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COMMENT

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

I. Introduction

The volume of solid waste, particularly in urban areas, is increasing as a result of several factors including population growth, industrial expansion, technological advances in the manufacture of consumer products, and continued American affluence.¹ Both public health and the environment are in jeopardy because disposal methods have not kept pace with the accumulation of solid waste.² "Solid waste" is defined as any garbage, refuse or other discarded material caused by agriculture, commercial and industrial operations, and by community activities.³ Stringent air and water pollution controls, which limit

1. Congress has concluded that population growth, industrial expansion, concentration of the population in urban areas and technological advances in the methods of manufacturing, packaging and marketing consumer products, have resulted in an increase and change in the characteristics of the materials discarded by society. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987 (1976 & Supp. II 1978).

The improvements in the standard of living, with its emphasis on convenience, have aggravated the disposal problem. *Id.* § 6901(a)(2). Americans annually dispose of 71 billion cans, 38 billion bottles, 35 million tons of paper, 7.6 million television sets and 7 million cars and trucks. Andersen, *Resource Conservation and Recovery Act of 1976: Closing the Gap*, 1978 WIS. L. REV. 637 [hereinafter cited as *Closing the Gap*] citing H.R. REP. NO. 1319, 94th Cong., 2d Sess. 7 (1976). Congress estimates that the amount of solid waste generated each year is 3-4 billion tons with an anticipated 8% annual increase based on current growth patterns. H.R. REP. NO. 1491, 94th Cong., 2d Sess. 9, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6238, 6247.

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

3. The term "solid waste" is defined as any garbage, refuse, sludge or other discarded solid material, resulting from industrial, commercial, mining and agricul-

the use of incineration and ocean dumping for disposal,⁴ contribute to the problems facing governmental bodies responsible for solid waste management.⁵ Although land has become the only practical method of disposal because it is not extensively regulated,⁶ its effectiveness as a receptacle has been weakened by the increased amount, changing nature, and unplanned disposal of refuse.⁷

This Comment focuses on the treatment and disposal of solid waste on land, particularly the use of sanitary landfills.⁸ Although waste

tural operations, and from community activities, but does not include solid or dissolved materials in domestic sewage or other materials which are sources of water pollution. 42 U.S.C. § 6903(27) (1976). This Comment does not address the problems relating to the disposal of hazardous wastes which include inorganic toxic metals, chemicals, synthetic organics, flammables, explosives and radioactive materials. *Id.* § 6921. For a discussion of hazardous waste management problems see *Closing the Gap*, *supra* note 1, at 635; Goldfarb, *The Hazards of Our Hazardous Waste Policy*, 19 NAT'L RESOURCES J. 249 (1979); Rosbe, *RCRA and the Regulation of Non-Hazardous Solid Waste: Closing the Circle of Environmental Control*, 35 BUS. LAW. 1519 (1980).

4. See, e.g., Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. I 1977 & Supp. II 1978 & Supp. III 1979); Federal Water Pollution Control Act (commonly known as the "Clean Water Act"), 33 U.S.C. §§ 1251-1376 (1976 & Supp. I 1977 & Supp. III 1979); Ocean Dumping, §§ 1401-1444 (1976 & Supp. I 1977).

5. All of these factors have presented communities with serious financial, management, intergovernmental and technical problems in the disposal of solid waste. 42 U.S.C. § 6901(a)(3). The collection and disposal of solid waste traditionally has been considered a local governmental function. See *Gardner v. Michigan*, 199 U.S. 325 (1905); *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Silver v. Los Angeles*, 217 Cal. App. 2d 134, 31 Cal. Rptr. 545 (Dist. Ct. App. 1963); *Strub v. Deerfield*, 19 Ill. 2d 401, 167 N.E.2d 178 (1960); *Building Comm'r v. C & H Co.*, 319 Mass. 273, 65 N.E.2d 537 (1946); *Board of Health v. Vink*, 184 Mich. 688, 151 N.W. 672 (1915); *Nehbras v. Village of Lloyd Harbor*, 2 N.Y.2d 190, 140 N.E.2d 241, 159 N.Y.S.2d 145 (1957); *Rochester v. Gutberlett*, 211 N.Y. 309, 105 N.E. 548, ___ N.Y.S. ___ (1914); *Meyers v. Cornwall*, 24 Misc. 2d 286, 192 N.Y.S.2d 734 (Sup. Ct. 1959); *V & H Equip. Rental Corp. v. Garfield Heights*, ___ Ohio App. 2d ___, 161 N.E.2d 646 (Ct. App. 1959); *Lutz v. Armour*, 395 Pa. 576, 151 A.2d 108 (1959); 42 U.S.C. § 6901(a)(4) (Supp. III 1979).

6. See Comment, *Solid Waste Disposal By Means of Sanitary Landfill*, 36 ALB. L. REV. 632, 661-62 (1972) [hereinafter cited as *Sanitary Landfill*]; 42 U.S.C. § 6901(b)(3). Congress has found that although land is too valuable a resource to be needlessly polluted by discarded materials, most solid waste disposal is on land in open dumps and sanitary landfills. *Id.* § 6901(b)(1). See also *Closing the Gap*, *supra* note 1, at 635-36.

7. W. MARX, *MAN AND HIS ENVIRONMENT: WASTE* 29-31 (1971). Land was less affected by waste than air and water, because it lacks the dispersive capabilities of the air and the dilution qualities of water. There are two types of refuse: organic and nondegradable. Organic refuse will eventually decompose but nondegradable refuse does not decompose. Modern packaging has created nondegradable, non-returnable, one-use products which are making an indelible impression on the environment.

8. Sanitary landfills have become a basic component of all solid waste management systems. Frankel, *Independent Contractor Profits From Disposal Operations*, 5 WASTE AGE 90 (May-June 1974).

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

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

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

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

11. Institute for Solid Waste of the American Pub. Works Ass'n, *Municipal Refuse Disposal* 56 (3d ed. 1970). For a discussion of the mechanics of a sanitary landfill, see *Sanitary Landfill*, *supra* note 6, at 632.

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

13. See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 51 N.Y.2d 679, 417 N.E.2d 78, 435 N.Y.S.2d 966 (1980); *Dutchess Sanitation Serv. Inc. v. Town of Plattekill*, 51 N.Y.2d 670, 417 N.E.2d 74, 435 N.Y.S.2d 962 (1980); *Town of Gloucester v. R.I. Solid Waste Management Corp.*, ___ R.I. ___, 390 A.2d 348 (1978). The term "municipality" includes a city, town, borough, county, parish, district, or other public body created by or pursuant to state law, with responsibility for the planning or administration of solid waste management. 42 U.S.C. § 6903 (13).

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

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

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

16. See, e.g., *Hackensack Meadowlands Dev. Comm'n v. City of Philadelphia*, 68 N.J. 451, 458-59, 348 A.2d 505, 509 (1975) (discussing the cities of Yonkers and

This Comment examines the historical role that municipalities have played in providing adequate methods for solid waste disposal, emphasizes the traditional methods of zoning and critiques the effectiveness of municipal regulation. It reviews recent federal and state solid waste management acts and analyzes the issue of preemption. First, whether the Federal Resource Conservation and Recovery Act of 1976¹⁷ preempts state solid waste disposal legislation, and second, whether state legislation preempts municipal ordinances regulating solid waste disposal. This Comment also discusses the constitutionality of state and municipal waste bans. State statutes prohibiting interstate waste disposal have been challenged as a violation of the commerce clause of the United States Constitution.¹⁸ Municipal bans on the intrastate disposal of solid waste may violate the commerce clause or be an illegitimate exercise of a municipality's police power. In conclusion, this Comment recommends more effective methods for states and municipalities to pursue in solving the problems of solid waste disposal.

II. Municipal Solid Waste Disposal

State and local governments, in executing their roles of administering law and furnishing public services, perform essential "governmental functions."¹⁹ The collection and disposal of solid waste is a necessary, essential and traditional governmental function generally performed by municipalities.²⁰ Therefore, a municipality has exclusive control over the disposal of solid waste and may impose any reasonable regulation thereof.²¹

Philadelphia); *Hardage v. Atkins*, 582 F.2d 1264 (10th Cir. 1978), *aff'd*, 619 F.2d 871 (10th Cir. 1980) (discussing Texas); *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 51 N.Y.2d 679, 417 N.E.2d 78, 435 N.Y.S.2d 966 (1980) (dissent discussing the city of Rochester); *Dutchess Sanitary Serv., Inc. v. Town of Plattekill*, 51 N.Y.2d 670, 417 N.E.2d 74, 435 N.Y.S.2d 962 (1980) (discussing New Jersey and Connecticut).

17. 42 U.S.C. § 6901-87 (Supp. I 1977).

18. U.S. Const. art. I, § 8 provides: "The Congress shall have Power . . . to regulate commerce . . . among the several states. . . ."

19. *National League of Cities v. Usery*, 426 U.S. 833 (1976). A few examples of essential or traditional governmental functions include fire prevention, police protection, *sanitation*, public health and parks and recreation. *Id.* at 851 (emphasis added).

20. See cases cited in note 5 *supra*. See also 42 U.S.C. § 6901(a)(4); Institute For Solid Waste of American Pub. Works Ass'n, *Municipal Refuse Disposal* 4 (3d ed. 1970).

21. *Rochester v. Gutberlett*, 211 N.Y. 309, 311, 318, 105 N.E. 548, 550 (1914). A municipality may provide that refuse shall only be removed by the city itself, or a private contractor hired by the city or by granting an individual an exclusive license to remove the city's refuse.

Courts have stated that the removal of solid waste is necessary for the continued well-being and health of a community and neighboring communities.²² As a result, municipalities have both the power and a duty to provide for the collection and disposal of waste.²³

A. The Historical Background of Zoning Ordinances

Zoning was one of the first methods employed by municipalities to regulate or prohibit refuse disposal within their boundaries.²⁴ The Supreme Court, in *Euclid v. Ambler Realty Co.*,²⁵ held that the authority to zone property is included within the state's police power because zoning bears a rational relation to the health and safety of the community.²⁶ Zoning, as an exercise of the state's police power, is generally delegated by the states to administrative agencies and local governments.²⁷ Formerly the several bases for a state's delegation of the power to zone were home rule powers,²⁸ implied powers of state constitutions,²⁹ and enabling legislation.³⁰ Currently, zoning enabling acts are used in all fifty states.³¹

22. *Nehbras v. Village of Lloyd Harbor*, 2 N.Y.2d 190, 194, 140 N.E.2d 241, 243, 159 N.Y.S.2d 145, 148 (1957). *See also* *Silver v. Los Angeles*, 217 Cal. App. 2d 134, 31 Cal. Rptr. 545 (Dist. Ct. App. 1963); *Strub v. Deerfield*, 19 Ill. 2d 401, 167 N.E.2d 178 (1960); *Building Comm'r v. C & H Co.*, 319 Mass. 273, 65 N.E.2d 537 (1946); *Board of Health v. Vink*, 184 Mich. 688, 151 N.W. 672 (1915); *Rochester v. Gutberlett*, 211 N.Y. 309, 105 N.E. 548 (1914); *Meyers v. Cornwall*, 24 Misc. 2d 286, 192 N.Y.S.2d 734 (Sup. Ct. 1965); *V & H Equip. Rental Corp. v. Garfield Heights*, ___ Ohio App. 2d ___, 161 N.E.2d 646 (Ct. App. 1959); *Lutz v. Armour*, 395 Pa. 576, 151 A.2d 108 (1959); *Kunz v. City of Titusville*, 373 Pa. 528, 97 A.2d 42 (1953).

23. *Nehbras v. Village of Lloyd Harbor*, 2 N.Y.2d 190, 194-95, 140 N.E.2d 241, 243, 159 N.Y.S.2d 145, 148 (1957).

24. *See* *Building Comm'r v. C & H Co.*, 319 Mass. 273, 65 N.E.2d 537 (1946); *Municipal Refuse Disposal*, *supra* note 11, at 63, 98.

25. 272 U.S. 365 (1926).

26. *Id.* at 391.

27. HAGMAN, *URBAN PLANNING* 76 (1971).

28. E.M. BASSETT, *ZONING: THE LAWS, ADMINISTRATION AND COURT DECISIONS DURING THE FIRST TWENTY YEARS*, reprinted in *Metropolitan America* 13, 14-15 (reprint ed. 1974). A home rule power is where a state constitution has empowered a municipality with broad regulatory powers. An example of a state which has home rule units is Illinois. *See* note 131 *infra* and accompanying text.

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

30. BASSETT, *supra* note 28, at 27. An enabling act for zoning is the grant of power to municipalities to regulate the height, area, size, location and use of buildings and the use of land. *Id.* Zoning enabling statutes set forth the purposes of zoning ordinances and contain guidelines and standards for enacting and administering them, including provisions for public protest. *Bollinger v. Board of Supervisors*, 217 Va. 185, 227 S.E.2d 682 (1976).

31. R. ANDERSON AND B. ROSWIC, *PLANNING, ZONING AND SUB-DIVISION, SUMMARY OF STATUTORY LAW OF THE 50 STATES* 191 (1966) (summarizes the Enabling Act in all states).

These acts grant municipalities the power to regulate the height, area, size, location, and use of buildings.³² In addition, they set forth categories for the use of land including commercial, industrial, residential, and agricultural uses.³³

Municipal zoning ordinances, in order to be a legitimate exercise of the police power, must relate to the health, safety and welfare of the community.³⁴ A municipal zoning ordinance that does not comply with the applicable local ordinance will be held invalid.³⁵ For example, the New York appellate division held that a town board had no authority to deny a permit for the excavation of a landfill site because the town board "did not have the power to deny the permit on grounds not expressly stated in the ordinance."³⁶

Until recently, most municipalities disposed of their refuse in open dumps creating public health hazards.³⁷ Unfortunately, the terms "dump" and "sanitary landfill" often are confused and used interchangeably by the public.³⁸ Consequently, there has been continuous public protest concerning proposed locations of sanitary landfills³⁹ based on the misconception that the burial of solid waste is a nuisance *per se*⁴⁰ because it endangers public health and decreases the value of adjoining property. However, courts have held that the establishment and operation of a sanitary landfill is not a nuisance *per se*, but is in fact a sensible solution to the problem of refuse disposal.⁴¹ A sanitary

32. HAGMAN, URBAN PLANNING 80 (1971).

33. *Id.*

34. *See, e.g.*, *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 373 (1926); *Township of Vanport v. Brobeck*, 22 Pa. Commw. 523, 349 A.2d 523, 524 (1975).

35. *See, e.g.*, *Case v. Knauf*, 32 Misc. 2d 137, 224 N.Y.S.2d 228 (Sup. Ct. 1961) (holding that it is invalid for a town to grant a permit to operate a sanitary landfill because the town's zoning ordinance permitted disposal of refuse only for the purpose of establishing grades); *Ench v. Mayor of Pequannock*, 47 N.J. 535, 222 A.2d 1 (1966) (holding that a town resolution which granted the plaintiff a franchise to build and operate a garbage incinerator was inconsistent with the Town's zoning ordinance).

36. *Chem-Trol Pollution Serv. v. Board of Appeals*, 65 A.D.2d 178, 180, 411 N.Y.S. 2d 69, 72 (4th Dep't 1978).

37. Note, *Problems Associated With The Management Of Solid Waste: Is There A Solution In The Offing?*, 83 W. VA. L. REV. 131, 132-33 (1980) [hereinafter cited as *Is There A Solution?*]. 42 U.S.C. § 6901(b)(3) (Supp. III 1979).

38. *See* note 9 *supra*. Institute For Solid Wastes Of American Pub. Works Ass'n, *Municipal Refuse Disposal* 93 (3d ed.1970).

39. *Id.*

40. The term "nuisance *per se*" is defined as an act, occupation, or structure which is a nuisance at all times and under all circumstances, regardless of the location or surroundings. BLACK'S LAW DICTIONARY 962 (5th ed. 1979). (citations omitted).

41. *See, e.g.*, *Kirk v. McTyeire*, 209 Ala. 125, 95 So. 361, 362 (1923); *Rocchi v. Zoning Bd.*, 157 Conn. 106, 109, 248 A.2d 922, 924 (1968); *Wood v. Town of*

landfill which is properly located, designed and efficiently operated, eliminates or effectively controls the public health hazards associated with an open dump.⁴² The Connecticut Supreme Court, in *Rocchi v. Zoning Bd. of Appeals*,⁴³ found that a sanitary landfill operation serves the public welfare and convenience and does not permanently or substantially injure neighboring property.⁴⁴

Zoning ordinances divide a municipality into districts based on functional utilization, such as residential, agricultural, commercial or industrial.⁴⁵ Conditional, permissible and prohibited uses are provided for within each zoned district.⁴⁶ In the absence of state pre-emption,⁴⁷ municipalities are free to locate a waste disposal facility in any district.⁴⁸ Generally, solid waste disposal is not expressly pro-

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

42. *Municipal Refuse Disposal*, *supra* note 38, at 63. *See also* *Rocchi v. Zoning Bd.*, 157 Conn. 106, 109, 248 A.2d 922, 924 (1968).

43. 157 Conn. 106, 248 A.2d 922 (1968).

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

45. HAGMAN, URBAN PLANNING at 80-81.

46. *Id.*

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

48. *City of Birmingham v. Scogin*, 269 Ala. 679, ___, 115 So.2d 505, 514 (1959) (zoning did not apply to the operation of a governmental function by a municipality and the operation of a garbage disposal area was held to be a discharge of a governmental function); *Pruett v. Dayton*, 39 Del. Ch. 537, ___, 168 A.2d 543, 544 (1961) (where a subdivision of a state government was not subject to its own zoning regulation when it exercised a governmental function); *Nehbras v. Village of Lloyd Harbor*, 2 N.Y.2d 190, 192, 140 N.E.2d 241, 242, 159 N.Y.S.2d 145, 147 (1957) (where a village was not subject to zoning restrictions in the performance of its governmental activities).

vided for in such zoning districts and is not considered a permissible use in any district.⁴⁹ Instead, it is viewed as a conditional use,⁵⁰ requiring either a variance,⁵¹ or a special⁵² or conditional use permit,⁵³ to operate within a municipality. These permits are not usually granted within residential districts because the impact on the environment and community outweighs the public necessity for a landfill.⁵⁴

49. See, e.g., *Citizens Against Lewis and Clark Landfill v. Pottawattamie County Bd.*, 277 N.W.2d 921 (Iowa 1979); *Vogelaar v. Polk County Zoning Bd.*, 188 N.W.2d 860 (Iowa 1971); *Schultz v. Board of Adjustment*, 258 Iowa 804, 139 N.W.2d 448 (1966); *Zengerle v. Board of County Comm'rs.*, 262 Md. 1, 276 A.2d 646 (1971); *Ench v. Mayor & Council of the Township of Pequannock*, 47 N.J. 535, 222 A.2d 1 (1966); *Case v. Knauf*, 32 Misc. 2d 137, 224 N.Y.S. 228 (1961); *Nehbras v. Village of Lloyd Harbor*, 2 N.Y.2d 190, 140 N.E.2d 241, 159 N.Y.S.2d 145 (1957); *Greene Township v. Kuhl*, 32 Pa. Commw. 592, 379 A.2d 1383 (1977); *Bollinger v. Board of Supervisors*, 217 Va. 185, 227 S.E.2d 682 (1976).

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

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

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

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

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

Thus, sanitary landfills are located in agricultural,⁵⁵ industrial⁵⁶ and manufacturing⁵⁷ districts.

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

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

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

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

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

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

59. *See, e.g.*, *In re Town of Shelburne Zoning Appeal*, 128 Vt. 89, 258 A.2d 836 (1969), where a municipality's zoning ordinance prohibited the dumping of refuse at any place not approved by the town board. The state statute directed the cities and town to provide and maintain sanitary landfills for refuse disposal. The court held

limit the quantity of waste to be disposed within its boundaries⁶⁰ because "no matter how carefully controlled, [it] present[s] some hazard to a community."⁶¹ Municipalities may not, however, limit the quantity of refuse to be disposed by discriminating on the basis of its source.⁶²

B. The Scope of the Problem

Two major factors contribute to the problem of efficient refuse disposal: the inadequate number of sites⁶³ and the erroneous presumption that solid waste disposal problems are unique to municipalities.⁶⁴

that a municipality could not deny a permit for the establishment of a sanitary landfill unless the permit would give rise to a nuisance or the applicant had not complied with the established regulations. In *Carlson v. Village of Worth*, 62 Ill. 2d 406, 343 N.E.2d 493 (1975) and *O'Connor v. City of Rockford*, 52 Ill. 2d 360, 288 N.E.2d 432 (1972), the Illinois Supreme Court held that non-home rule units may not zone out sanitary landfills. See also *General Battery Corp. v. Zoning Hearing Bd.*, 29 Pa. Commw. Ct. 498, 371 A.2d 1030 (1977), where the court said that zoning ordinances are presumed valid.

60. See, e.g., *Ex Parte Lyons*, 27 Cal. App. 2d 182, 80 P.2d 745, (Dist. Ct. App. 1938); *Yaworski v. Town of Canterbury*, 21 Conn. Supp. 347, 154 A.2d 758 (Super. Ct. 1959); *Boone Landfill, Inc., v. Boone County*, 51 Ill. 2d 538, 283 N.E.2d 890 (1972); *Southern Ocean Landfill, Inc. v. Mayor of Ocean*, 64 N.J. 190, 314 A.2d 65 (1974); *Public Health Council v. Franklin Township Bd. of Health*, 108 N.J. Super. 239, 260 A.2d 859 (Super. Ct. App. Div. 1970); *Ench v. Mayor & Council of the Township of Pequannock*, 47 N.J. 535, 222 A.2d 1 (1966); *Shaw v. Township of Byram*, 86 N.J. Super. 598, 207 A.2d 570 (Super. Ct. App. Div. 1965); *Wiggins v. Town of Somers*, 4 N.Y.2d 215, 149 N.E.2d 869, 173 N.Y.S.2d 579 (1958); *Case v. Knauf*, 32 Misc. 2d 137, 224 N.Y.S.2d 228 (Sup. Ct. 1961); *Lutz v. Armour*, 395 Pa. 576, 151 A.2d 108 (1959).

61. *Wiggins v. Town of Somers*, 4 N.Y.2d 215, 221, 149 N.E.2d 869, 873, 173 N.Y.S.2d 579, 584 (1958). In order to minimize this potential hazard, municipalities restrict the landfills within their boundaries to permit only those which are necessary to handle the town's refuse. Municipalities also deal with the problem of solid waste disposal by zoning ordinances permitting only municipally owned and operated sanitary landfills within a residential area. See *Kavanagh v. London Grove Township*, 33 Pa. Commw. 420, 382 A.2d 148 (1978) (holding constitutional a Pennsylvania zoning ordinance of this type).

62. See section IV *infra*.

63. See Note, *The Commerce Clause and Interstate Waste Disposal: New Jersey's Options After The Philadelphia Decision*, 11 RUT.-CAM. L.J. 31 (1979) [hereinafter cited as *New Jersey's Options*]; *Impermissible Isolation*, *supra* note 13, at 343; *Sanitary Landfill*, *supra* note 6, at 635-39; *Is There A Solution?*, *supra* note 37, at 135-38.

64. F. GRAD, G.W. RATHJENS, A.J. ROSENTHAL, ENVIRONMENTAL CONTROL: PRIORITIES, POLICIES, AND THE LAW 154 (1971) [hereinafter cited as ENVIRONMENTAL CONTROL]; Goldfarb, *The Hazards of Our Hazardous Waste Policy*, 19 NAT'L RESOURCES J. 249, 257-58 (1979).

Federal and state legislation which prohibit open dumping have caused a sharp decrease in the number of land disposal sites.⁶⁵ As a result, municipalities must find other suitable means for solid waste disposal. Although sanitary landfills have become a popular waste disposal method,⁶⁶ several problems prevent their increased use, including the lack of land suitable for a solid waste receptacle.⁶⁷ In addition, the presence of restrictive and exclusionary ordinances limits the number of available sites.⁶⁸ Finally, public opposition to the location of sanitary landfills hinders municipal acquisition of appropriate landfill facilities.⁶⁹

The persistent belief that solid waste disposal is a municipal problem prevents effective regulation.⁷⁰ The problem of refuse disposal transcends territorial limits and affects areas substantially larger than a single municipality.⁷¹ Furthermore, most municipalities are too small to finance, construct or operate modern disposal facilities.⁷² The increasing involvement of federal and state governments in solid waste regulation indicates that the problems involving disposal have reached regional and national proportions.⁷³ While the disposal of refuse continues to be a municipal function, state and regional planning is needed in order to find effective and economical solutions.

65. 42 U.S.C. § 6902(3). See notes 91-98 *infra* and accompanying text.

66. 42 U.S.C. §§ 6901(b)(1), 6944(b) (1976); *Municipal Refuse Disposal*, *supra* note 38, at 92. See also *New Jersey's Options*, *supra* note 63, at 33; *Sanitary Landfill*, *supra* note 6, at 634; *Is There A Solution?*, *supra* note 37, at 132-33.

67. 42 U.S.C. § 6901(b)(6); *New Jersey's Options*, *supra* note 63, at 31, 36-38; *Note, Garbage, The Police Power, And The Commerce Clause: City of Philadelphia v. New Jersey*, 8 CAP. L. REV. 613, 613 (1979); *Is There A Solution?*, *supra* note 37, at 135-37.

68. *Sanitary Landfill*, *supra* note 6, at 638. A survey conducted by the American Public Works Association in 1956 indicated that approximately 60% of the cities in the United States were restricted in the acquisition of land for solid waste disposal sites by their own zoning ordinances. *Municipal Refuse Disposal*, *supra* note 38, at 95.

69. See *Citizens Against Lewis and Clark Landfill v. Pottawattamie County Bd.*, 277 N.W.2d 921, 922 (1979). *Municipal Refuse Disposal*, *supra* note 38, at 61; S.M. Brown, *Advanced Planning Critical In Establishing Effective Land Use Management*, 17 *Solid Waste Management* 62, 66 (May 1974); *Sanitary Landfill*, *supra* note 6, at 638; *Is There A Solution?*, *supra* note 37, at 138.

70. ENVIRONMENTAL CONTROL, *supra* note 64, at 154.

71. *Id.* at 66, 153.

72. See *New Jersey's Options*, *supra* note 63, at 59; *Impermissible Isolation*, *supra* note 13, at 349; *Is There A Solution?*, *supra* note 37, at 149-51.

73. *Sanitary Landfill*, *supra* note 68, at 633. See also note 75 *infra* and accompanying text.

III. Government Regulation of Solid Waste

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

A. Statutory Provisions

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

The RCRA was enacted to promote the protection of health and environment and to conserve valuable materials and energy resources.⁸¹ The Act prohibits future open dumping⁸² and requires the

74. See notes 19-23 *supra* and accompanying text.

75. 42 U.S.C. § 6901(a)(4) (Supp. III 1979). *Sanitary Landfill*, *supra* note 6, at 633.

76. See notes 102-66 *infra* and accompanying text.

77. See notes 128-66 *infra* and accompanying text.

78. Solid Waste Disposal Act of 1965, Pub. L. No. 89-272, tit. II, 79 Stat. 997, (1965) (current version at 42 U.S.C. §§ 6901-87 (1976)). In 1970, the Solid Waste Disposal Act was amended by the Resource Recovery Act of 1970, Pub. L. No. 91-512, § 101 (b)(1), 84 Stat. 1227 (1970) (current version at 42 U.S.C. §§ 6901-81 (1976 & Supp. II 1978)) which shifted the emphasis from disposal of wastes to the demonstration, construction and resource recovery systems which preserve and enhance the quality of air, water and land resources. *Id.* 84 Stat. 1229-30, § 207. A resource recovery system is a solid waste management system that provides for the collection, separation, recycling and recovery of solid wastes. 42 U.S.C. § 6903(23) (1976).

79. *Id.*

80. 42 U.S.C. §§ 6901-87 (1976 & Supp. II 1978). One of the Congressional Committees which drafted the Resource Conservation and Recovery Act stated: "[T]he approach taken by this legislation eliminates the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes. . . ." *House Comm. on Interstate and Foreign Commerce, Report on H.R. 14496*, 94th Cong., 2d Sess. 4 (1976). Despite substantial advances in the field of solid waste management, federal regulation of solid waste is not as advanced as is federal control of the air and water pollution. F. GRAD, 1 TREATISE ON ENVIRONMENTAL LAW § 4.02, at 4-52.3 (1980).

81. 42 U.S.C. § 6902.

82. *Id.* § 6902(3). It also regulates the treatment, storage, transportation and disposal of hazardous wastes. *Id.* § 6902(4). The Act provides for training grants in

conversion of existing dumps to facilities that do not present danger to health and environment.⁸³ Although the RCRA recognizes that solid waste disposal is a national problem,⁸⁴ statements found in the legislative history provide that "federal preemption . . . is undesirable, inefficient and damaging to local initiative."⁸⁵ The RCRA provides for federal assistance to state and local governments and interstate agencies for the development of solid waste management plans.⁸⁶ In addition, the RCRA calls for the establishment of cooperative efforts among federal, state and local governments.⁸⁷ In order for states to qualify for federal assistance they must submit a state solid waste management plan and name a state agency to be responsible for the plan's implementation.⁸⁸

The legislatures of all fifty states have enacted laws governing the collection, disposal and management of solid waste. They establish guidelines for collection and disposal facilities⁸⁹ and require state approval or permits for the operation of such facilities.⁹⁰ These plans fall into three general categories. First, there are state plans which entrust solid waste control to a state agency concerned with public health.⁹¹ For example, Alabama provides that the state health de-

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

83. *Id.* § 6902(3).

84. *Id.* § 6901(a)(4) (Supp. III 1979).

85. H.R. REP. NO. 94-1491, 94th Cong., 2d Sess., 3, 10 reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6238, 6271.

86. 42 U.S.C. § 6902(1). These plans are for the improvement of solid waste management techniques and methods of collection, separation and recovery of solid waste. The Act also provides for the promulgation of guidelines for solid waste collection, transport, separation, recovery and disposal practices and systems. *Id.* § 6902(5).

87. *Id.* § 6902(8).

88. *Id.* §§ 6943-47.

89. F. GRAD, 1 TREATISE ON ENVIRONMENTAL LAW § 4.02, at 4-35 (1980).

90. *Id.*

91. State solid waste acts where the administering agency is the department of health services include: Alabama: ALA. CODE §§ 22-27-1 to 22-27-27 (1977 & Supp. 1979); Arizona: ARIZ. REV. STAT. ANN. § 9-441 (1977), ARIZ. CODE tit. 9, §§ 8-401-433 (1979); Colorado: COLO. REV. STAT. §§ 30-20-101 to 115, 201 to 205 (1973 & Supp. 1978); Hawaii: HAW. REV. STAT. §§ 340A-1 to 340A-3 (1976 & Supp. 1980); Indiana: IND. CODE §§ 19-2-1-1 to 34 (1974 & Supp. 1979); Maryland: MD. ANN. CODE art. 43, §§ 394-394B (1980 & Supp. 1980); Mississippi: MISS. CODE ANN. §§ 17-17-1 to 17-17-41 (Supp. 1981); New Hampshire: N.H. REV. STAT. ANN. §§ 147:23-147:47 (1977 & Supp. 1979); North Dakota: N.D. CENT. CODE §§ 23-29-01 to

partment shall have supervision over the equipment, methodology and personnel employed in the management of solid wastes.⁹² In addition, Alabama state and county boards of health may adopt rules and regulations to specify the methodology and procedures required by these acts.⁹³

Second, state statutes may authorize a state agency concerned with the environment to control solid waste disposal.⁹⁴ This was the approach taken by Connecticut when it established a Department of Environmental Protection in 1973.⁹⁵ The department commissioner examines all existing and proposed solid waste facilities and is authorized to plan, design, construct and operate them in order to prevent air and water pollution.⁹⁶ The department protects, conserves and

23-29-15 (1978); Oklahoma: OKLA. STAT. ANN. tit. 63, §§ 2251 to 2265 (West 1973); Tennessee: TENN. CODE ANN. §§ 53-4301 to 4324 (1977 & Supp. 1981); Texas: TEX. REV. CIV. STAT. ANN. art. 4477-7 §§ 1-11 (Vernon 1976 & Supp. 1980-81); Utah: UTAH CODE ANN. § 26-15-5(5)(c) (1976); Virginia: VA. CODE §§ 32.1-177 to 32.1-186 (1979 & Supp. 1981); West Virginia: W. VA. CODE §§ 16-1-9 to 16-9-8 (1979).

92. ALA. CODE §§ 22-27-1 to 22-27-27, (1977 & Supp. 1979).

93. *Id.*

94. State solid waste statutes authorizing a state agency concerned with the environment, natural resources, and pollution problems to regulate waste disposal include: Alaska: ALASKA STAT. §§ 46.030.020, .710 to .840, .860 to .900 (1977 & Supp. 1980); ALASKA ADMIN. CODE tit. 18 §§ 60.010-60.130 (1978); Arkansas: ARK. STAT. ANN. §§ 82-2701-2712 (1976); Connecticut: CONN. GEN. STAT. ANN. §§ 19-524a-19-524nn (West 1977 & Supp. 1981); Florida: FLA. STAT. ANN. §§ 403.701-403.715 (West Supp. 1981); Georgia: GA. CODE ANN. §§ 43-1601 to 1620 (1978); Hawaii: HAW. REV. STAT. §§ 342-1 to 342-54 (1976 & Supp. 1980); Illinois: ILL. ANN. STAT. ch. 111½, §§ 1001-1061 (Smith-Hurd 1977 & Supp. 1981-82); Iowa: IOWA CODE §§ 455B.75 to 455B.99 (Supp. 1981-82); Kentucky: KY. REV. STAT. §§ 109.011 to 109.250, 224.005 to 224.900 (Supp. 1980); Louisiana: LA. REV. STAT. ANN. §§ 1121-1124, § 1150.1-.26 (West 1979); Maine: ME. REV. STAT. ANN. tit. 38, §§ 1301-1319-A (1978 & Supp. 1981-82); Massachusetts: MASS. GEN. LAWS ANN. ch. 16, §§ 18-24B (West 1979); Michigan: MICH. COMP. LAWS §§ 299.401 to 299.437 (Supp. 1981-82); Minnesota: MINN. STAT. ANN. §§ 115A.01-115A.72 (West Supp. 1981); Missouri: MO. ANN. STAT. §§ 260.200 to .245 (Vernon Supp. 1981); Nebraska: NEB. REV. STAT. §§ 81-1516 to 81-1525 (1971), §§ 19-2101 to 19-2113 (1977); Nevada: NEV. REV. STAT. §§ 444.440 to 444.630 (1979); New Jersey: N.J. STAT. ANN. §§ 13:1E-1 to 13:1E-48 (West 1979), 48:13A-1 to 13 (West Supp. 1981-82); New York: N.Y. ENVIR. CONSERV. LAW §§ 27-0101 to 1315 (McKinney 1973 & Supp. 1980-81); Ohio: OHIO REV. CODE ANN. §§ 3734.01-.99 (Baldwin 1980 & Supp. 1980); Oregon: OR. REV. STAT. §§ 459.005-.285 (1980); Pennsylvania: PA. STAT. ANN. tit. 35, §§ 6018.101-1003 (Purdon Supp. 1981-82); Rhode Island: R.I. GEN. LAWS §§ 23-18.9-1 to 18.9-11 (1979 & Supp. 1980); South Dakota: S.D. COMP. LAWS ANN. §§ 34A-6-1 to 34A-6-50 (1977 & Supp. 1981); Vermont: VT. STAT. ANN. tit. 24, §§ 2201-2204 (1975 & Supp. 1981); Washington: WASH. REV. CODE ANN. §§ 70.95.010 to 70.95.911 (1975 & Supp. 1981); Wisconsin: WIS. STAT. ANN. §§ 144.43 to 144.48 (West 1974 & Supp. 1981-82); Wyoming: WYO. STAT. §§ 35-11-501 to 35-11-503 (1977 & Supp. 1981).

95. Connecticut Solid Waste Management Act, CONN. GEN. STAT. ANN. § 19-524a(b) (West 1977 & Supp. 1981).

96. *Id.* § 19-524b.

improves the natural resources and environment of the state and ensures that the health, safety and welfare of the people of Connecticut are safeguarded and enhanced.⁹⁷

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

B. Preemption

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

97. *Id.*

98. State solid waste laws authorizing a separate entity with exclusive control over the field of solid waste include: California: CAL. GOV'T CODE §§ 66700-66796.83 (West Supp. 1966-80) (Solid Waste Management Board); Delaware: DEL. CODE ANN. tit. 7, §§ 6401-6426 (Supp. 1980) (Delaware Solid Waste Authority Act); District of Columbia: D.C. CODE ANN. §§ 6-501 to 6-511 (1973 Supp. 1977) (Commissioners of the District of Columbia); Idaho: IDAHO CODE §§ 31-4401 to 31-4410 (Supp. 1981) (Board of County Commissioners); Kansas: KAN. STAT. ANN. §§ 65-3401 to 3419 (1980) (Department of Health and Environment); Montana: MONT. ADMIN. CODE §§ 16-2.14 (2)-S14100 (1974) (Department of Health and Environmental Sciences); New Jersey: N.J. STAT. ANN. §§ 48:13A-1 to -13 (1978) (Board of Public Utility Commission); New Mexico: N.M. STAT. ANN. §§ 3-48-1 to 3-48-7 (1981) (Municipalities), §§ 4-56-1 to 4-56-3 (1981) (Board of County Commissioners); North Carolina: N.C. GEN. STAT. §§ 130-166.16 to 166.21F. (1974 & Supp. 1979) (Department of Human Resources); Rhode Island: R.I. GEN. LAWS §§ 19-1 to 19-29 (1979 & Supp. 1980) (R.I. Solid Waste Management Corp.); South Carolina: S.C. CODE §§ 44-67-10 to 44-67-130 (Supp. 1979) (Department of Health & Environmental Control); West Virginia: W. VA. CODE §§ 7-1-3e to 3f (1976); §§ 7-16-1 to 7-16-8 (Supp. 1981) (County Solid Waste Authorities).

99. DEL. CODE ANN. tit. 7, §§ 6401-6426 (Supp. 1980).

100. *Id.* § 6403.

101. *Id.* § 6404.

102. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), *rehearing denied*, 431 U.S. 925 (1977). See also B. SCHWARTZ, CONSTITUTIONAL LAW 142-43 (2d ed. 1979).

served to the federal government.¹⁰³ The Supreme Court pronounced that a state is precluded or preempted from acting only where either the nature of the subject matter or an explicit declaration of congressional design indicates that state action is precluded.¹⁰⁴ The enactment of state statutes regulating the disposal of solid waste affects interstate commerce; therefore, courts are forced to consider the doctrine of preemption.¹⁰⁵

1. Federal

The view expressed by Congress in the RCRA that solid waste disposal is a national problem¹⁰⁶ has not been extended to include the preemption of state statutes.¹⁰⁷ The issue of federal preemption was first discussed in a series of state and federal decisions regarding the power of the State of New Jersey to prohibit the disposal of all solid waste originating outside the state.¹⁰⁸ An action in the New Jersey state courts challenged the constitutionality of this statute¹⁰⁹ as a violation of the commerce clause.¹¹⁰ The New Jersey Supreme Court ultimately held that the statute was not preempted by the Solid Waste Disposal Act of 1965¹¹¹ and was not a violation of the commerce clause.¹¹² The United States Supreme Court noted probable jurisdiction¹¹³ and the decision was appealed.¹¹⁴ However, the RCRA, which expanded the role of the federal government in solid waste disposal, had become law prior to the Court's consideration of the merits.¹¹⁵ The Supreme Court vacated the state's decision and re-

103. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 377 (1st reprint 1978).

104. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).

105. City of Philadelphia v. New Jersey, 437 U.S. 617, 619-21 (1978).

106. 42 U.S.C. § 6901(a)(4) (Supp. III 1979).

107. City of Philadelphia v. New Jersey, 437 U.S. 617, 620 (1978).

108. Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth., 127 N.J. Super. 160, 316 A.2d 711 (Super. Ct. Ch. Div. 1974), *rev'd*, 68 N.J. 451, 348 A.2d 505 (1975), *vacated sub nom.* City of Philadelphia v. New Jersey, 430 U.S. 141 (1977), *modified*, 73 N.J. 562, 376 A.2d 888 (1977), *rev'd*, 437 U.S. 617 (1978).

109. Waste Control Act, N.J. STAT. ANN. §§ 13:11-1 to 10 (West 1979).

110. Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth., 127 N.J. Super. 160, 316 A.2d 711 (Super. Ct. Ch. Div. 1974), *rev'd*, 68 N.J. 451, 348 A.2d 505 (1975).

111. Pub. L. No. 89-272, tit. II, 79 Stat. 997 (1965) (current version at 42 U.S.C. §§ 6901-87 (1976)).

112. Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth., 68 N.J. 451, 348 A.2d 505 (1975).

113. City of Philadelphia v. New Jersey, 425 U.S. 910 (1976).

114. City of Philadelphia v. New Jersey, 430 U.S. 141 (1977).

115. The Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-87 (1976).

manded the case to the state courts on the issue of preemption in light of the recent enactment of the RCRA.¹¹⁶ On remand,¹¹⁷ the New Jersey Supreme Court held that the state statute banning the disposal of out-of-state waste was consistent with the federal program and was not preempted.¹¹⁸ In addition, the court reaffirmed its prior holding that the New Jersey statute was not a violation of the commerce clause.¹¹⁹

The plaintiffs appealed to the United States Supreme Court for a stay of this judgment¹²⁰ and the Court noted probable jurisdiction.¹²¹ In *City of Philadelphia v. New Jersey*,¹²² the Court agreed with the New Jersey court and held that the state law was not preempted by the RCRA.¹²³ The Court determined that Congress did not have a clear and manifest purpose to preempt the states in the regulation of solid waste.¹²⁴ In so ruling, however, the Court held that the statute was unconstitutional because it banned the disposal of out-of-state wastes.¹²⁵

2. State

The doctrine of preemption includes the notion that a state's legislative or administrative authority may override municipal regulation.¹²⁶ A few states have taken an active role in solid waste disposal.¹²⁷

116. *City of Philadelphia v. New Jersey*, 430 U.S. 141, 143 (1977).

117. *City of Philadelphia v. New Jersey*, 73 N.J. 562, 376 A.2d 888 (1977).

118. *Id.* at 574, 376 A.2d at 894.

119. *Id.*

120. *City of Philadelphia v. New Jersey*, 434 U.S. 964 (1977).

121. *Id.*

122. 437 U.S. 617 (1978).

123. *Id.* at 620.

124. *Id.* at 620-21 n.4. See H.R. REP. NO. 94-1491, 94TH CONG., 2D Sess. 3,10 reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6271. It was the Committee's intention that "federal assistance should be an incentive for state and local authorities to act to solve the discarded materials problem."

125. 437 U.S. 617, 629 (1978).

126. See *County of Cook v. John Sexton Contractors Co.*, 75 Ill. 2d 494, 389 N.E.2d 553 (1979); *City of Des Plaines v. Chicago & N.W. Ry. Co.*, 65 Ill. 2d 1, 357 N.E.2d 433 (1976); *Metropolitan Sanitary Dist. v. City of Des Plaines*, 63 Ill. 2d 256, 347 N.E.2d 716 (1976); *Carlson v. Village of Worth*, 62 Ill. 2d 406, 343 N.E.2d 493 (1975); *City of Chicago v. Pollution Control Bd.*, 59 Ill. 2d 484, 332 N.E.2d 11 (1974); *O'Connor v. City of Rockford*, 52 Ill. 2d 360, 288 N.E.2d 432 (1972); *Southern Ocean Landfill, Inc. v. Mayor and Council of Ocean*, 64 N.J. 190, 314 A.2d 65 (1974); *Ringlieb v. Parsippany-Troy Hills*, 59 N.J. 348, 283 A.2d 97 (1971); *Town of Gloucester v. R.I. Solid Waste Management Corp.*, ___ R.I. ___, 390 A.2d 348 (1978).

127. See, e.g., Illinois: ILL. REV. STAT. ch. 111½, §§ 1001-1051 (1977) (The Illinois Environmental Protection Act); New Jersey: N.J. STAT. ANN. §§ 13:1E-1 to

Within these states, therefore, it has been necessary for the courts to determine whether state and municipal refuse disposal regulations operate concurrently or whether the municipal regulations are preempted.

The Illinois Environmental Protection Act of 1970¹²⁸ was enacted to provide for a statewide program of environmental regulation specifically designed to address the problems of solid waste treatment and disposal.¹²⁹ Pursuant to the Illinois Constitution of 1970,¹³⁰ many municipalities and counties were home rule units with broad regulatory powers.¹³¹ There was some question as to the regulatory powers of non-home rule units.¹³² As a result, the Illinois Supreme Court heard several cases involving the issue of whether the Environmental Protection Act preempted both home rule and non-home rule environmental regulation.¹³³

In *O'Connor v. City of Rockford*,¹³⁴ the court held that a non-home rule county cannot require a city, in its operation of a landfill, to comply with a county ordinance because the Act was intended to override local regulation.¹³⁵ When a non-home rule municipality sought to require an operator of a proposed landfill to comply with its environmental protection ordinance, the court followed the legislative policies of the Act and the rationale of *O'Connor* and held that the Act preempted local regulation.¹³⁶

The Supreme Court of Illinois also ruled on the authority of home rule units. When the Environmental Protection Agency filed a complaint against a home rule city for operating a landfill without an agency permit, the court upheld the city's issuance of a permit through its own environmental agency and declared that state and local governments can legislate concurrently on environmental issues.¹³⁷ In a subsequent decision, a home rule municipality at-

13:1E-48 (West 1979) (The New Jersey Solid Waste Management Act), §§ 48:13A-1 to 12 (West 1979) (The Solid Waste Utility Control Act of 1970); Rhode Island: R.I. GEN. LAWS §§ 19-4 to 19-29 (1979 & Supp. 1980).

128. ILL. REV. STAT. ch. 111½, §§ 1001-1051 (1977).

129. ILL. REV. STAT. ch. 111½, §§ 1020-1022(a)(ii) (1977).

130. ILL. CONST. art. VII § 6(a).

131. *Id.* "[A] home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare. . . ."

132. *Carlson v. Village of Worth*, 62 Ill. 2d 406, 343 N.E.2d 493 (1975); *O'Connor v. City of Rockford*, 52 Ill. 2d 360, 288 N.E.2d 432 (1972).

133. See cases cited in note 126 *supra*.

134. 52 Ill. 2d 360, 288 N.E.2d 432 (1972).

135. *Id.* at 367, 288 N.E.2d at 436.

136. *Carlson v. Village of Worth*, 62 Ill. 2d 406, 408, 343 N.E.2d 493, 495 (1975).

137. *City of Chicago v. Pollution Control Bd.*, 59 Ill. 2d 484, 489, 322 N.E.2d 11, 14-15 (1974).

tempted to apply its city health ordinance to a regional sewage treatment plant.¹³⁸ The court ruled that the application of the city's ordinance to the plant was not within the constitutional grant of home rule powers,¹³⁹ noting that local regulation interferes with the greater interest of the regional district.¹⁴⁰

In *County of Cook v. John Sexton Contractors Co.*,¹⁴¹ the Illinois Supreme Court resolved the apparent discrepancy between home rule decisions¹⁴² and affirmed its position as to the regulation of non-home rule units.¹⁴³ A home rule county sought to enjoin the private owner of a sanitary landfill from further development and operation of the landfill until it complied with the county's zoning laws.¹⁴⁴ The court determined that the county had the authority to impose zoning restrictions.¹⁴⁵ It also found that the Pollution Control Board, which is empowered to review the Environmental Protection Agency's decision in the granting of permits, had the power to adopt regulations for the location of landfills, but not to designate the actual site.¹⁴⁶ Thus, the court held that these "distinct but concurrent powers"¹⁴⁷ must be exercised cooperatively to accomplish the public policy of the Environmental Protection Act.¹⁴⁸ A home rule unit in Illinois, therefore, may legislate concurrently with the state on solid waste disposal as long as it conforms with the minimum standards established by the Act.¹⁴⁹ As to non-home rule units, however, the court decided that the Environmental Protection Act preempts municipal regulation.¹⁵⁰

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

138. *Metropolitan Sanitary Dist. v. City of Des Plaines*, 63 Ill. 2d 256, 347 N.E.2d 716 (1976).

139. *Id.* at 261, 347 N.E.2d at 719.

140. *Id.*

141. 75 Ill. 2d 494, 389 N.E.2d 553 (1979).

142. See notes 137-40 *supra* and accompanying text.

143. See notes 134-36 *supra* and accompanying text.

144. *County of Cook v. John Sexton Contractors Co.*, 75 Ill. 2d 494, 389 N.E.2d 553 (1979).

145. *Id.* at 511, 389 N.E.2d at 558.

146. *Id.* at 516, 389 N.E.2d at 560.

147. *Id.* at 516-17, 389 N.E.2d at 561.

148. *Id.*

149. *Id.* at 514, 389 N.E.2d at 559-60, *citing* *City of Chicago v. Pollution Control Bd.*, 59 Ill. 2d 484, 322 N.E.2d 11 (1974).

150. *Id.* at 515, 389 N.E.2d at 560, *citing* *O'Connor v. City of Rockford*, 52 Ill. 2d 360, 388 N.E.2d 432 (1972) and *Carlson v. Village of Worth*, 62 Ill. 2d 406, 343 N.E.2d 493 (1975).

151. The Rhode Island Solid Waste Management Corporation Act of 1974, R.I. GEN. LAWS §§ 19-1 to 19-29 (1979 & Supp. 1980).

town ordinance banning the importation of solid wastes not originating within the town was preempted by the Rhode Island Solid Waste Management Corporation Act.¹⁵² The court examined the legislative intent and found that it had enacted the statute because of the inefficient practices and management techniques of municipalities.¹⁵³ The court declared that the legislature intended "disposal of solid waste to be handled on a statewide basis with control centralized in the Corporation."¹⁵⁴ Therefore, the court held that the Act preempted municipal regulation of solid waste collection and disposal.¹⁵⁵

In 1970, New Jersey adopted two statutes¹⁵⁶ which make the state solid waste industry a public utility¹⁵⁷ and require the development and formulation of statewide, regional, county, and inter-county plans for solid waste management.¹⁵⁸ Owners and operators of a private sanitary landfill sought a determination that the legislature had preempted a township ordinance regulating the operation of landfills.¹⁵⁹ The New Jersey Supreme Court held that with these acts the legislature intended to uniformly regulate the field of solid waste collection, disposal and management.¹⁶⁰ The court stated:

[i]f each municipality in the state could place and restrict in a manner similar to . . . the ordinance passed by the Parsippany-Troy Hills, . . . the conflicting ordinances and requirements of the separate municipalities would bring to a complete halt the sanitary landfill operations in this state, the refuse disposal business, all to the detriment of the general health of the general public.¹⁶¹

152. *Town of Glocester v. Rhode Island Solid Waste Management Corp.*, ___ R.I. ___, 390 A.2d 348 (1978).

153. *Id.* at ___, 390 A.2d at 349.

154. *Id.*

155. *Id.*

156. The Solid Waste Management Act, N.J. STAT. ANN. §§ 13:1E-1-48 (West 1979), and the Solid Waste Utility Control Act, N.J. STAT. ANN. §§ 48:13A-1-12 (West Cum. Supp. 1978).

157. *Id.* § 13:1E-27.

158. N.J. STAT. ANN. §§ 13:1E-2. Both statutes do not mention the legislative concern below inter-county level except that they are enforceable on a local level. *Id.* § 13:1E-9; N.J. STAT. ANN. §§ 48:13A-1-12. In 1971 the supplement to the Solid Waste Management Act provided that local governments may adopt health or environmental protection ordinances or regulations "more stringent" than the Act. N.J. STAT. ANN. § 13:1E-17 (1971).

159. *Ringlieb v. Township of Parsippany-Troy Hills*, 59 N.J. 348, 351, 283 A.2d 97, 99 (1971).

160. *Id.* at 353, 283 A.2d at 100.

161. *Id.* at 352, 283 A.2d at 100.

Thus, the court concluded that the town cannot provide additional protection with an ordinance which imposes penalties or requires the same procedures as those of the state.¹⁶²

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

IV. The Constitutionality of Waste Disposal Bans and Restrictions

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

A. State

In 1972, New Jersey enacted a Waste Control Act¹⁶⁹ which prohibited the disposal of all wastes generated out of state in order to protect public health, safety and welfare.¹⁷⁰ The Supreme Court held this Act violative of the commerce clause in *City of Philadelphia v. New Jersey*.¹⁷¹ The Court determined that waste is commerce and that

162. *Id.* at 354, 283 A.2d at 101.

163. N.J. STAT. ANN. § 13:1E-17 (1971).

164. *Southern Ocean Landfill, Inc. v. Mayor and Council of Ocean*, 64 N.J. 190, 195, 314 A.2d 65, 66 (1974).

165. *Id.* at 192, 314 A.2d at 66.

166. *Id.* at 195, 314 A.2d at 67.

167. See notes 169-238 *infra* and accompanying text.

168. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 625 (1978); *Dutchess Sanitation Serv., Inc. v. Town of Plattekill*, 51 N.Y.2d 670, 677, 417 N.E.2d 74, 78, 435 N.Y.S.2d 962, 966 (1980); *Impermissible Isolation*, *supra* note 13, at 343.

169. N.J. STAT. ANN. §§ 13:1E-1 to 13:1E-48 (West 1979).

170. N.J. STAT. ANN. § 13:1I-9-10 (West 1979). The Act included a legislative finding that the state's environment was threatened by the treatment and disposal of waste which originated out of state. *Id.* § 13:1I-9.

171. 437 U.S. 617 (1978).

“all objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset.”¹⁷² The New Jersey statute was struck down because it discriminated against waste, an article of commerce, on the basis of origin.¹⁷³ The Court found that the Waste Control Act imposed the burden of conserving New Jersey’s landfills on other states and was an attempt by the state to isolate itself from “a problem common to many by erecting a barrier against the movement of interstate trade.”¹⁷⁴

The Court also expressed a fear that New York and Pennsylvania would enact retaliatory statutes banning the disposal of extraterritorial solid waste if the New Jersey statute was upheld.¹⁷⁵ In fact, Pennsylvania enacted a retaliatory statute in 1977 while the *City of Philadelphia* decision was pending.¹⁷⁶ The Court’s decision had been written prior to the enactment of the statute, however, and it was never challenged.

The purpose of the commerce clause is to establish a national economic unit.¹⁷⁷ Retaliatory statutes have been held to frustrate this

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

173. 437 U.S. 617, 626-27 (1978).

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

175. *Id.* at 629.

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

177. See *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949); *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935).

goal.¹⁷⁸ If one state has the power to exclude solid waste from final disposition within its borders all states have that power, and the effect would be to halt commerce at state lines.¹⁷⁹ In addition, the threat of economic isolation may not be used as a weapon to force other states into reciprocal agreements.¹⁸⁰

The Tenth Circuit, in *Hardage v. Atkins*,¹⁸¹ invalidated the Oklahoma Controlled Industrial Waste Disposal Act¹⁸² because it contained a reciprocity clause. The Oklahoma statute forbade the receipt and disposal of controlled industrial wastes into the state unless the state of origin had enacted: (1) "substantially similar standards for controlled industrial waste disposal as Oklahoma; and (2) had entered into a reciprocity agreement with the State of Oklahoma."¹⁸³ Plaintiff challenged the reciprocity clause of the Act because another state, a potential customer of plaintiff, did not have a reciprocal agreement with Oklahoma.¹⁸⁴ The Tenth Circuit concluded that the Oklahoma statute violated the commerce clause because the shipment of out of state industrial waste into Oklahoma was prohibited unless the state of origin had a reciprocal agreement.¹⁸⁵

In a related decision the Tenth Circuit considered whether the entire Oklahoma statute or only the clause relating to reciprocity agreements was unconstitutional.¹⁸⁶ The court held the entire statute to be unconstitutional because the substantially similar standards provision, in effect, imposed an economic embargo on industrial waste.¹⁸⁷

As a result of the determination that state exclusionary statutes barring solid waste disposal violate the commerce clause, all such statutes are unconstitutional. Despite this fact, not all state exclusionary statutes have been challenged or repealed.¹⁸⁸ A few remain in

178. See *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944); *Oklahoma v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

179. *Oklahoma v. Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911).

180. *A&P Tea Co. v. Cottrell*, 424 U.S. 366 (1976).

181. 582 F.2d 1264 (10th Cir. 1978), *aff'd*, 619 F.2d 871 (10th Cir. 1980).

182. OKLA. STAT ANN. tit. 63, §§ 2751-2765 (West 1978).

183. *Id.* § 2764.

184. *Hardage v. Atkins*, 582 F.2d 1264, 1265 (10th Cir. 1978).

185. *Id.* at 1266-67.

186. *Hardage v. Atkins*, 619 F.2d 871 (10th Cir. 1980).

187. *Id.* at 873-74.

188. The states with exclusionary statutes are Delaware: DEL. CODE tit. 16, § 1701 (Supp. 1976); Illinois: ILL. ANN. STAT. ch. 111½, § 1021 (Smith-Hurd 1977); Louisiana: LA. REV. STAT. ANN. § 40:1299.36 (West Supp. 1977) (repealed 1979 La. Acts No. 449, § 5); Maine: ME. REV. STAT. tit. 17, § 2253 (Supp. 1976); Massachusetts: MASS. GEN. LAWS ANN. ch. 270 § 17A (West Supp. 1977) (repealed 1979); New Hampshire: N.H. REV. STAT. ANN. § 147:30-f (Supp. 1973); New Jersey: N.J. STAT.

effect, but should these statutes be challenged, it is doubtful they will be upheld.¹⁸⁹

B. Municipal

Whereas states have enacted legislation to prevent state regulation of waste disposal, municipalities have erected barriers against both intrastate and interstate importation of solid waste.¹⁹⁰ Municipal bans, like state exclusionary statutes, prevent the realization of an effective means of solid waste disposal. They have been challenged as a violation of the commerce clause¹⁹¹ and also as an illegitimate exercise of the police power.¹⁹²

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

189. The state exclusionary statutes that are still in effect include: Delaware: DEL. CODE tit. 16, § 1701 (Supp. 1976); Illinois: ILL. ANN. STAT. ch. 111½ § 1021 (Smith-Hurd 1977); Maine: ME. REV. STAT. tit. 17, § 2253 (Supp. 1976); New Hampshire: N.H. REV. STAT. ANN. § 147:30f (1981); Pennsylvania: 35 PA. CONS. STAT. ANN. § 6007 (f.1) (Purdon 1977); Rhode Island: R.I. GEN. LAWS § 19-7 (Supp. 1980).

190. See notes 193-238 *infra* and accompanying text.

191. See notes 193-211 *infra* and accompanying text.

192. See notes 212-238 *infra* and accompanying text.

1. Commerce Clause

The Rhode Island Solid Waste Management Corporation challenged a municipality's anti-importation ordinance which banned the disposal of out of town waste within its boundaries in *Town of Gloucester v. Rhode Island Solid Waste Management Corp.*¹⁹³ The Rhode Island Supreme Court did not reach the constitutional issue because it determined that the state had preempted municipal regulation of solid waste disposal.¹⁹⁴ Thus, the town's ordinance was repugnant to the state's policy of the statewide management of solid waste.¹⁹⁵ In *Dutchess Sanitation Service, Inc. v. Town of Plattekill*,¹⁹⁶ the ordinance of a New York municipality which prohibited any waste originating out of town from disposal within its territorial limits was challenged by the owner and operator of a sanitary landfill located within the town.¹⁹⁷ The plaintiff sought to vacate that part of the injunction which prevented the disposal of refuse originating out of state.¹⁹⁸ The New York Court of Appeals held, citing *City of Philadelphia*, that the town's ordinance violated the commerce clause because the town was regulating refuse solely on the basis of its origin.¹⁹⁹ A town ordinance disallowing the acceptance of refuse originating out of town for final disposal in the town²⁰⁰ was declared constitutional by the New York Court of Appeals, however, in *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*.²⁰¹ The court found that

193. ___ R.I. ___, 390 A.2d at 348 (1978).

194. *Id.* at ___, 390 A.2d at 349.

195. *Id.*

196. 51 N.Y.2d 670, 417 N.E.2d 74, 435 N.Y.S.2d 962 (1980).

197. *Id.* at 672, 417 N.E.2d at 76, 435 N.Y.S.2d at 962, 963. The Plattekill Town Ordinance Regulating Garbage, Rubbish and Other Articles read in part: "No licensee shall collect any garbage, rubbish and waste materials of any kind which originate outside the bounds of the Town of Plattekill in the Town of Plattekill dumping area or any other property, public or private in the Town of Plattekill."

198. In *Town of Plattekill v. Dutchess Sanitation Inc.*, 56 A.D.2d 150, 391 N.Y.S.2d 750 (3d Dept. 1977), the court granted a permanent injunction against Dutchess.

199. 51 N.Y.2d 670, 677, 417 N.E.2d 74, 78, 435 N.Y.S.2d 962, 966 (1980). In the final footnote of the court's decision it was noted that three judges of the court would have held the ordinance invalid "not only in effect, but facially as well." *Id.* at 678 n.3, 417 N.E.2d at 78 n.3, 435 N.Y.S.2d at 966 n.3.

200. *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 51 N.Y.2d 679, 682-83, 417 N.E.2d 78, 79, 435 N.Y.S.2d 966, 967 (1980). Town of Caledonia enacted its Sanitary Landfill Ordinance on July 17, 1976. The ordinance provided: "Refuse generated outside of the Town of Caledonia, New York will not be accepted at facilities licensed by the Town of Caledonia unless authorized by the Town Board and consistent with the regional comprehensive plan as it relates to solid waste management."

201. *Id.* at 685, 417 N.E.2d at 81, 435 N.Y.S.2d at 68-69.

the ordinance did not discriminate against interstate refuse, but instead excluded *all* out of town refuse.²⁰²

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

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

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

202. *Id.* at 684, 417 N.E.2d at 80, 435 N.Y.S.2d at 968.

203. *Id.* at 685, 417 N.E.2d at 81, 435 N.Y.S.2d at 969 (Fuchsberg, J., dissenting).

204. *Id.* at 686, 417 N.E.2d at 82, 435 N.Y.S.2d at 969-70 (Fuchsberg, J., dissenting).

205. *Id.* at 686, 417 N.E.2d at 81, 435 N.Y.S.2d at 969 (Fuchsberg, J., dissenting).

206. *Id.* at 688, 417 N.E.2d at 83, 435 N.Y.S.2d at 971 (Fuchsberg, J., dissenting).

207. *Id.* at 688, 417 N.E.2d at 83, 435 N.Y.S.2d at 970-71 (Fuchsberg, J., dissenting).

208. *Dutchess Sanitation Serv., Inc. v. Town of Plattekill*, 51 N.Y.2d 670, 677, 417 N.E.2d 74, 78, 435 N.Y.S.2d 962, 966 (1980).

209. *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 51 N.Y.2d 679, 417 N.E.2d 78, 435 N.Y.S.2d 966 (1980).

210. *Id.* at 685, 417 N.E.2d at 81, 435 N.Y.S.2d at 969 (Fuchsberg, J., dissenting).

211. *Id.* at 687, 417 N.E.2d at 82, 435 N.Y.S.2d at 971 (Fuchsberg, J., dissenting). See also *Schiener v. Penfold*, Index No. E91205/81 (Sup. Ct. Erie County 5/15/81), where Justice Joslin held invalid a Solid Waste Management Ordinance enacted by the Town of Sardinia because the Town Board failed to prepare an Environmental

2. *Illegitimate Exercise of the Police Power*

Municipalities also attempt to control solid waste disposal through the use of their zoning power.²¹² The propriety of restrictive or exclusive municipal zoning ordinances has been seriously questioned. In fact, courts have held these zoning ordinances to be unconstitutional.²¹³ Although a municipality may limit the quantity of refuse disposed as a legitimate exercise of its zoning power,²¹⁴ a municipality may not limit quantity by discriminating on the basis of the source of refuse.²¹⁵

For example, the California Court of Appeals in *Ex Parte Lyons*²¹⁶ held that a county ordinance banning the importation of refuse produced outside the county is an arbitrary and improper exercise of the town's police power.²¹⁷ The county argued that the disposal of solid waste originating outside of the county created a menace to public health, welfare and safety.²¹⁸ The court noted that while it is possible that an increase in the quantity of refuse may endanger the public health, the ordinance did not limit the amount of waste, but discriminated against refuse on the basis of origin.²¹⁹ The Supreme Court of Pennsylvania in *Lutz v. H. T. Armour*²²⁰ found a similar ordinance

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

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

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

213. See, e.g., *Ex Parte Lyons*, 27 Cal. App. 2d 182, 80 P.2d 745 (1938); *Yaworski v. Town of Canterbury*, 21 Conn. Supp. 347, 154 A.2d 758 (1959); *Lutz v. Armour*, 395 Pa. 576, 151 A.2d 108 (1959); *Carlson v. Village of Worth*, 62 Ill. 2d 406, 343 N.E.2d 493 (1975); *O'Connor v. City of Rockford*, 52 Ill. 2d 360, 288 N.E.2d 432 (1972); *Boone Landfill, Inc. v. Boone County*, 51 Ill. 2d 538, 283 N.E.2d 890 (1972); *Southern Ocean Landfill, Inc. v. Mayor and Council of the Township of Ocean*, 64 N.J. 190, 314 A.2d 65 (1974); *General Battery Corp. v. Zoning Hearing Bd.*, 29 Pa. Commw. 498, 371 A.2d 1030 (1977).

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

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

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

217. *Id.* at ___, 80 P.2d at 749.

218. *Id.* at ___, 80 P.2d at 746.

219. *Id.* at ___, 80 P.2d at 749.

220. 395 Pa. 576, 151 A.2d 108 (1959).

unconstitutional.²²¹ The court, citing *Ex Parte Lyons*, stated that the effect of the ordinance was to make any quantity of out of town refuse harmful to public health, while local waste, regardless of amount, did not violate the town's health standards.²²² This distinction was held to be arbitrary, discriminatory and without merit.²²³

In *Yaworski v. Town of Canterbury*,²²⁴ the Superior Court of Connecticut declared a town ordinance void because it prohibited the disposal of out of town refuse within its borders.²²⁵ The court held that the legislature granted municipalities only the power to regulate the disposal of solid waste.²²⁶ This power, the court ruled, did not include the power to ban.²²⁷ The New Jersey Supreme Court in *Southern Ocean Landfill Inc. v. Mayor and Council of the Township of Ocean*²²⁸ struck down an ordinance because it conflicted with the legislature's policy of regionalization of waste facilities.²²⁹ Both the New Jersey and Connecticut courts determined that their respective legislatures had preempted municipal action in the area of solid waste disposal.²³⁰

Geographic origin also has been rejected as a basis for discriminating against solid waste generated outside a municipality.²³¹ In *Boone Landfill Inc. v. Boone County*,²³² the Illinois Supreme Court held that a county may not ban the disposal of refuse solely on the basis of its geographical source.²³³ The court rejected the county's claim that the purpose of the zoning ordinance was to limit the quantity of refuse discarded.²³⁴ A town zoning ordinance completely excluding industrial waste disposal facilities within its boundaries was challenged in *General Battery Corp. v. Zoning Hearing Board of Alsace Township*.²³⁵ The Pennsylvania Commonwealth Court found that the Department of Environmental Resources controls the waste disposal fa-

221. *Id.* at 581, 151 A.2d at 111.

222. *Id.* at 579-80, 151 A.2d at 110.

223. *Id.*

224. 21 Conn. Supp. 347, 154 A.2d 758 (1959).

225. *Id.* at 352, 154 A.2d at 761.

226. *Id.* at 351, 154 A.2d at 760-61.

227. *Id.*

228. 64 N.J. 190, 314 A.2d 65 (1974).

229. *Id.* at 193-94, 314 A.2d at 66-67.

230. *Id.* at 194, 314 A.2d at 67; *Yaworski v. Town of Canterbury*, 21 Conn. Supp. 347, 351, 154 A.2d at 758, 760-61 (1959).

231. See notes 173, 199, 208-210 *supra* and accompanying text.

232. 51 Ill. 2d 538, 283 N.E.2d 890 (1972).

233. *Id.* at 542, 283 N.E.2d at 892.

234. *Id.*

235. 29 Pa. Commw. 498, 371 A.2d 1030 (1977).

cilities, and therefore, the facilities did not create health or safety hazards which would justify the total exclusion of disposal facilities.²³⁶

Although the town argued that the ordinance protected its residents from waste generated in another municipality,²³⁷ the court concluded that the origin of solid waste has little bearing on whether its disposal is harmful.²³⁸

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

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

236. *Id.* at 502, 371 A.2d at 1032.

237. *Id.*

238. *Id.* at 503, 371 A.2d at 1033.

239. See notes 9-12, 66 *supra* and accompanying text.

240. See notes 58-73, Section IV B *supra* and accompanying text.

241. J. GOLDSTEIN, GARBAGE AS YOU LIKE IT 47 (1969).

242. See notes 59-62, 190-238 *supra* and accompanying text.

243. *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 51 N.Y.2d 679, 417 N.E.2d 78, 435 N.Y.S.2d 966 (1980).

244. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Dutchess Sanitation Serv. Inc. v. Town of Plattekill*, 51 N.Y.2d 670, 417 N.E.2d 74, 435 N.Y.S.2d 962 (1980).

245. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1980); *Dutchess Sanitation Serv. Inc. v. Town of Plattekill*, 51 N.Y.2d 670, 677, 417 N.E.2d 74, 78, 435 N.Y.S.2d 962, 966 (1980); *Impermissible Isolation*, *supra* note 13, at 333.

246. 437 U.S. 617.

247. *Id.* at 628.

V. Conclusion

There are a limited number of appropriate landfill sites.²⁴⁸ These must be available to all states and municipalities. Therefore, all municipal bans on the importation of intrastate waste should be held invalid. Few municipalities are either isolated from or independent of neighboring communities; consequently, unilateral land use decisions by one municipality affect the needs and resources of an entire region.²⁴⁹

The proliferation of solid waste requires a uniform statewide and regional approach, rather than fragmented municipal action, in order to achieve effective solid waste control. Municipalities lack the financial resources, land and expertise to plan, develop and implement efficient and effective solutions to their solid waste problems.²⁵⁰ As a result, uncoordinated municipal refuse disposal activities develop to meet the immediate needs of local governments. These ineffective practices create health hazards and pollution problems, and cause the dissipation of land and other valuable resources, all of which affect areas larger than a single municipality.²⁵¹ Municipalities, therefore, must work together and each accept their "fair share"²⁵² of refuse, regardless of its origin, if an effective solution is to be developed.

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

248. 42 U.S.C. § 6901(b)(6).

249. See *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 897, 908 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); *Southern Burlington County N.A.A.C.P. v. Mount Laurel*, 67 N.J. 151, 166, 336 A.2d 713, 720 (1975); *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

250. See notes 67-72 *supra* and accompanying text.

251. *New Jersey's Options*, *supra* note 63, at 34.

252. Cases illustrating a municipality's power to exclude and prohibit refuse disposal completely from their boundaries can be analogized to exclusionary zoning cases which have the effect of excluding certain types of housing. In *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), a village restricted its land use to one-family dwellings excluding lodging houses, boarding houses, fraternity houses, or multiple dwelling houses. The U.S. Supreme Court upheld the zoning ordinance under the police power of the state. In *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976), the town adopted a land use plan that restricted the housing growth rate in order to protect its small town character and surrounding open space. The Ninth Circuit permitted the zoning restriction since it bore a rational relationship to a legitimate state interest. *Id.* at 908-09. In *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975), the town had a zoning ordinance excluding low and moderate income housing. The Supreme Court of New Jersey declared the ordinance invalid since every municipality must afford the opportunity for decent and adequate low and moderate income housing at least to the municipality's "fair share" of the regional need. *Id.* at 174, 336 A.2d at 724. In *Golden v. Planning Bd. of*

volume of solid waste produced within a state or region is large enough to necessitate processing refuse on a larger scale.²⁵³ State and regional agencies should have exclusive authority to conduct studies to locate environmentally safe areas within the state or region for the establishment of sanitary landfills. These agencies should strategically allocate districts for refuse disposal before they are needed. This would eliminate the processing and time involved in obtaining municipal variances and conditional use permits²⁵⁴ and satisfy local interests in conserving land. States and regions should establish public service corporations to plan, finance, construct, operate and regulate waste disposal facilities.²⁵⁵ A state or regional solid waste management corporation could effectively prevent municipalities from enacting ordinances excluding or restricting refuse disposal.²⁵⁶

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

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

253. 42 U.S.C. § 6901 (1976 & Supp. I 1977 & Supp. II 1978 & Supp. III 1979).

254. See notes 50-57 *supra* and accompanying text.

255. See, e.g., New Jersey Solid Waste Utility Control Act of 1970, N.J. STAT. ANN. §§ 48:13A-1 to 48:13A-13 (Supp. 1981-82); Rhode Island Solid Waste Management Corp. Act, R.I. GEN. LAWS §§ 19-1 to 19-29 (1979 & Supp. 1980).

256. See notes 126-166 *supra* and accompanying text.

