*); Tenneco v. Sutton, 530 F. Supp. 411 (M.D. La. 1981) (regulating sale of privately owned natural gas not state market participation so *Reeves* inapplicable).

following discussion shows, however, state market participation in hazardous waste facilities would provide a means to control waste imports.

Applying Reeves to Hazardous Waste Site Development

Several states have enacted legislation which authorizes state agencies to acquire by purchase, condemnation, or otherwise, land and facilities needed for the disposal of hazardous wastes.[125] In some cases, statutes actually authorize state agencies to operate these facilities.[126] The statutes generally require the collection of fees from persons disposing of wastes at these sites and may express a legislative intent that such operations be self-supporting enterprises.[127]

State owned and operated hazardous waste facilities would appear to be constitutionally indistinguishable from the South Dakota cement plant. The state making such an investment to provide a needed service not previously available in the marketplace and operating the facility as a revenue generating entity would be behaving in that marketplace like a private entrepreneur. As such, under the Supreme Court's decisions, the state-owned hazardous waste facility would seem to have the freedom to select its own customers. It could, if it so chose, limit its customers to those who generated their hazardous wastes within the state. The fact that such a stipulation would impose a *de facto* restriction on the flow of wastes in interstate commerce should not change the constitutionality of that import control.[128]

Preemption by RCRA—An Issue Avoided

In fields where both the federal and state governments have acted, the supremacy clause[129] requires that the state law be preempted under the following circumstances: 1) where the state law conflicts with federal statute, 2) where enforcement of the state law would frustrate the federal scheme, or 3) where the totality of circumstances show Congress intended

125. *E.g.*, ARIZ. REV. STAT. ANN. § 36–2804(A) (West Supp. 1982); MD. NAT. RES. CODE ANN. §§ 3-701-13 (1983); MINN. STAT. ANN. § 155A.06 (West Supp. 1983); N.Y. PUB. AUTH. LAW § 1285-c (McKinney 1982); 1979 OR. LAWS §§ 459.595, 468.220(h) (1979); VA. CODE § 32.1-178(11) (Michie. Supp. 1982); WASH. REV. CODE § 70.105.040 (West Supp. 1983).

126. *E.g.*, ARIZ. REV. STAT. ANN. § 36-2804(A) (West Supp 1982); MD. NAT. RES. CODE ANN. §§ 3-701-13 (1983); N.Y. PUB. AUTH. LAW § 1285-c (McKinney 1982); VA. CODE § 32.1-178(12) (Michie. Supp. 1982); WASH. REV. CODE ANN. § 70.105.040 (West Supp. 1983).

127. *E.g.*, ARIZ. REV. STAT. ANN. § 36-2805 (West Supp 1982); MD. NAT. RES. CODE ANN. §§ 3-711 (1983); VA. CODE § 32.1-178(14) (Michie. Supp. 1982); WASH. REV. CODE ANN. § 70.150.040 (West Supp. 1983).

128. *See* White v. Massachusetts Council of Construction Employers, 103 S. Ct. 1042 (1983) (fact that state order has result of requiring private employment practices otherwise violative of commerce clause no bar where state acting as private market participant).

129. U.S. CONST. art. VI, cl. 2.

to fully occupy the field.[130] A court reviewing such a case begins with the assumption that Congress did not intend to displace state law,[131] then goes on to assess whether compliance with both state and federal laws is impossible,[132] the state law stands as an obstacle to accomplishment of the full Congressional purpose,[133] or the federal scheme is so pervasive that it is reasonable to infer that Congress meant to leave no room for the states.[134]

In the case of the Resource Conservation and Recovery Act ("RCRA"),[135] it is clear from the face of the statute that Congress had no express intent to preclude state legislative initiatives in the field. Section 3009[136] of the Act indicates quite the opposite intent. Under the Act, states are simply prohibited from imposing any requirement *less* stringent on the transportation or disposal of hazardous waste than that provided by the Act.[137] There is no indication whatsoever that Congress intended to prevent states from imposing more stringent regulation on hazardous waste transportation and disposal. The Supreme Court has expressly reached the same conclusion, finding no supremacy clause barrier to state imposed regulations on hazardous waste imports.[138]

Having ruled out any express Congressional intent to preempt state imposed restrictions on waste imports, it would still be possible for a court to hold that state owned site refusal to accept out-of-state wastes violated an implied federal preemption. Factors bearing on an implied preemption include 1) the aim and intent of Congress, 2) pervasiveness of the federal scheme, 3) whether federal uniformity is vital to the national interest, and 4) whether Congressional objectives would be obstructed.[139] The Supreme Court has already held,[140] with respect to a statute seeking

130. Maryland v. Louisiana, 451 U.S. 725, 746-47 (1981); Matter of Gary Aircraft Corp., 681 F.2d 365 (5th Cir. 1982) citing Malone v. White Motor Corp., 435 U.S. 497 (1978).

131. 541 U.S. at 746.

132. Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963).

133. *See* Ray v. Atlantic Richfield Co., 435 U.S. 151.

134. *See* Rice v. Santa Fe Elevator Corp., 332 U.S. 318 (1947).

135. 42 U.S.C. §§ 6901–6987 (1976).

136. *Id.* at § 6929.

137. *Id.*

138. City of Philadelphia v. New Jersey, 437 U.S. 617, 620–21 & n.4 (1978). Even though the New Jersey statute was held unconstitutional under the commerce clause, *see infra* text accompanying notes 42–63, the Court said, "We agree . . . that the state law has not been preempted by federal legislation." *Id.* at 620. The Court reviewed the federal act and found "no 'clear and manifest purpose of Congress' [citation omitted] to preempt the entire field of interstate waste management or transportation, either by express statutory command [citation omitted] or by implicit legislative design [citation omitted]. *Id.* at 620 n.4.

139. Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1146-47 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972).

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

to exercise police powers,[141] that neither was RCRA pervasive enough nor was the field it regulated so in need of national uniformity as to require preemption.[142] Congress clearly did not intend to preclude state hazardous waste sites. The only remaining question is whether Congressional objectives would be obstructed.

Congress' clear object, which resounds throughout the legislative history of RCRA, was to put an end to the indiscriminate dumping of hazardous chemicals along roadsides, into rivers and streams, and alongside poorly engineered local dumps. States which provide additional hazardous waste disposal capacity meeting regulatory requirements are furthering this objective.

State owned waste sites, though they may refuse to accept imported wastes, should not be preempted by federal statute. The state is not exercising a police power to restrict imports; therefore, it is doubtful that any conflict sufficient to bring the supremacy clause to bear could ever exist. Even if supremacy clause questions were to arise, it is clear that state action could not produce a conflict with the federal statute significant enough to overcome the presumed validity of the state law.

Other Limitations

The apparent trend toward allowing states which participate in the free market to select their customers regardless of the resulting impacts on interstate commerce does contain several important caveats, and state-owned hazardous waste facilities pursuing *de facto* import restrictions under the *Reeves* decision could still run afoul of the commerce clause in a number of ways. Each involves uncertainty as to whether a state operating a hazardous waste site constitutes "direct participation in the market", which is the only relevant question under the *Reeves* analysis.[143]

First, *Reeves* was a five to four decision in which the minority argued forcefully that a state is exempt from the commerce clause only where it is performing an "integral operation in areas of traditional government functions."[144] While municipal waste disposal is commonly a governmental operation, hazardous waste disposal may not be considered a "traditional government function."

Second, the *Reeves* decision classified the New Jersey landfill restrictions contested in *City of Philadelphia v. New Jersey* together with other

141. All of the recent supremacy clause cases concern instances where the exercise of a state police power, acting to regulate the private marketplace, conflicts with concurrent federal regulation. In a case where the state is itself acting in, rather than regulating, the marketplace, it is highly questionable whether any traditional supremacy clause analysis could be tortured to fit such facts.

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

143. *See infra* text accompanying notes 107-108.

144. 447 U.S. 429, 451-52 (1980).

decisions finding natural resources hoarding by states unconstitutional.[145] It distinguished the cement plant from the landfill by noting that the cement factory produces a product at the end of a complex and costly process involving an expensive physical plant and human labor acting on raw materials.[146] It is arguable that hazardous waste disposal also requires a production process. If this distinction is important, then the extent to which a state hazardous waste facility processes, neutralizes, or otherwise treats incoming wastes, could be determinative before the courts. On the other hand, the importance of the "production process" distinction is clouded by the fact that the *Reeves* majority relied heavily on *Hughes v. Alexandria Scrap Corp.*, which did not involve a physical plant or a production process, but simply a state bounty program on abandoned automobiles. *White v. Massachusetts Council of Construction Employers* further clouds the issue in that *Construction Employers* involved no "production process", but simply hiring practices of contractors engaged for the construction of city building projects.

Finally, it is unclear whether a state that simply owned a facility, which it leased or otherwise contracted with another party to operate, would be considered to be "operating freely in the free market."[147] It is possible that a state attempting to restrict the customers of a privately operated, state-owned site would be found to be imposing unconstitutional restrictions on the private pursuit of interstate trade.

Whether a state finds it desirable to participate in the hazardous waste disposal marketplace depends upon a variety of factors. A state must assess its potential direct financial risk and possible exposure to liability as the owner of a high risk facility. In addition, the political climate in the state and urgency of the need for additional waste disposal capacity must be evaluated. But it is clear that where a state requires additional capacity and wishes to conserve this capacity for the use by its own industry, the *Reeves* decision provides means to achieve these goals with

145. 437 U.S. 617, 627 (1978). *E.g.*, Hughes v. Oklahoma, 441 U.S. 322 (1979) (minnows); Pennsylvania v. West Virginia, 262 U.S. 553 (1923) (natural gas); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911) (same). Each of the cases cited by the majority involved a state attempting to restrict the export of a privately owned natural resource.

146. *See also* South-Central Timber Development, Inc. v. LeResche, 511 F. Supp. 139 (D. Alaska 1981), *rev'd*, 693 F.2d 890 (9th Cir. 1982) (timber is a natural resource and commerce clause analysis is required regardless of state ownership).

147. In Washington St. Bldg. & Constr. Trades Council v. Spellman, 518 F. Supp. 928 (E.D. Wash. 1981), the court held that where the State of Washington was merely serving as a sublessor of a tract of federally owned land in the Hanford Military Reservation, the state actually was in the real estate business, and not a market participant in the radioactive waste business to a degree sufficient to place state restrictions on the import of radioactive wastes beyond the reach of the commerce clause.

the greatest probability of success in the near future. At the very least, it is an incentive for states to consider state ownership and operation of new treatment and disposal facilities.

CONCLUSION

Beginning with the earliest commerce clause decisions, the Supreme Court set out to promote integrated, efficient national expansion. Therefore, the Court consistently has overruled isolationist or protectionist state legislation affecting the free flow of interstate commerce. By applying similar standards to questions involving interstate traffic in hazardous wastes, however, the Court may be frustrating the achievement of adequate, efficiently sited and utilized hazardous waste disposal capacity essential to continued national economic progress. In view of the Supreme Court's decision to treat waste disposal capacity as an article of commerce or a natural resource not subject to state import regulation, states seeking the advantages of import restrictions must look elsewhere. Compacts, although legally sound, are currently fraught with political and economic difficulties. Thus, state ownership of new facilities may provide the remaining basis for state governments to exercise control over hazardous waste imports.