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THE COMMERCE CLAUSE AND FLOW-CONTROL: THE PROBLEMS OF REGULATING THE IMPORTATION OF SOLID WASTE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION V. MEYER¹

by Rebecca Tenbrook

I. INTRODUCTION

Waste disposal is a monumental problem in this country.² Every year, more and more waste is produced and as landfill space is exhausted, states are forced to open new ones or find ways to decrease the flow of waste into current landfills. To address this problem, several states have enacted statutes that forbid, tax, or charge out-of-state waste entering a state's landfills. These statutes, however, have been struck down by the courts as violative of the Commerce Clause. *National Solid Wastes Management Association v. Meyer* was Wisconsin's attempt to craft a waste control measure which would survive judicial review. This casenote will

discuss why efforts toward regulation have failed in other states and why Wisconsin's attempt was also unsuccessful. In addition, this casenote will also advance a perspective on the topic that differs from the traditional approach of regulating the flow of waste into states, namely, control over the flow of waste into landfills. Furthermore, it will propose a regulatory and enforcement plan that may have a better chance of surviving a constitutional challenge.

II. FACTS AND HOLDING

National Solid Wastes Management Association, (NSWMA), together with various other waste management and

sanitation companies, filed this action to contest a Wisconsin state law which regulated solid waste entering Wisconsin landfills.³ The plaintiffs contended that the Wisconsin statute violated the Commerce Clause⁴ of the United States Constitution and that they were entitled to relief under 42 U.S.C § 1983.⁵

The statute in question required that eleven recyclable materials be recovered from commercial and residential waste before such waste was dumped in Wisconsin landfills.⁶ The plaintiff's objected to the requirement that, for any waste hauler to use the landfill, everyone in the community to which the hauler belonged must follow Wisconsin's recycling requirements.⁷ These requirements applied even if that hauler does not reside in Wisconsin and if the other members of the community in which it did reside did not use Wisconsin landfills.⁸ The plaintiffs argued that the statute violated the Commerce Clause because it regulated commerce occurring wholly outside Wisconsin.⁹ They also argued that the statute was discriminatory on its face and in practical effect, since it treated similar products from different points of origin differently.¹⁰ For these reasons, plaintiffs contended the statute should be given strict scrutiny.¹¹

Defendants argued that the statute was not discriminatory and, therefore, should be evaluated using a balancing approach.¹² They further contended that the interests of the State of Wisconsin in managing the use of its landfills outweighed the burdens that the statute placed on

¹ 63 F.3d 652 (7th Cir. 1995), *petition for cert. denied*, 116 S.Ct. 1351 (U.S. April 1, 1996).

² See *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 368-69 (1992) (Rehnquist, J., dissenting) (citing United States Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1990 Update* 10).

³ *National Solid Wastes Management Ass'n*, 63 F.3d at 653. See Wis. STAT. §§ 159.07-.11 (Supp. 1995).

⁴ *National Solid Wastes Management Ass'n*, 63 F.3d at 656.

⁵ *Id.*

⁶ *Id.* at 654.

⁷ *Id.* at 654-655. The statute required communities wishing to use Wisconsin landfills to: collect, process, and market the eleven named solid wastes; prohibit the entry of the eleven solid wastes into its landfills; adhere to Wisconsin Department of Natural Resources' rules on the collection and disposal of the solid wastes; take adequate steps to enforce recycling regulations, acquire the equipment to implement recycling measures; and "make a reasonable effort" to reduce the volume of the eleven solid wastes produced. Wis. STAT. §§ 159.07(3), .11

⁸ *National Solid Wastes Management Ass'n*, 63 F.3d at 655.

⁹ *Id.* at 656.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 658.

commerce.¹³ The district court agreed with the defendants, finding that the statute was neither facially discriminatory nor discriminatory in effect.¹⁴ In addition, the court found the burden on commerce to be slight compared to the benefits, which included conservation of landfill capacity and environmental protection.¹⁵

The Seventh Circuit reversed, holding: the practical effect of the Wisconsin statute was to control commercial conduct wholly outside the State of Wisconsin; the statute discriminated against out-of-state waste haulers; and the Wisconsin plan overburdened interstate commerce when the requirements were balanced against state interests.¹⁶

III. LEGAL HISTORY

A. The Commerce Clause - The Basics

The Commerce Clause gives Congress the power to regulate interstate commerce, seemingly for the purpose of assuring free trade between the states.¹⁷ Generally, when the Constitution grants regulatory powers to Congress and Congress does not exercise those powers, the states are not constrained by the mere existence of the possibility that Congress might regulate their conduct. In other words, where Congress is silent, the states are free to act. However, in certain discrete instances, the Supreme Court has struck

down state regulatory actions which interfere with the apparent purpose of a Constitutional provision. One of these instances is the so-called dormant Commerce Clause doctrine.¹⁸ This doctrine severely limits state action which interferes with the free-trade of interstate commerce.¹⁹ The dormant Commerce Clause, at times, is in direct conflict with various states' rights to decide how best to utilize their natural resources and ensure the health and safety of their citizens.²⁰ The Court has addressed this tension by allowing impediments to free trade only when the regulations, if facially discriminatory, survive strict scrutiny, or, when not facially discriminatory, do not unduly burden interstate commerce.²¹ This leaves only a few limited areas in which states can regulate interstate commerce: protection of health or safety;²² subsidies;²³ compensatory taxes;²⁴ market participation;²⁵ and non-discriminatory regulation of commerce.

Protectionism involves a state's power to regulate commerce to protect the health and safety of its citizens at the expense of interstate commerce. These regulations are facially discriminatory or discriminatory in effect and as such, are subject to strict scrutiny. For such a regulation to survive, the state must prove that its interest is substantial, that interstate commerce is the cause of the problem the regulations are designed to correct, and that there is no

non-discriminatory correction method available.²⁶ For example, laws which limit or forbid the importation of potentially dangerous materials (quarantine laws) are not violative of the dormant Commerce Clause because they serve the interests of health and safety and not a desire to promulgate economic protectionism. The basic defense of a quarantine law is that there is something different about a regulated import that makes it more dangerous than domestic products of the same type.²⁷

The flip side of health and safety protectionism is the regulation of exports for health and safety reasons which is also allowed, but with different restrictions.²⁸ The regulations must be designed to protect the citizenry and the regulations must be the same for in-state and out-of-state users.²⁹ These types of regulations are subject to a balancing test rather than to strict scrutiny, since they are not discriminatory but may impose an undue burden on interstate commerce.³⁰ Under the test diagrammed in *Pike v. Bruce Church*,³¹ courts will weigh the substantiality of the interest the state seeks to protect against the magnitude of the burden the state places on interstate commerce.

The courts also review discrimination in favor of domestic interests using the *Pike* balancing test when the state is involved in a transaction as a market participator.

¹³ *Id.* at 656.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 660-63.

¹⁷ U.S. Const. art. I, § 8, cl. 3.

¹⁸ See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987).

¹⁹ See *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 359 (1992).

²⁰ *Id.* See also *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S.Ct. 1677, 1682 (1994).

²¹ *Brown-Forman Distillers Corp.*, 476 U.S., 573, 579 (1986) (discussing facially discriminatory state statutes). *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (discussing facially neutral state statutes).

²² See *C&A Carbone*, 114 S.Ct. at 1687.

²³ *Id.*

²⁴ *Chemical Waste Management v. Hunt*, 504 U.S. 334, 346 n.9 (1992)

²⁵ See *Philadelphia v. New Jersey*, 437 U.S. 617, 627 n.6 (1979). See also *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

²⁶ This is the traditional "compelling interest and least restrictive means" test demanded by strict scrutiny. See *Philadelphia*, 437 U.S. 617.

²⁷ *Maine v. Taylor*, 477 U.S., 131 (1986) (allowing a prohibition against import of baitfish infected with a parasite that was dangerous to Maine ecosystems).

²⁸ *Spathase v. Nebraska*, 458 U.S. 941 (1982).

²⁹ *Id.* at 955-56. This case involved a regulation on groundwater exports and stated, "[o]bviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent uncontrolled transfer of water out of the State." *Id.*

³⁰ *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

³¹ *Id.*

When the state enters into a commercial transaction or operates a business, it can conduct its business as it pleases.³² If it wishes to do business solely with its own citizens, that is the state's prerogative. In these cases, the state can only regulate the market in which it is participating, and only the conduct of the parties to the transaction.³³ It cannot create a monopoly, nor can it exercise control over a substantial portion of a natural resource.³⁴

A state also can provide its citizens an advantage over out-of-state competitors without violating the Commerce Clause if its actions do not serve to regulate commerce. For example, states can provide subsidies to their citizens, but not to non-resident competitors.³⁵ This type of state action does not violate the Commerce Clause because it does nothing to impede the free flow of interstate commerce. Similarly, states can seek to even the playing field through compensatory taxes. A compensatory tax is designed to assess the costs of a state funded service which citizens pay through general revenues to out-of-state users.³⁶

Furthermore, states retain the power to regulate *intrastate* commerce. If the effects of regulations on intrastate commerce spill

over onto interstate commerce, the courts review them using the same two-tier approach discussed above. If the regulation is facially discriminatory or discriminatory in effect against out-of-state economic interests, it will receive strict scrutiny.³⁷ If in-state entrepreneurs are treated in the same way as out-of-state ones, the court will apply the balancing test and the regulation will stand if the state interest outweighs the burden on interstate commerce.³⁸

On the other hand, the dormant Commerce Clause denies states the ability to regulate imports which are not distinct from domestic products when they do not regulate their own products,³⁹ to impose a greater burden on imports than that on domestic products for no other reason than that they are imports,⁴⁰ to condition imports or exports on a sister state's agreement to reciprocate in kind,⁴¹ and to regulate, either directly or in effect, conduct which occurs wholly outside the state.⁴²

B. Regulation Of Solid Waste - What Has Not Worked

Wisconsin is not the first state to try to regulate waste flow into its landfills

without success. New Jersey,⁴³ Alabama,⁴⁴ Oregon,⁴⁵ and Michigan,⁴⁶ among others, have all taken different tacks on this issue and have come away from the courthouse defeated.

1. New Jersey

In *Philadelphia v. New Jersey*,⁴⁷ the first case involving solid waste disposal considered by the United States Supreme Court, the state of New Jersey cited health and safety reasons for its ban on the importation of most solid wastes for disposal in the state's landfills.⁴⁸ The court, however, was suspicious that New Jersey's regulations amounted to economic protectionism. Although the purpose of the New Jersey law was not to gain a competitive edge for its citizens in the waste disposal business, the effect, the legislative means, was protectionist and therefore disallowed.⁴⁹ The court stated that legislation that stops interstate commerce at the border is the "clearest example" of economic protectionism, and virtually *per se* invalid.⁵⁰ It went on to say that the determining element in deciding whether a statute amounts to economic protectionism "is the attempt by one State to isolate itself from a problem common to many by erecting a

³² *Hughes*, 426 U.S. at 809-10.

³³ *Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980).

³⁴ *Id.*

³⁵ *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988).

³⁶ *Oregon Waste Sys., Inc. v. Department of Envl. Quality of State of Or.*, 114 S. Ct. 1345, 1351 (1994).

³⁷ *Id.* at 1350

³⁸ *Id.*

³⁹ *Philadelphia*, 437 U.S. at 628.

⁴⁰ *Oregon Waste Sys.*, 114 S. Ct. at 1350.

⁴¹ *Sporhase*, 458 U.S. at 944.

⁴² *Healy v. Beer Institute*, 491 U.S. 324, 332 (1989).

⁴³ *Philadelphia*, 437 U.S. at 617.

⁴⁴ *Chemical Waste Management*, 504 U.S. 334; *National Solid Wastes Management Ass'n v. Alabama Dep't Envl. Management*, 910 F.2d 713 (11th Cir. 1990).

⁴⁵ *Oregon Waste Sys., Inc.*, 114 S. Ct. at 1345.

⁴⁶ *Fort Gratiot Sanitary Landfill*, 504 U.S. at 353.

⁴⁷ *Philadelphia*, 437 U.S. at 617.

⁴⁸ New Jersey law states in pertinent part:

No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner [of the State Department of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety, and welfare and has promulgated regulations permitting and regulation the treatment and disposal of such waste in this State.

Id. at 618, quoting N.J. STAT ANN. §13:11-10 [West Supp. 1978]. In accordance with this regulation, the commissioner then established four categories of waste which would not be prohibited under the statute: swine feed, separated recyclables, recovered potential resources, and noxious wastes headed for treatment facilities. *Philadelphia*, 437 U.S. at 624.

⁴⁹ *Philadelphia*, 437 U.S. at 624.

⁵⁰ *Id.*

barrier against the movement of interstate trade."⁵¹ The court qualified this hardline statement, however, leaving open the possibility of a regulation which is not patently discriminatory or which serves a compelling state interest.⁵² These are the *Pike* balancing test and quarantine exceptions.

Although the *Philadelphia* court rejected the application of both exceptions, it offered guidelines for when the exceptions would apply. In order to survive the *Pike* balancing test, a legislative act must not be discriminatory on its face or in practical effect. In addition, the act may impose only an incidental burden on interstate commerce and must also advance a legitimate local concern.

The quarantine exception can only be invoked when laws seek to discriminate against out-of-state products not because they come from out-of-state, but because they are noxious or dangerous. The court refused to apply this exception to the New Jersey law because, it stated, "[t]he harms caused by waste are said to arise after its disposal in landfill sites, and at that point, . . . there is no basis to distinguish out-of-state waste from domestic waste. If one is inherently harmful, so is the other."⁵³

2. Alabama

The next attempt at regulation came out of Alabama in the form of the Holley Bill.⁵⁴ The Holley Bill prohibited private

hazardous waste management facilities from accepting hazardous materials from out-of-state if the state in question prohibited disposal of hazardous waste within its borders and had no facility for such, or if it had no facility and had not entered into an agreement for disposal of hazardous wastes which the state of Alabama had signed.⁵⁵

Alabama advanced three arguments for the constitutionality of the Holley bill. The first two, the *Pike* balancing test and quarantine exception, both failed. The third was a Congressional authorization argument. Alabama argued that Congress, through the requirements of the Superfund Amendments and Reauthorization Act (SARA)⁵⁶ and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),⁵⁷ imposed on the states an obligation to regulate the movement and disposal of hazardous wastes within their respective borders. The court disagreed. It stated that for Congress to give to the states the power of regulating or burdening interstate commerce, this grant must be "expressly stated" and "unmistakably clear."⁵⁸ The court did not find that level of certainty met here. SARA, for example, required the generating state to conform with factual requirements to assure an adequate landfill capacity and held the state liable for any infraction.⁵⁹ The court did not permit this arrangement to be translated into a

grant of power that allowed receiving states to compel adherence to federal requirements by denying non-qualifying generating states access to its management facilities.⁶⁰

Two years later Alabama tried again by imposing a "cap" on the yearly amount of hazardous waste that could be disposed of at a site, in addition to a two-tiered fee system.⁶¹ The fee systems consisted of a flat per-ton fee paid by the operator of the facility and an additional fee assessed against waste generated out-of-state.⁶² This was quite a departure from the outright banning of entry of out-of-state waste the courts had previously struck down, and the cap and base fee survived review. Only the additional fee was an object of contention in this case. The court again disallowed it, calling the statute facially discriminatory and overly burdensome.⁶³ Although Alabama argued that the additional fee worked to advance legitimate state concerns,⁶⁴ the court concluded that, except for its point of origin, imported waste was indistinguishable from domestic waste and as such resulted in discriminatory treatment.⁶⁵ The court further reasoned that the additional fee did not constitute the least restrictive means of protecting Alabama's interest as required to prevent regulations from being found facially discriminatory.⁶⁶

⁵¹ *Id.* at 628.

⁵² *Id.* at 628-29.

⁵³ *Id.* at 629.

⁵⁴ ALA. CODE § 22-30-11 (1989).

⁵⁵ *Id.*

⁵⁶ Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at Section 104(c)(9), 42 U.S.C. § 9604(c)(9)).

⁵⁷ Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-75 (1982 & Supp. V 1987).

⁵⁸ *National Solid Waste Management Ass'n v. Alabama*, 910 F.2d at 721 (citing *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 90 (1984) [other citations omitted]).

⁵⁹ *Id.*

⁶⁰ *Id.* "Although Congress may override the commerce clause by express statutory language, it has not done so in enacting CERCLA" (quoting *Alabama v. United States*, 871 F.2d 1548, 1555 n.3).

⁶¹ ALA. CODE § 22-30b-2(a) [Supp. 1991].

⁶² *Chemical Waste Management*, 504 U.S. at 338. See also ALA. CODE § 22-30b-2(a) [Supp. 1991]: "For waste and substances which are generated outside of Alabama and disposed of at a commercial site for the disposal of hazardous waste of hazardous substances in Alabama, an additional fee shall be levied at the rate of \$72.00 per ton."

⁶³ *Chemical Waste Management*, 504 U.S. at 342.

⁶⁴ *Id.* at 343. The Alabama Supreme Court enumerated these concerns in its decision as: health and safety; environmental protection; compensatory revenue; and waste flow control. *Id.*, [citing *Chemical Waste Management v. Hunt*, 584 So.2d 1367, 1388-89 (1991)].

⁶⁵ *Chemical Waste Management*, 504 U.S. at 344.

3. Michigan

On the same day, the Supreme Court struck down Michigan's efforts in this arena. Instead of attempting to regulate the flow of commerce at the border of the state, Michigan's Solid Waste Management Act ("SWMA")⁶⁷ required each county within the state to develop and implement waste reduction programs that comported with state health standards. This included a prohibition against accepting waste generated out-of-county without Michigan's express permission.⁶⁸

Michigan argued that the SWMA differed from the law struck down in *Philadelphia* because it impeded in-state, but out-of-county waste, and out-of-state waste equally.⁶⁹ The court rejected this argument, stating that the existence of an equal burden on citizens of the state did not eliminate the discrimination, it only lessened its effect.⁷⁰

Michigan fell back on the health and safety regulation argument. This failed, as it had in cases before because Michigan was not able to prove that SWMA served valid health and safety goals.⁷¹

4. Oregon

In 1994, Oregon's regulation, which mandated a compensatory tax on waste, was reviewed by the Supreme Court. The

Oregon statute called for a fee of \$.85 per ton on domestic waste and \$2.25 per ton on imported waste.⁷² The purported reasons for the discrepancy were the disparate impact of the costs of disposal on citizens versus non-citizens and an effort to force out-of-state users to "pay their fair share."⁷³ Although a legitimate state interest existed, the court found the regulation facially discriminatory and as a result struck down the regulation.⁷⁴

The court found no basis for the assertion that out-of-state waste is more expensive to dispose of or process than in-state waste.⁷⁵ Nor did it think that Oregon had successfully identified the intrastate burden the tax purportedly compensated for or the approximate cost of that burden.⁷⁶ The lack of these two elements of a compensatory tax proved fatal to Oregon's claim.

5. Pennsylvania

Finally, Pennsylvania tried to use the market participant exception to the dormant Commerce Clause to survive judicial review.⁷⁷ The Pennsylvania Department of Environmental Resources ("DER") required that each county designate a waste facility and contract with that facility for disposal of all of the county's waste.⁷⁸ It also made it illegal to dump waste in any

facility other than the county's designated facility.⁷⁹ The counties were, in theory, free to contract with anyone they chose, and in that way, were participants in the market. However, the court found that the DER regulations acted as a constraint on the county's ability to contract because the contracts could only be made pursuant to the regulations.⁸⁰ The court held that the state was acting to compel the terms of the contract and crafting the circumstances under which the counties could contract. Pennsylvania, therefore, was acting to regulate the market and was not acting as a market participant.⁸¹

In sum, states have not succeeded in slowing the flow of waste into their landfills by enacting regulations that burden interstate commerce. Thus far, health and safety protection, quarantine, the *Pike* test, congressional authorization, compensatory tax, and market participant doctrines have all failed as defenses to such doctrines. As a result, Wisconsin, and those who follow, must find other approaches to this problem.

IV. INSTANT DECISION

In the instant case, the court examined a Wisconsin statute that required out-of-state communities to implement Wisconsin-like recycling programs in order to utilize

⁶⁶ *Chemical Waste Management*, 504 U.S. at 345. The court offered Alabama two alternatives to the additional fee that would not violate the constitution: taxing citizen and non-citizen vehicles transporting waste by the mile, and a cap on the total waste allowed in its landfills. *Id.* Alabama had already enacted a tonnage limit in the portion of the statute that was upheld. But, as Justice Rehnquist pointed out in his dissent, requiring an evenhanded tax on transportation would serve to impose two taxes on citizens, as compared to only one tax on alien. Citizens would be required to pay for inspection and regulation of waste management out of general tax revenues as well as a tax aimed a transport, while the only burden placed on non-citizens would be the transport tax. *Id.* [Rehnquist, J., dissenting].

⁶⁷ The statute was enacted as MICH. COMP. LAWS ANN. §§ 299.401-437 [West 1978]. See *Fort Gratiot Sanitary Landfill*, 504 U.S. at 356.

⁶⁸ MICH. COMP. LAWS ANN. § 299.413a.

⁶⁹ *Fort Gratiot Sanitary Landfill*, 504 U.S. at 361.

⁷⁰ *Id.*

⁷¹ The court reiterated its stand, stating that, "[i]here is, however, no valid health and safety reason for limiting the amount of waste that a landfill operator may accept from outside the State, but not the amount that the generator may accept from inside the State." *Fort Gratiot Sanitary Landfill*, 504 U.S. at 367.

⁷² ORE. REV. STAT. §§ 459A.110(1), (5) [1991].

⁷³ *Oregon Waste Sys.*, 114 S. Ct. at 1351.

⁷⁴ *Id.* at 1355.

⁷⁵ *Id.* at 1351-52.

⁷⁶ *Id.* at 1352 [citing *Maryland v. Louisiana*, 451 U.S. 758-59 [1981], and *Alaska v. Arctic Maid*, 366 U.S. 199, 204-05 [1961] [other citations omitted].

⁷⁷ *Empire Sanitary Landfill, Inc. v. Pennsylvania*, 645 A.2d 413, 418 [1994].

⁷⁸ *Id.* at 416 [citing *Municipal Waste Planning, Recycling and Waste Reduction Act of July 28, 1988*, Pub. L. No. 556, codified as 53 P.S. §§ 4000.101-1904].

⁷⁹ *Empire Sanitary Landfill*, 645 A.2d at 416.

⁸⁰ *Id.* at 418.

⁸¹ *Id.* at 417. Another problem with the market participant allowance, although not addressed in this case, involves the monopoly prohibition. If the state can enter into contracts and craft them to the state's specifications, but cannot have a monopoly or control a substantial portion of a natural resource, the success it will enjoy in protecting its interests will be limited. The state can use its bargaining power to control the flow of waste to the landfills it owns, but the other owners are free to manage their landfills as they please. The state cannot step in and dictate the terms of other contracts, because it will be deemed a market regulator.

Wisconsin's landfills.⁸² The court held that the practical effect of the Wisconsin statute was to control conduct occurring wholly outside the borders of the state and as such was a direct violation of the Commerce Clause.⁸³

The court stated that, even if the Wisconsin statute was not in direct violation of the dormant Commerce Clause, its practical effect was impermissibly discriminatory against out-of-state waste haulers. The court reasoned that the statute warranted heightened scrutiny because out-of-state communities were forced to follow Wisconsin recycling practices regardless of the merit of their own recycling programs and because the waste generated in those communities was no more dangerous than waste generated in Wisconsin.⁸⁴

The court rejected Wisconsin's argument that the statute constitutes the least restrictive means of enforcing its pro-recycling policies. The court explained that because the Wisconsin statute was subject to heightened scrutiny, Wisconsin was required to show that its concerns could not "be adequately served by non-discriminatory alternatives."⁸⁵ The statute clearly indicated that if recyclable materials were separated and processed at a materials recovery facility then the waste would meet Wisconsin's environmental needs.⁸⁶ Because such a nondiscriminatory alternative existed, the statute could not be justified under a heightened scrutiny standard.⁸⁷

Regardless of whether the preceding two arguments were available, the court stated that the Wisconsin statute would still fail the balancing test laid out in

Pike.⁸⁸ Specifically, the court reasoned that the burdens imposed on out-of-state haulers far out-weighed any realizable benefits for Wisconsin.⁸⁹ Furthermore, the court stated that Wisconsin's interests were not furthered by requiring out-of-state communities to conform to Wisconsin recycling requirements.⁹⁰ For these reasons the court concluded that Wisconsin Statute §159.07(3) violated the Commerce Clause of the Constitution and was, therefore, invalid.

V. COMMENT

The Wisconsin statute has two important components. The first is waste containing any of eleven recyclable materials may not be dumped in the state of Wisconsin. No objection was made to this prohibition. The second part, and the real problem, is the exception to that general prohibition. Wisconsin will allow loads of waste that contain the outlawed materials to be dumped if the waste is generated by a community that presorts its recyclables. This exception appears to serve as a safety-net for haulers. Wisconsin is aware that recycling at the curb is not fool-proof, and, thus, has allowed for minor mistakes on the part of haulers. Since Wisconsin is able to regulate the disposal practices of its residents, it retains a measure of control over how often the exception is employed. Wisconsin can enforce recycling at the curb, and greatly reduce the amount of prohibited materials dumped in its landfills.

For waste generated within Wisconsin, this exception presents no controversy; however, waste coming from outside

Wisconsin's borders is another matter. The objection raised by NSWMA concerns the measure of control over out-of-state behavior the exception would give to Wisconsin. The exception is predicated on waste being generated in a community which has a recycling program like Wisconsin's, and, thus, compels out-of-state users of Wisconsin's landfills to implement such a program in an out-of-state community.

A. Rehnquist's Dissent

Chief Justice Rehnquist has dissented in every case argued before the Supreme Court involving Commerce Clause challenges to state waste dumping regulations from *Philadelphia* through *Oregon Waste Systems*. His argument is a variation on the quarantine exception to the dormant Commerce Clause. Rehnquist stated that, under the existing court position on quarantines, a state may dispose of infectious, dangerous, or noxious materials produced in the state as best it can, and forbid traffic of the same from out-of-state, even if the materials are identical.⁹¹ So, a state can make provisions to dispose of contagious cattle resident to the state, and prohibit importation of diseased cattle for disposal at the same facilities. "The physical fact of life that [a State] must somehow dispose of its own noxious items does not mean that it must serve as a depository for those of every other State."⁹² He then applied this rationale to solid waste. Just because a State has noxious solid waste of its own to dispose of, the Commerce Clause does not inflict on the state the duty to dispose of the same noxious solid

⁸² *National Solid Wastes Management Ass'n*, 63 F.3d at 654.

⁸³ *Id.* at 663.

⁸⁴ *Id.* at 658.

⁸⁵ *Government Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1279 (7th Cir. 1992).

⁸⁶ *National Solid Wastes Management Ass'n*, 63 F.3d at 662.

⁸⁷ *Id.* at 661. The court stated that requiring all waste entering the landfill to be treated at a recovery facility would fulfill Wisconsin's goals in a non-discriminatory way. *Id.* at 662. This would force on Wisconsin communities the added burden of a second screening of their waste, as Wisconsin towns were already required to separate their refuse. In the alternative, Wisconsin could stop requiring its citizens to recycle and instead have all the refuse treated at a reclamation facility. Bringing in a "middleman" reclamer to replace citizen sorting "at the curb" would greatly increase the cost of waste disposal. *Id.*

⁸⁸ *Pike*, 397 U.S. at 142.

⁸⁹ *National Solid Wastes Management Ass'n*, 63 F.3d at 662-63.

⁹⁰ *Id.*

⁹¹ *Philadelphia*, 437 U.S. at 632 (Rehnquist, J., dissenting).

⁹² *Id.*

waste produced from other states.⁹³

Rehnquist noted that solid waste disposal regulations, like Michigan's,⁹⁴ are indistinguishable from the regulations Nebraska imposed on the exportation of water resources and which the court upheld in *Sporhase*. The regulations apply equally to in-state and out-of-state consumers and are designed to protect against excessive depletion of a natural resource.⁹⁵ He stated that:

Commerce Clause concerns are at their nadir when a state act works in this fashion - raising prices for all the State's consumers, and working to the substantial disadvantage of other segments of the State's population - because in these circumstances 'a State's own political processes will serve as a check against unduly burdensome regulations' . . . In sum, the law simply incorporates the common sense notion that those responsible for a problem should be responsible for its solution to the degree they are responsible for the problem but no further.⁹⁶

Rehnquist argued that requiring states to accept out-of-state solid waste would force states with low-cost available land to convert that land to landfills in order to cope with the volume of incoming waste.⁹⁷ That, Rehnquist insisted, is not what the Commerce Clause is about.

Rehnquist was joined in *Philadelphia* by Chief Justice Burger, and in *Fort Gratiot* and *Oregon Waste Systems* by Justice Blackmun. With Burger and Blackmun retiring, Rehnquist has lost his support for

this argument, and it is difficult to imagine that he will be able to persuade the present court.

B. Quarantines

The Supreme Court, in every case it has considered, has denied the argument that a State can ban importation of waste because it poses a danger to the State. In every case the court has considered, however, the waste in question has been identical to waste produced and disposed of in-state. The court has left open the question of whether different, more dangerous waste, could be quarantined in the same way as diseased cattle or infected baitfish. In fact, the court has on numerous occasions alluded to the fact that a regulation may get court approval if it can be proven that the out-of-state waste somehow endangers or damages the state in a way that in-state waste does not.⁹⁸

In ruling out a quarantine designation for the Alabama additional fee provision the court cited *Guy v. Baltimore*,⁹⁹ which said, "In the exercise of its police powers, a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the health or which would endanger the lives or property of its people."¹⁰⁰ That case further stated that if the regulation was of a like kind of product that was distinct only in origin, the regulation would not be allowed.¹⁰¹ Further, upon declaring that the Michigan law was not a quarantine law, the court stated that the "conclusion would be different if the imported waste raised health or other concerns not presented by Michigan waste."¹⁰²

It is this distinction on which Wisconsin can capitalize. *National Solid Waste Management Association v. Meyer* is the first case that might provide compelling proof that out-of-state waste is significantly different from Wisconsin waste. Wisconsin has imposed upon its citizens stringent recycling and reclamation requirements. Provided these requirements are adequately enforced, Wisconsin waste will be substantially "cleaner" than out-of-state waste that is generated in an environment free of these regulations. Wisconsin waste will not contain the eleven forbidden recyclable materials. In addition, Wisconsin's available landfill space will not be squandered and the health of its citizens not endangered by noxious unseparated waste coming from out-of-state.

The challenges to this argument are three-fold. The first is definitional. Wisconsin will need to prove that this difference between its waste and out-of-state refuse is substantial enough to constitute a different "kind" of waste. Second, it also will need to prove that the difference makes the imported waste a danger to the health or safety of Wisconsin citizens. Third, it will need to prove that its interest in conserving landfill space is a compelling one.

The more difficult problem Wisconsin will face is convincing the court that there is no alternative, non-discriminatory means of achieving Wisconsin's end. In *Maine*, the quarantine law was upheld because out-of-state baitfish posed a danger in-state baitfish did not, and available inspection techniques were not adequate to detect the danger.¹⁰³ An opponent to Wisconsin could easily argue that there are

⁹³ *Id.* at 633.

⁹⁴ *Fort Gratiot Sanitary Landfill*, 504 U.S. at 372.

⁹⁵ In the case of solid waste disposal, the natural resource is an "attractive and safe environment." *Id.* at 371.

⁹⁶ *Id.*, quoting *Kassel v. Consolidated Freightways Corp. of Del.*, 450 U.S. 662, 675 (1981) [emphasis in the original].

⁹⁷ *Fort Gratiot Sanitary Landfill*, 504 U.S. at 373. "I see no reason in the Commerce Clause, however, that requires cheap-land States to become the waste repositories for their brethren, thereby suffering the many risks that such sites present." *Id.*

⁹⁸ The New Jersey law was found not to be a quarantine law because the waste was not damaging until after it entered the landfill, and at that point, it was identical to New Jersey generated waste. *Philadelphia*, 437 U.S. at 629.

⁹⁹ 100 U.S. 434 (1880).

¹⁰⁰ *Id.* at 443.

¹⁰¹ *Id.*

¹⁰² *Fort Gratiot Sanitary Landfill*, 504 U.S. at 367.

¹⁰³ *Maine*, 477 U.S. at 151-52.

alternative, less restrictive means to fulfilling Wisconsin's goals, namely, reclamation and inspection.

C. Reclamation and Inspection

Wisconsin could, as the court in this case suggested,¹⁰⁴ require that all waste be treated at a reclamation facility before entering the landfills, or that it be inspected for the presence of the prohibited articles. Mandatory treatment of waste at reclamation facilities would ensure that Wisconsin's goal of excluding recyclable materials from its landfills is achieved. If the requirement was imposed on domestic and foreign waste alike, the even-handed regulation would fall within an exception to the Commerce Clause and would be upheld provided that it could pass the *Pike* test. Despite its probable judicial success, Wisconsin will not likely want to implement this proposal because reclamation facilities are both expensive to operate and maintain. If the State undertakes the operation itself, it faces enormous costs which the citizens of Wisconsin must pay. If the State leaves reclamation to private companies, it must police those companies to ensure compliance, again, at a high cost to Wisconsin taxpayers. These are costs out-of-state haulers will not share, and ones Wisconsin cannot easily pass on via a compensatory tax.

Furthermore, because Wisconsin taxpayers are already separating their waste, domestic waste would be separated twice, once at the curb and once at the reclamation facility. If Wisconsin residents were willing to shoulder the burden of curb-side recycling, evidenced by the adoption of this provision, there is little likelihood that they will be willing to pay for someone else to do it a second time or in their place.

Another option open to Wisconsin is to require inspection of waste for

prohibited recyclables prior to disposal into the landfills. Here, again, the inspection statute would need to work even-handedly with regard to domestic and foreign waste, as well as, satisfy the *Pike* test. Instead of serving to discriminate against out-of-state commerce by stopping waste at the border, inspections would take place at the disposal site and, thus, burden Wisconsin citizen haulers with the same requirements as non-citizen haulers. This places it beyond the reach of strict scrutiny since such a statute would be neither facially discriminatory nor discriminatory in effect.

In order to survive the balancing test in *Pike*, Wisconsin may need to limit inspections to random spot-checking. Stopping and searching every load entering a landfill may so significantly slow the flow of commerce that it constitutes an impermissible impediment or undue burden. If that burden is not outweighed by Wisconsin's interest in preserving landfill space and environmental cleanliness, the plan will be held unconstitutional. Random sampling of loads entering the landfill may reduce this burden to permissible levels.

D. Enforcement - Fines

Wisconsin still has an enforcement problem. If it were allowed to inspect every load, it would be a simple matter to turn back those in violation of the ban. As a practical matter, however, turning back a randomly chosen violator serves only to place it farther back in the line formed at the disposal site. There is nothing to keep haulers from trying to sneak the same load through again as the odds of being randomly chosen on a second or third entry attempt plummet. There must be some form of deterrence to this type of action. Stiff fines may serve this purpose.

Violations of the Resource Conservation and Recovery Act (RCRA) carry fines

of up to \$25,000 per day the violation remains uncorrected.¹⁰⁵ The possibility of such severe fines acts as a fairly good incentive for companies to conform with RCRA standards. A fine not to exceed \$25,000 for each of the eleven types of prohibited recyclables found in a hauler's load may be sufficient for Wisconsin's purposes. That translates into a possible fine of as much as \$275,000 for a single load.¹⁰⁶ Such severe penalties should have a sufficiently deterring effect so that no hauler would dare try to dispose of prohibited wastes in Wisconsin landfills.

Alternatively, since fines are punitive in nature, Wisconsin may want to require a violator to forfeit a percentage of its company assets or revenues up to a legislatively set maximum. This would allow the court to "fine until it hurts," and would allow a level that varies from company to company. Both of these options leave the court discretion to punish based on the egregiousness of the offense or the number of violations.

Although statutorily imposed fines are commonplace, fines have been challenged on Constitutional grounds, as violative of the Eighth Amendment. The Eighth Amendment, although normally invoked in criminal cases to object to a penal sentence as being cruel or unusual, also prohibits excessive bail and excessive fines in civil cases. Eighth Amendment challenges to court-imposed civil fines, however, have rarely been successful.

In *Chicago, Rock Island and Pacific Railway Co. v. Davis*,¹⁰⁷ the court gave the standard for deciding when penalties are excessive. Acceptable penalties are "no more than reasonable and adequate to accomplish the purpose of the law and remedy the evil intended to be reached."¹⁰⁸ The Supreme Court, in *St. Louis Iron Mountain & Southern Railway Co. v. Williams*,¹⁰⁹ expanded on the

¹⁰⁴ See *supra* note 44.

¹⁰⁵ 42 U.S.C. § 6928(g) (1988).

¹⁰⁶ OSHA is permitted to impose a fine for every individual act or single course of action without violating its "egregious penalty policy." *Secretary of Labor v. Caterpillar Inc.*, OSHRC, No. 87-0922 (Feb. 5, 1993). It remains to be seen if this standard would be applied to fines for violations of Wisconsin's dumping laws and if the presence of each of the kinds of prohibited recyclables would amount to separate acts or courses of action.

¹⁰⁷ 170 S.W. 245 (1914).

"reasonable and adequate" standard and listed several factors to be considered when judging a fine. When a fine "is considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence . . . , we think it properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable."¹¹⁰ This standard leaves the legislature with enormous latitude in crafting fines and the courts with wide discretion in assessing them. In *United States v. Environmental Waste Control*,¹¹¹ the court gave guidelines for deciding the magnitude of a fine. The court stated that an Administrator must consider the seriousness of the violation and the efforts made to comply with RCRA requirements in assessing a fine accompanying a RCRA violation.¹¹² Finally, in *TXO Production Corp. v. Alliance Resources Corp.*,¹¹³ the court once again broadened the range of acceptable fines, concluding that a fine need only

bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be much greater.¹¹⁴

With these restrictions in mind, the fines imposed by Wisconsin law should be calculated to reflect the grievousness of the actual and potential harm to

Wisconsin's environment that would be caused by the accelerated filling of its landfills,¹¹⁵ the amount necessary to deter potential violators, and the reasonable relationship between the two.

Despite the Draconian nature of a rule forbidding the dumping of recyclables and the stiff fines associated with enforcing such a rule, Wisconsin should not be reluctant to go forward with its plan for fear of overburdening its own citizens. Wisconsin has already shown its willingness to bear the burden of citizen refuse-sorting and has already adopted such a rule. As a result, Wisconsin waste is already largely free of the prohibited items so the likelihood of one of Wisconsin's haulers being in violation should be relatively small. Furthermore, the threat of such a fine might prove a useful incentive for collectors and haulers to ensure that state recycling requirements aimed at communities are being met. It would be to the haulers advantage to enforce the state's mandate of curb-side recycling so as to avoid the risk of being penalized. Since state enforcement will be reduced, an additional waste collection fee may be needed. If Wisconsin citizens are required to pay collectors such a fee then it should be returned to the citizens in the form of state tax decreases.

The second benefit to Wisconsin citizens is the probable furtherance of the State's original goal, not being forced to dispose of out-of-state waste at all. Out-of-state haulers will be forced to screen their refuse meticulously before transporting it to Wisconsin landfills, and will, therefore, incur significant costs their Wisconsin counterparts avoid through curb-side

recycling. Furthermore, out-of-state haulers run the heightened risk of huge penalties levied against them if they fail in this endeavor. Eventually, it may become more cost effective for them to find other dumping grounds for their excess waste.

V. CONCLUSION

To date, states' efforts toward preserving landfill space have met with resistance in the courts. This has largely been due to the fact that states have directed their efforts on the transportation of out-of-state waste into their borders for disposal. The Commerce Clause has consistently defeated these attempts. Commerce Clause exceptions have also not been useful in securing states' aims. In order to avoid violating the Commerce Clause, states must focus their efforts away from the transportation of waste into its borders. Even-handed regulation seems the only answer. While Wisconsin has enacted an even-handed regulation, its enforcement policy has defeated it for the same reasons import restrictions were struck down: they singled out out-of-state commerce. A state that imposes random inspections and fines would work both as an even-handed regulation and an even-handed enforcement policy. As such, it has a good chance of withstanding judicial scrutiny, provided the state complies with the *Pike* balancing test and Eighth Amendment requirements. In the end, the answer to the states' environmental protection problems may lie in the willingness on the part of its citizens to burden themselves in order to ease the burden on their environment.

¹⁰⁸ *Id.* at 246.

¹⁰⁹ 251 U.S. 63 (1919).

¹¹⁰ *Id.* at 670 (upholding a \$200 judgement against railroad as not violative of Eighth Amendment; the actual damages were \$1.32 plus \$50 attorney's fees).

¹¹¹ 710 F.Supp. 1172 (1989).

¹¹² *Id.* at 1242.

¹¹³ 113 S. Ct. 2711, 2721 (1993), citing *Games v. Fleming Landfill, Inc.*, 413 S.E.2d, 897, 909 (1991).

¹¹⁴ *TXO Prod. Corp.*, 113 S. Ct. at 2721.

¹¹⁵ The largest concerns were: 1) Wisconsin's present landfill space would be consumed by recyclable materials, 2) Wisconsin would be forced to forfeit additional land to build new landfills, squandering Wisconsin's natural resources and inflicting on its citizens costs in terms of loss of use of these lands and decrease in value of adjoining properties, 3) the dangers associated with landfills would multiply with the increased number of landfills required, and 4) Wisconsin's air, land, and water ecosystems would be adversely affected. See *Philadelphia*, 437 U.S. at 630 (Rehnquist, J., dissenting). See also *Fort Gratiot Landfill*, 504 U.S. at 373 (Rehnquist, J., dissenting).