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The Civil War of Waste

Here's the rub: "'How can you properly manage wastes when you have no control on the amount of wastes coming in[to the state]'?" This question has plagued many state and local governments since the United States Supreme Court handed down its decision in *Fort Gratiot Landfill v. Michigan Department of Natural Resources*. The Court in *Fort Gratiot* held that a Michigan statute, prohibiting private landfills from accepting waste originating outside the county in which the landfill is located, violated the Commerce Clause of the United States Constitution. The National Solid Waste Management Association calculates that approximately fifteen million tons of municipal solid waste ("MSW") was transported interstate in 1989. That fifteen million tons represents about eight percent of the trash created by the entire United States. The chief importers of this trash were Pennsylvania, Ohio, Indiana and Virginia, with the principal exporters of fifty-three percent of this out-of-state waste being New Jersey and New York. What actions does the Commerce Clause prohibit importing states to take? What actions does it allow? Should the federal government step in and regulate this area? What are the con-

1. Matt Yancy, *States Reach Compromise On Bill to Stem Interstate Trash Shipping*, THE ASSOCIATED PRESS, July 23, 1992, available in LEXIS, Envl Library (quoting an unnamed United States Senator commenting on the battle between the states who have tried to ban the import of municipal solid waste ("MSW") from other states).
5. *Fort Gratiot*, 112 S. Ct. at 2028. The Michigan statute allowed each county's Solid Waste Management Board to authorize the importation of MSW, but St. Clair County's Board did not do so. Id. at 2022. The suit was brought by Fort Gratiot due to this exclusion by St. Clair County. Id.
6. The Commerce Clause provides: "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.
7. Id.
8. Id. New York and New Jersey also import some small amount of MSW, but this statistic represents only the exported amount, not the net of exports over imports. Id.
sequences of federal intervention and regulation? This comment will answer these questions, and offer a solution to the dilemma afflicting states: What are we going to do with our trash?

RESTRICTIONS ON BANS OF THE INTERSTATE DISPOSAL OF WASTE

The first eruption of the trash battle ensued in early 1973, when New Jersey enacted its Waste Control Act ("New Jersey Act"). The New Jersey Act barred the importation of "any solid or liquid wastes which originated or was collected outside the territorial limits of the State." Several private New Jersey landfill operators, and neighboring states that had agreements with these operators, challenged the new law in New Jersey state court on state and federal grounds. While the trial court found the New Jersey law unconstitutional because it discriminated against interstate commerce, the Supreme Court of New Jersey concluded that the law advanced vital health and environmental objectives, with only incidental effect on interstate commerce, and reversed the decision. In its decision on the appeal to the United States Supreme Court, the Court stated that the New Jersey Act, "block[ed] the importation of waste in an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites." It held that the New Jersey Act was "clearly impermissible under the Commerce Clause of the Constitution." The Court definitively stated in City of Philadelphia v. New Jersey that garbage was, indeed, an article of interstate commerce, and could not be restricted by the states unless authorized by Congress, or unless dictated by genuine health and safety reasons. As the Court could find no distinction between New Jersey's garbage (which was allowed in New Jersey landfills) and other states' garbage (which was not), it declined to allow the state to discriminate against the garbage of other states.

From the time of the United States Supreme Court's decision in

12. Hackensack Meadowlands, 348 A.2d at 514.
15. Id. at 622.
16. Id. at 626-27.
City of Philadelphia, until the present, states have continued to search for creative ways to keep out-of-state trash from entering their landfills.\textsuperscript{17} Due to the fungibility of non-hazardous waste (it all has the same foul characteristics), in Fort Gratiot, Michigan attempted to distinguish its plan from New Jersey's, arguing that unlike New Jersey's complete ban on MSW imports, the Michigan plan did not discriminate against out-of-state MSW in favor of in-state waste.\textsuperscript{18} Rather, each county could prohibit imports of MSW from other counties within the state, as well as from outside the state.\textsuperscript{19} In other words, it discriminated against waste coming from other counties in the state, so that it was not singling out garbage from other states. This distinction did not persuade the Court. It had already addressed this argument in City of Philadelphia, noting, "[w]hat is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade."\textsuperscript{20} The Michigan statute was clearly an attempt to keep its landfills free of out-of-state waste, ensuring that its citizens could continue to dispose of their waste in the future. During oral argument, Fort Gratiot's counsel, Harold Finn, argued that with the amount of garbage that it wanted to import, Fort Gratiot would still have twenty years of landfill capacity left.\textsuperscript{21} Michigan disputed that figure, arguing that it would only have six years of capacity left at the Fort Gratiot site if Fort Gratiot continued to accept the same volume of out-of-state waste.\textsuperscript{22} The Court decided that capacity was not the issue; the issue was economic protectionism, and the Court labeled the Michigan statute a "protectionist measure" that could not hold up under Commerce Clause analysis.\textsuperscript{23}

\textsuperscript{17} In a different twist on the issue, a case currently on certiorari before the Court, Town of Clarksville v. C & A Carbone, Inc., 587 N.Y.S.2d 681 (1992), cert. granted, 113 S. Ct. 2411 (1993), challenges a local ordinance that required all solid waste processed or handled in the locality be disposed of at the town-authorized disposal site, prohibiting export of municipal solid waste from the locality.

\textsuperscript{18} Fort Gratiot, 112 S. Ct. at 2024.

\textsuperscript{19} Id.

\textsuperscript{20} City of Philadelphia, 437 U.S. at 628.

\textsuperscript{21} Supreme Court Hears Oral Arguments in Michigan Solid Waste Litigation, STATE ENV'T REP., Apr. 1, 1992, available in LEXIS, Envil Library (quoting Mr. Harold Finn of Finn Dixon & Herling of Stamford, Connecticut, during oral argument before the United States Supreme Court in Fort Gratiot case) [hereinafter Supreme Court Hears Oral Arguments].

\textsuperscript{22} Id. (paraphrasing Michigan state Assistant Solicitor General Thomas Casey during oral argument of the Fort Gratiot case before the United States Supreme Court).

\textsuperscript{23} Fort Gratiot, 112 S. Ct. at 2028.
Other states have also tried legislative means to protect their borders from the flood of out-of-state trash that threatens to overflow their landfills. The nation’s oldest and largest hazardous waste disposal facility in the country is located in Emelle, Alabama, where approximately ninety percent of the tonnage each year comes from other states.\textsuperscript{24} The base tipping fee\textsuperscript{25} for all hazardous waste dumped at the Emelle facility was $25.60/ton.\textsuperscript{26} Alabama also imposed an additional tipping fee of $72.00/ton on hazardous waste generated outside of the state that was disposed of within the state of Alabama.\textsuperscript{27} It was this surcharge that found disfavor with the United States Supreme Court.\textsuperscript{28} The Court found that the fee facially discriminated against hazardous waste from states outside of Alabama, and, therefore, could not withstand Commerce Clause scrutiny.\textsuperscript{29}

Chemical Waste Management, Inc. followed its victory in Alabama with a victory in Louisiana, when it (along with the Supreme Court’s decision in \textit{Chemical Waste Management}) convinced the Louisiana Legislature to rescind its hazardous waste fee structure, which was similar to Alabama’s.\textsuperscript{30} It had been enacted over fear that the hazardous waste deflected from Alabama due to the high cost of disposal, would end up in Louisiana landfills.\textsuperscript{31} When Alabama’s law was declared unconstitutional, the Louisiana Legislature repealed the additional fees it had established.\textsuperscript{32}

South Carolina was also concerned about the amount of hazardous waste pouring into it, and, in 1989, enacted a legislative provision that prohibited the disposal of hazardous waste in South Carolina if the waste came from states that prohibited the treatment of hazardous waste within their boundaries, or that had not entered into an interstate or regional agreement for the safe treatment of hazardous waste.\textsuperscript{33} In other words it created a “blacklist” of states whose hazardous waste it would refuse to accept.

\textsuperscript{25} A tipping fee is the amount charged to dispose of waste at a disposal site. Usually it is a fee per ton of waste, but it can also be assessed in other ways. \textit{Supreme Court Hears Oral Arguments}, cited at note 21.
\textsuperscript{26} Ala. Code § 22-30B-2(a) (Supp. 1991).
\textsuperscript{27} Ala. Code § 22-30B-2(b) (Supp. 1991).
\textsuperscript{28} \textit{Chemical Waste Management}, 112 S. Ct. at 2015.
\textsuperscript{29} Id. at 2014-15.
\textsuperscript{30} \textit{Chemical Waste Scores Big Win in Louisiana Tax Dispute}, ENV'T WEEK, July 9, 1992 [hereinafter \textit{Chemical Waste Scores Big}].
\textsuperscript{31} \textit{Chemical Waste Scores Big}, cited at note 30.
\textsuperscript{32} Id.
North Carolina was placed on South Carolina’s blacklist, and suit was filed in federal court to enjoin the enforcement of the Act. The Fourth Circuit Court of Appeals noted that South Carolina seemed to want to penalize waste generators residing in states that failed, in South Carolina’s eyes, to properly plan for managing their own hazardous waste. The court granted the preliminary injunction against the enforcement of the contested provisions, stating in its opinion:

[T]he effect of every state designing particular limits and bars for out-of-state waste could be catastrophic. Indeed, such treatment of hazardous waste—in essence, ensured nontreatment of some hazardous waste—might destroy not only the theoretical principle of a national economic union, but contains the real potential to destroy land, if not also persons, within the union. Unless and until Congress alters the law, the apparent Congressional intent . . . would seem to remain—better that hazardous waste be treated and disposed of somewhere, even if spread disproportionately among the states, than that future Superfund sites arise.

In a 1991 effort to eliminate the importation of MSW into the state, the Indiana Legislature introduced a three-part regulatory system. The first section of the statute instituted a ban on backhauling in certain types of vehicles. It restricted the type of truck that would be allowed to collect MSW and transport it into Indiana, thereby eliminating the practice of backhauling for those who did not dedicate their trucks to the transport of suitable materials as indicated under the statute. The second part of the statute imposed the backhauling ban by requiring that trucks be registered with the Indiana Department of Environment Manage-

35. Hazardous Waste Treatment Council, 945 F.2d at 791 (citation omitted).
36. Id. at 792 (citation omitted).
38. IND. CODE § 13-7-31-13.1 (1991). Backhauling is a practice employed by truckers, where they load what would otherwise be an empty trailer or flatbed with municipal solid waste, and haul it to a disposal site. The practice is usually employed after the trucker has dropped the primary load, and is returning to the base of operation. If the trucker did not haul the trash, the trailer would be vacant. Backhauling allows truckers to make additional money by renting their trailers to ship the waste to the disposal site. Government Suppliers Consolidating Serv. v. Bayh, 975 F.2d 1267, 1272 (7th Cir. 1992), cert. denied, 113 S. Ct. 977 (1993).
39. Suitable trucks were trucks that transported municipal waste; special waste; hazardous waste; waste from the combustion of coal; recyclable material; wood, concrete, brick and other construction and demolition material; dirt, sand, gravel, asphalt, salt, and other highway maintenance material; coal, gypsum, slag, scrap metal, and other bulk industrial commodities; and infectious waste. IND. CODE § 13-7-31-13.1 (1991).
ment, indicating that the truck was in compliance with the backhauling requirements, and prohibiting landfills from accepting waste from trucks not bearing the required identification sticker.\textsuperscript{40} The final portion of the regulatory scheme imposed one uniform disposal fee on all waste, and an additional fee that applied only to waste from outside of Indiana.\textsuperscript{41}

The Seventh Circuit Court of Appeals found all three of the Indiana provisions violative of the Commerce Clause.\textsuperscript{42} It relied heavily on the Supreme Court’s decisions in City of Philadelphia and Fort Gratiot, noting that the regulatory scheme, taken as a whole, had the purpose and effect of significantly reducing the flow of out-of-state garbage into the state of Indiana, by increasing the cost of disposing of the waste in Indiana.\textsuperscript{43} Once again, a state effort to protect itself from others’ waste was stymied.

The state of Massachusetts tried a regulatory route similar to that attempted in Indiana. Massachusetts required all vehicles that were licensed to transport hazardous waste in Massachusetts to display a sticker, at a cost of $200 each.\textsuperscript{44} When the fee structure was challenged in state court, the Supreme Judicial Court of Massachusetts concluded that the flat fees benefitted in-state companies and discriminated against out-of-state trucking companies, by making it more expensive to do business in Massachusetts.\textsuperscript{45} It too struck down the fees as violative of the Commerce Clause.\textsuperscript{46}

In 1990, the Georgia legislature enacted legislation that labeled out-of-state MSW as “special solid waste,” requiring landfill operators to apply for a permit from the state to handle and dump this “special” waste into landfills operating in the state of Georgia.\textsuperscript{47} It also subjected solid waste handlers to onerous administrative requirements if the handler wished to dump out-of-state waste in Georgia.\textsuperscript{48} When the statute was contested in Southern States

\textsuperscript{40} IND. CODE § 13-7-31-8 and § 13-7-31-14(1) (1991).
\textsuperscript{41} IND. CODE § 13-9.5-5-1(b) (1991).
\textsuperscript{42} Government Suppliers, 975 F.2d at 1286.
\textsuperscript{43} Id. at 1278-79.
\textsuperscript{44} MASS. GEN. L. ch. 21C, §§ 7, 5 (1990).
\textsuperscript{45} American Trucking Ass’n, Inc. v. Secretary of Admin., 613 N.E.2d 95, 103 (Mass. 1993).
\textsuperscript{46} American Trucking, 613 N.E.2d at 105.
\textsuperscript{47} GA. CODE ANN. § 22 (1990).
\textsuperscript{48} GA. CODE ANN. § 12-8-27 (1990). These additional requirements for obtaining a permit to dump out-of-state waste included developing a waste analysis plan and identifying types of waste received by the facility. The statute dictated that all out-of-state waste be accompanied by a manifest noting its quantity and composition, and its origin, routing and destination. It instituted a $10/ton fee for disposal of all out-of-state waste in Georgia land-
Landfill v. Georgia Department of Natural Resources, the United States District Court for the Middle District of Georgia determined that the Georgia system unfairly discriminated against out-of-state waste, in violation of the Commerce Clause. It granted summary judgment to Southern States Landfill, relying on precedent set by the Supreme Court in City of Philadelphia and Fort Gratiot, and refused to allow the state of Georgia to enforce the disputed provisions of the statute.

ALLOWABLE RESTRICTIONS ON INTERSTATE DISPOSAL OF WASTE

Some states have had better luck in keeping other states’ trash out of their landfills. The rulings in Fort Gratiot and City of Philadelphia declared unconstitutional state-adopted measures prohibiting the import of MSW. There is no prohibition, however, on private operators who refuse to accept out-of-state waste for disposal in their landfills. In 1992, Indiana had some measure of success in reducing the out-of-state waste going into its landfills when some of its landfill owners began utilizing this loophole. When six of Indiana’s seven landfills stopped accepting waste imports, the amount of waste dumped in Indiana’s landfills decreased from 50,000 tons in January, 1992 to a little more than 14,000 tons in August. Another technique Indiana implemented to help reduce its waste imports was to sign formal agreements with other states. These agreements eliminated imports of garbage from New Jersey, and decreased imports from both New York and...
Pennsylvania.\textsuperscript{55} So far, these interstate disposal agreements have not been challenged in court on Commerce Clause grounds.\textsuperscript{56}

Montana has relatively low tipping fees of $12-15/ton, and is considered one of the least expensive states in which to deposit trash.\textsuperscript{57} In 1989, Montana instituted a two-year moratorium on imports of MSW, giving the state time to prepare itself for a perceived onslaught of out-of-state garbage.\textsuperscript{58} The moratorium was extended for the same reason in 1991 for two more years.\textsuperscript{59} Despite the \textit{Fort Gratiot} decision in 1991, no one has contested Montana's moratorium.\textsuperscript{60}

Rhode Island has also managed to effectively ban the imports of MSW.\textsuperscript{61} The state has one large regional landfill (Central Landfill), which is operated by the state, and five small, municipally owned landfills which are for the exclusive use of the those communities.\textsuperscript{62} In 1987, Rhode Island banned the disposal of out-of-state waste at Central, claiming it was a public resource reserved for the citizens of the state of Rhode Island.\textsuperscript{63} The ban was challenged in federal court by a Massachusetts hauler, who claimed the ban violated the Commerce Clause of the Constitution.\textsuperscript{64} The district court upheld the ban because it did not restrict waste imports to privately-owned waste facilities.\textsuperscript{65} The practical effect of the ban on imports, however, allows Rhode Island to maintain Central Landfill for the exclusive use of its residents.

The state of Pennsylvania has orchestrated a more circumspect approach to stem the tide of trash across it borders. Labeled "Operation Trashnet," the state combined the efforts of the state Departments of Environmental Resources and Transportation and the Pennsylvania State Police. The operation instituted inspection

\begin{thebibliography}{99}
\item 55. \textit{Id.}
\item 56. \textit{Id.}
\item 58. \textit{Montana Offers Cheap Disposal}, cited at note 57.
\item 59. \textit{Id.}
\item 60. \textit{Id.}
\item 61. Other states that have used a similar method to avoid MSW imports are the District of Columbia, Maryland and Oregon. \textit{Attorney Says States—Not U.S. Government—Hold Keys to Waste Transport}, \textit{INTEGRATED WASTE MANAGEMENT}, Aug. 8, 1990, available in LEXIS Envtl Library [hereinafter \textit{Attorney Says States}].
\item 63. \textit{Lefrancois}, 669 F. Supp. at 1206.
\item 64. \textit{Id. at} 1207.
\item 65. \textit{Id. at} 1212.
\end{thebibliography}
stations at ten locations near Pennsylvania landfills. The Governor of Pennsylvania insisted that the inspections were "to crack down on illegal and unsafe garbage trucks," but he continued, "[w]e wanted to send a message to the waste industry: Don't dump on Pennsylvania." During the inspections, the state police and the Department of Transportation checked all trucks, including waste trucks, to ensure conformance with weight, maintenance and other safety regulations. The Department of Environmental Resources also screened the garbage trucks for violations of Pennsylvania's environmental regulations that relate to waste haulers. The September 1992 Trashnet operation was the fifth such effort in the state of Pennsylvania since 1989, designed to stem the stream of trash coming into the state. Lacking federal authority to institute an outright ban on garbage imports, Operation Trashnet will probably continue.

A final technique states may use to slow the flow of out-of-state garbage across state borders is to refuse to license a new landfill unless the developer "voluntarily" agrees to restrict or eliminate out-of-state waste at that site. Employing this procedure, however, may prove to be a double-edged sword for the states. If the developer agrees to the ban and the landfill is created, the state wins. If the developer rejects the stipulation of banning out-of-state waste, the state has lost a new landfill site. States that seek to use this system should seriously consider whether they can afford, both financially and ecologically, to forfeit a new landfill


68. Id.

69. Id. Under Operation Trashnet, the Department of Environmental Resources inspected 14,066 garbage trucks, finding 4,127 violations. It has ordered 305 trucks removed from the Commonwealth due to illegal loads. Id.

70. Id.

71. Id.

72. It should be noted that the author has no knowledge of states actually issuing such a harsh ultimatum to potential new landfill operators. Political realities, however, would indicate that this could indeed be a potential scenario. An operator with a pending application for a landfill license (as well as the operator's attorney) would be quite aware of the regulatory traps that could ensnare the application in bureaucratic red tape, and might be willing to avoid such entanglements if it suited his economic interests.
FEDERAL LEGISLATIVE MEASURES

While states have enacted the various legislative and nonlegislative measures noted above to try to stop waste imports, they have also looked to the federal government for help with their perceived predicament. Since the Commerce Clause of the United States Constitution gives Congress the power to regulate commerce between states, Congress alone has the ability to place limits on garbage exports, and allow states to restrict or completely ban waste imports. In July 1992, just a month after the Supreme Court overturned the Michigan and Alabama laws in *Fort Gratiot* and *Chemical Waste Management*, respectively, legislation was introduced in the United States Senate to give governors of states the power to suspend out-of-state waste imports. A similar bill in the House of Representatives failed to make it to the floor for a vote, and died in committee. During the 1993 legislative session, companion bills were introduced in both the Senate and the House which would give governors the authority to freeze imports of out-of-state waste to either 1991 or 1992 levels, and ban all waste imports to landfills that had not received any out-of-state waste in 1991. A similar bill was also introduced in the House, entitled the Local Government Interstate Waste Control Act. Traditionally, exporting states, like New Jersey and New York, have opposed these measures, while the importing states of Pennsylvania and Indiana favored them. The bills introduced early this year seem to have a

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75. *Boucher Reintroduces Bill*, cited at note 74. The Senate bill was S. 439, 103d Cong., 1st Sess. (1993) and the House bill was H.R. 1076 103d Cong., 1st Sess. (1993). In addition to the ability to completely ban imports, governors would also have the capacity to limit out-of-state waste shipments to landfills that received greater than 50,000 tons of MSW in 1991, if the imports were at 30 percent or more of the amount received in 1991. *Coats Makes Third*, cited at note 73.


77. The Senate bill is sponsored by senators from Indiana, Kentucky, Kansas, Oklahoma, Iowa, Missouri, Ohio, Michigan and Tennessee. The House bill is endorsed by representatives from Oregon, Nebraska, Indiana, Ohio, Tennessee, Missouri and South Dakota. *Coats Make Third*, cited at note 73.
good chance of passing, and, unlike previous bills, appear to have the approval of the President. Whether the President's campaign statements are more than simply rhetoric, however, remains to be seen.

Importing states that are gazing towards Congress for a solution to the interstate waste problem may be looking in the wrong direction. According to William L. Kovacs, who was the chief counsel for the U.S. House of Representatives Subcommittee on Transportation and Commerce during the development and enactment of the Resource Conservation and Recovery Act of 1976, "[i]t takes the Environmental Protection Agency [EPA] three to six years to promulgate a regulation. It takes another two to four years for the courts to decide on a regulation's validity." He also stated that it took EPA twelve years to issue guidelines for recycled product procurement. With this kind of track record, combined with the lack of federal funding that proliferates today, Congress should be the last resort for importing states looking to slow the stream of waste across their borders.

THE CONSEQUENCES OF FEDERAL LEGISLATION ALLOWING STATES TO BAN OUT-OF-STATE GARBAGE IMPORTS

Most states that import out-of-state waste are very anxious to stop other states from dumping on them. At first blush, this seems to be a rational proposition: make every state responsible for the garbage it generates. Unfortunately, it is not as simple as it sounds. No state in the union is completely self-reliant when it comes to disposing of its own garbage; all states are exporters of some wastes and importers of others. Why, then, are these states trying to stop waste imports? Will not Michigan's attempt to keep Penn-

78. During his 1992 campaign, then-candidate Bill Clinton endorsed the right of states to decide whose garbage can cross their borders. He stated, "[o]ne of the things we should do is that the United States Congress should pass, and the president should sign, an act which gives every state the right to ban the import of out-of-state waste." Coats Makes Third, cited at note 73 (quoting Mr. Clinton from a statement he made during a debate in South Dakota on February 23, 1992).

The Bush Administration opposed the 1992 bill, stating, "[t]his type of inflexible approach will significantly restrict the nation's ability to manage solid waste sensibly." Yancy, cited at note 1.


80. Id.

sylvania's solid waste out of its borders meet with similar resistance by Pennsylvania against Michigan's hazardous waste? In this scenario, neither state benefits, and all the citizens lose. It is this type of retaliation and economic protectionism that the Commerce Clause sought to avoid.82

State citizens, sadly, do not possess such a national mindset. What they see is another ugly landfill in their state, made necessary because other states are filling up the existing landfills with out-of-state waste. The "not in my backyard"83 mentality possessed by these citizens is misplaced and unwarranted. Economic forces should be allowed to determine where and when new waste disposal sites are situated. States that have the capacity and desire to build new landfills should be encouraged to do so, and states that do not should not be punished because of it. State citizens must look beyond their own backyard for the answers to the nation's waste disposal problem.

For instance, examine the hazardous waste disposal question. Since few states produce very large quantities of hazardous waste, a requirement that every state dispose of its own hazardous waste would be environmentally and economically wasteful.84 At a cost of between $100 and $150 million to construct a hazardous waste site,85 there would be few bidders anxious to construct such a facility unless they were assured that they could solicit business from out-of-state. Otherwise, a facility built to accommodate the hazardous waste disposal needs of a company in the state would be superfluous if the company relocated to another state. Given the fact that most states would not be able to attract the capital to site a hazardous waste facility,86 what would they do with the hazardous wastes generated if the states that do have hazardous waste dumps prohibit or restrict imports? As the Fourth Circuit Court of Appeals noted in **Hazardous Waste Treatment Council**, "better
that hazardous waste be treated and disposed of somewhere, even if spread disproportionately among the states, than that future Superfund sites arise."\(^{87}\)

Nonhazardous solid waste, also called MSW, constitutes a more massive (in terms of volume) problem. Approximately twenty-eight thousand tons of garbage are transported interstate each day in the United States.\(^{88}\) At least forty-three states transfer fifteen million tons of MSW between states each year.\(^{89}\) Those states that have the ability to landfill this waste within their borders do not necessarily do so. What dictates the location in which the trash is landfilled is more a matter of economics than anything else. The least expensive alternative is usually chosen by the disposal companies. If it costs more to dump the garbage in the disposer's home state, it may choose to dump it somewhere else. This same basic business decision is made by companies every day, all over the country. "Should I buy those parts from a New York supplier, or go with the supplier from my own state?" It would not be unreasonable to venture that very few business decisions are made based on the state in which the company is located. Rather, the costs involved are evaluated, the quality of the products and services are compared, and a decision is made after considering which mix of these factors best fits the needs of the company. This is and should continue to be the process by which disposal companies dispose of the trash they collect.

On the other side of the economic coin are the suppliers of trash, the people and companies that reside in the state. While the disposal companies are seeking the least expensive alternative to dispose of their trash, what incentive do these people have to reduce the amount of garbage they generate? These producers of municipal solid waste are the first to gripe if someone wants to construct a landfill near them, and yet they are loath to shoulder the burden of disposal.\(^{90}\) As was recently noted, "[t]he key to a rational garbage policy is to insure that the prices people are charged for disposal services reflect the true social costs of getting rid of the stuff."\(^{91}\)

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87. Hazardous Waste Treatment Council, 945 F.2d at 792.
89. Sloane, cited at note 2, at 10.
90. Evidence of this loathing abounds when a city government attempts to raise taxes to cover the cost to dispose of the city's garbage.
One proposed way to match the amount of garbage generated to its disposal cost is to tax products according to the post-consumption cost of cleaning them up. A drawback to this plan is that clean-up costs are hard to calculate. Other communities have begun to charge households for waste disposal, based on the amount of trash left at the curb for collection. While new, these programs pose many logistical problems; however, they should be considered as valid alternatives to government regulation of the municipal solid waste industry.

Another recommendation made to help solve a state's importation dilemma is for the state (rather than the federal government) to regulate the disposal industry as a public utility. The state of New Jersey has adopted this practice, and New Jersey's average tipping fees are the highest in the nation. The neighboring state of Pennsylvania, however, does not regulate its disposal industry, and its tipping fees remain below the national average. One of the reasons cited for Pennsylvania's lower tipping fees is the fact that they are effectively limited by competition. Based on the models in New Jersey and Pennsylvania, granting state public utility status to the waste disposal industry will do little to resolve a state's garbage problem.

**CONCLUSION**

Federal legislation should not allow states to discriminate

92. Id. An example is that laundry detergent sold in a plastic bottle might have five cents added onto its cost, while a cardboard container of detergent would only have a one cent “clean-up tax” added onto it. Id.

93. Id. Even if the cost of disposing of a product could be determined, consumers might still be willing to pay the additional five cents for packaging they find more convenient.

94. Id. In Seattle, it costs each household $13.50 to dispose of its first garbage can of household waste each week, and $9.00 for each additional can. Recyclable materials were hauled free of charge. In the first year that these charges were imposed, Seattle's MSW disposal dropped by twenty-two percent. Id.

95. Passell, cited at note 91, at Cl. Public utilities are closely monitored by state agencies, and are allowed a monopoly on the commodity they supply to consumers. Fee or rate increases for the products or service they offer to the consumer must usually be approved by a public utility commission that oversees the utility.

96. Id.

97. Id.

98. Id. Another item of note is that in Pennsylvania, the incentive to invest in a multi-million dollar landfill remains high. If there is demand for the space, it will pay for itself in tipping fees. In New Jersey in 1988, there were only two pending applications for landfill sites, while in the same year in Pennsylvania there were thirty-one applications pending. Id.
against other states’ trash. This type of plan would jeopardize the nation as a whole, because each state’s import policy would become a political question. The garbage problems the nation faces are too big for each individual state to manage. There are a limited number of potential landfill sites in each state, and although some states have a greater capacity than others, eventually even those will be filled. The real force of a national program should aim to convince the public that landfill sites are safe and necessary. A national crusade should encourage recycling and waste reduction. It should also foster the establishment of more solid waste landfill facilities. The technology exists to build ecologically sound landfills. With the proper economic incentives, states can build and maintain their own MSW facilities, or they can delegate this responsibility to private enterprise. In either case, the market forces will determine whether it is better for the state to continue to ship its garbage out-of-state, or to dispose of it within its own borders.

In today’s society, everyone bears the cost of disposing of increasingly larger amounts of MSW. At some point, economic principles indicate that, as the number of available landfills decrease, the cost of disposing of waste increases. An unpopular way to stop the upward spiral is to build more landfills. Another way is to decrease the amount of trash that goes into existing landfills. The third and least attractive alternative is to allow federal regulation of the waste industry. The third approach could bring disastrous consequences, the worst of which is more trash. We must remember that we are in the early stages of a national crisis. If the federal government steps in with price regulations, it will make matters better for all—at first. In the future, however, we will be confronted with developing a solution to the ultimate problem: What are we going to do with all the trash?

Allowing states to limit MSW imports will not solve the United States’ problem of shrinking landfill space. Eventually, every state will have to face the fact that its landfill space is finite. States that have the capacity to import trash will be able to make other states pay dearly for the importation privilege. This expense might be the only impetus for states to find the space for a landfill. If a state

99. An EPA-commissioned report conducted by Tufts University studied hazardous waste capacity. The research showed that there is no shortage of landfill capacity, only a public perception of one. Singletary, cited at note 84.

100. The Tufts University study suggested that the public must believe that a waste facility poses a low risk, and that the facility represents a legitimate need, not based solely on cost/benefit analysis. Singletary, cited at note 84.
does not have the space, or the state's citizens refuse to allow construction of a new landfill, let the citizens pay. Money is, after all, a commodity that every state in the union is willing to import.

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