Volume 4 | Issue 2 Article 5

1993

The Future of Solid Waste Import Bans under the Dormant Commerce Clause: Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources

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THE FUTURE OF SOLID WASTE IMPORT BANS UNDER THE DORMANT COMMERCE CLAUSE: *FORT GRATIOT SANITARY LANDFILL, INC. v. MICHIGAN DEPARTMENT OF NATURAL RESOURCES*

> The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.[1]

I. INTRODUCTION

As our country nears the end of the 20th Century, there is little question that the problems associated with the disposal of our nation's garbage are nearing crisis proportions.[2] Unfortunately, while almost all would agree that there is a solid waste problem, there is no consensus on how to solve it. As existing landfills become filled to capacity, states must either develop new

1. THE FEDERALIST No. 22 (Alexander Hamilton).

2. There have been many articles written in recent years discussing the issue. *See, e.g.*, Anne Ziebarth, *Environmental Law: Solid Waste Transport and Disposal Across State Lines—The Commerce Clause Versus the Garbage Crisis*, 1990 ANN. SURV. AM. L. 365 (1991); Michael R. Harpring, Comment, *Out Like Yesterday's Garbage: Municipal Solid Waste and the Need for Congressional Action*, 40 CATH. U. L. REV. 851 (1991); David Pomper, Comment, *Recycling* Philadelphia v. New Jersey*: The Dormant Commerce Clause, Postindustrial "Natural" Resources, and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309 (1989).

Over 179 million tons of municipal solid waste are generated in the United States each year. Ann R. Mesnikoff, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home*, 76 MINN. L. REV. 1219, 1219 (1992).The four major ways in which states handle this vast solid waste problem are: source reduction, recycling, incineration, and landfilling. However, landfills ultimately receive 80% of all solid waste generated in this country. Jonathan P. Meyers, Note, *Confronting the Garbage Crisis: Increased Federal Involvement as a Means of Addressing Municipal Solid Waste Disposal*, 79 GEO. L.J. 567, 570 (1991). Considering that 40% of all landfills operating in the United States may become filled to capacity by 1995, it is clear that the nation's solid waste problem is growing at a rapid pace. David Wartinbee, Note, Swim Resource Systems, Inc. v. Lycoming County*: Our Barriers to Solid Wastes Are Growing*, 7 COOLEY L. REV. 527, 528 (1990).

landfill sites or export their solid waste to landfill facilities in other states.[3] Given the prevailing "Not In My Back Yard" mentality[4] in most communities, attempts to establish new landfill facilities are often politically infeasible.[5] Therefore, the latter option is frequently embraced.[6]

Not surprisingly, however, states which have traditionally accepted out-of-state waste into their landfills have become increasingly concerned about their ability to meet their own future waste disposal needs. To alleviate these concerns, several states have attempted during the last twenty years to erect barriers to the importation of out-of-state waste.[7] Unfortunately, in *City of Philadelphia v. New Jersey*,[8] the Supreme Court held that state imposed bans on the importation of wastes are, as a general rule, an impermissible infringement on interstate commerce.[9]

Despite *City of Philadelphia*, state legislatures in the intervening years have continued to implement a variety of environmental policies which effectively restrict the importation of waste into

3. *See* Meyers, *supra* note 2, at 571-72.

4. This phenomenon is often referred to by the acronym "NIMBY." For a fuller discussion of the "NIMBY" phenomenon, see Orlando E. Delogu, *"NIMBY" Is a National Environmental Problem*, 35 S.D. L. REV. 198 (1990).

5. "In 1988 approximately two-thirds of Americans opposed the siting of landfill facilities near their homes." Meyers, *supra* note 2, at 572. Citizen groups have several means by which to oppose the creation of new landfills including: legal delay, political pressure, legislative exemption, gubernatorial override, and extra-legal activities. *Id.*

Of course, there are other reasons why new landfill sites might not be a viable option for some communities. The geological characteristics of some areas make creating landfills environmentally inappropriate. Pomper, *supra* note 2, at 1336 n.147. Also, the costs of building and operating a landfill site present a further obstacle for already financially strained state and local governments. *See* Mesnikoff, *supra* note 2, at 1230. Interestingly, while states like New Jersey and Michigan have attempted to prevent out-of-state waste from being dumped within their borders, other states have passed legislation which prohibits solid waste from being exported. *See id.* at 1231-33 (discussing Rhode Island and Minnesota statutes placing prohibitions on export of solid waste). These laws are designed to protect in-state landfill facilities whose costs make them unable to compete with landfill owners in other states. *See id.* Unfortunately, export bans are in many ways just as vulnerable to attack under the Commerce Clause as are import bans. *Id.* at 1238.

6. According to recent estimates, over 15 million tons of solid waste are transported in interstate commerce annually. *See* Mesnikoff, *supra* note 2, at 1220.

7. Meyers, *supra* note 2, at 575. *See, e.g.*, ALA. CODE § 22-30B-2(a) (Supp. 1992); MICH. COMP. LAWS §§ 299.301-.437 (1987 & Supp. 1992); N.H. REV. STAT. ANN. § 147:28 (1990); N.J. STAT. ANN. § 13:1I-10 (West 1978) (repealed 1981); PA. STAT. ANN. tit. 35, §§ 6018.101-.1003 (1977 & Supp. 1992); R.I. GEN. LAWS § 23-19-13.1 (1989).

8. 437 U.S. 617 (1978).

9. *Id.* at 629.

their states.[10] By interpreting *City of Philadelphia* narrowly, these states had hoped to use alternative means to reach the same result: preserving their states' landfill capacity by curbing the importation of out-of-state waste. However, in *Fort Gratiot Landfill, Inc. v. Michigan Department of Natural Resources*[11] and *Chemical Waste Management, Inc. v. Hunt*,[12] the Supreme Court reaffirmed the basic tenets of *City of Philadelphia* by rejecting the attempts of Michigan and Alabama to circumvent the holding in that case.

This Note analyzes the *Fort Gratiot* decision in the context of *City of Philadelphia* as well as other relevant Dormant Commerce Clause[13] cases. While showing that the *Fort Gratiot* decision is faithful to general principles of constitutional law established in prior cases, this Note will demonstrate the significance which this decision will have on attempts to solve the problems of solid waste disposal at both the state and national level. Two major propositions will be asserted: 1) State and local governments will continue to possess considerable power to manage the allocation of landfill space within their borders; and 2) Congress, being the proper body to make national environmental policy under our constitutional system, will be more likely to enact comprehensive solid waste management legislation after *Fort Gratiot*.

II. FACTS

In 1978, to address the mounting problems of solid waste

10. *See* Meyers, *supra* note 2, at 575 ("Approximately twenty-five states have either passed or are considering laws that would restrict the amount of out-of-state waste allowed to cross their borders."). Minnesota, Michigan, Alabama, and Oregon are among the states which have placed restrictions on the importation of waste. *Id.*

In addition to legislative acts, governors have promulgated executive orders which restrict waste imports. *See* Stephen M. Johnson, *Beyond* City of Philadelphia v. New Jersey, 95 DICK. L. REV. 131, 132-34 (1990) (discussing W. Va. Executive Order No. 6-87 (1987) and Pa. Executive Order 1989-8 (1989)).

11. 112 S. Ct. 2019 (1992).

12. 112 S. Ct. 2009 (1992). In *Chemical Waste Management, Inc.*, an Alabama statute imposed a tax on hazardous wastes disposed of at in-state landfill facilities. Although this fee was presumably legitimate, the Supreme Court found an additional tax imposed on hazardous waste imported into Alabama from out-of-state unconstitutional under the Commerce Clause. *Id.* at 2011. For a general discussion of tax discrimination under the Commerce Clause, see Philip M. Tatarowecz and Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879 (1986).

13. The Supreme Court has consistently found that the Commerce Clause places an implicit limitation on the power of states to regulate or interfere with interstate commerce. This limitation on the states is commonly referred to as the "Dormant Commerce Clause." For a general discussion of the Dormant Commerce Clause, see *infra* notes 45-50 and accompanying text.

disposal within Michigan, the state legislature enacted a comprehensive Solid Waste Management Act (SWMA).[14] The SWMA required every county within the state to estimate the amount of solid waste[15] which it would generate within the next twenty years and formulate a plan for disposing of this waste in compliance with state health standards.[16] St. Clair County[17] subsequently devised a solid waste management plan which was approved by the Michigan Department of Natural Resources in 1983.[18] Signifi-

14. 1978 Mich. Pub. Acts No. 641 (codified as amended at MICH. COMP. LAWS ANN. §§ 299.401-.437 (West Supp. 1992)). The original act as well as amendments made to it prior to 1988 were never contested by Ft. Gratiot and remain effective even after the decision. *Fort Gratiot*, 112 S. Ct. at 2023.

15. Solid waste is defined by the SWMA as follows:

> Sec. 7.(1) "Solid waste" means garbage, rubbish, ashes, incinerator ash, incinerator residue, street cleanings, municipal and industrial sludges, solid commercial and solid industrial waste, and animal waste other than organic waste generated in the production of livestock and poultry. Solid waste does not include the following:
> (a) Human body waste.
> (b) Organic waste generated in the production of livestock and poultry.
> (c) Liquid waste.
> (d) Ferrous or nonferrous scrap directed to a scrap metal processor or to a reuser of ferrous or nonferrous products.
> (e) Slag or slag products directed to a slag processor or to a reuser of slag or slag products.
> (f) Sludges and ashes managed as recycled or nondetrimental materials appropriate for agricultural or silvicultural use pursuant to a plan approved by the director.
> (g) Materials approved for emergency disposal by the director.
> (h) Source separated materials.
> (i) Site separated materials.
> (j) Fly ash or any other ash produced from the combustion of coal . . .
> (k) other wastes regulated by statute.

MICH. COMP. LAWS ANN. § 299.407(7) (West Supp. 1992). For the purposes of this Note, the term "solid waste" will be given the same meaning as that used in Michigan's SWMA.

16. *Fort Gratiot*, 112 S. Ct. at 2021-22; *see also* MICH. COMP. LAWS ANN. § 299.425 (West 1984).

17. St. Clair County is located approximately 25 miles northeast of Detroit in the Detroit Metropolitan Statistical Area. It borders both Lake Huron and Lake St. Clair. Thus, it is conveniently located for the purposes of land and water transportation. HAMMOND'S GOLD MEDALLION WORLD ATLAS 250 (1989). Given its geographical accessibility, it is not surprising that the Fort Gratiot landfill appealed to other counties and states wishing to dispose of their solid waste.

St. Clair County, as well as the State of Michigan, was a defendant in the suit brought by Ft. Gratiot and remained a party through the case's final disposition before the Supreme Court. There are references throughout this Note to arguments made by the State of Michigan. It should be assumed that St. Clair County joined and supported these arguments even though St. Clair County will not be mentioned by name unless it is crucial to an understanding of the case.

18. Bill Kettlewell Excavating, Inc. v. Michigan Dep't of Natural Resources, 931 F.2d 413, 415 (6th Cir. 1991), *rev'd sub nom.* Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019 (1992). The plan

cantly, St. Clair County's plan made no provisions for the importation of waste from outside the county.[19]

Fort Gratiot Sanitary Landfill, Inc. (Ft. Gratiot) is a privately owned company which has operated a landfill in St. Clair County since 1971.[20] In 1987, Ft. Gratiot was issued a permit to operate a sanitary landfill in St. Clair County.[21] In December 1988, the Michigan Legislature amended the SWMA to impose restrictions on the importation of out-of-county waste.[22] On February 13, 1989, Ft. Gratiot applied to the St. Clair County Solid Waste Planning Committee[23] for approval to accept 1,750 tons of out-of-state waste per day.[24] Even though Ft. Gratiot had promised to reserve enough space to handle the solid waste disposal needs of St. Clair County for the next twenty years, its application was denied.[25]

Ft. Gratiot immediately sought declaratory judgment in federal district court claiming that the 1988 Waste Import Restric-

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was supposed to be updated every five years, but as of 1988 St. Clair County had not completed its preparation of an updated solid waste management plan. *Id.*

19. *Id.*

20. *Id.* at 414. Fort Gratiot is owned by Bill Kettlewell Excavating, Inc. In the lower court decisions, in fact, "Bill Kettlewell Excavating, Inc." appears in the case name. *See* Bill Kettlewell Excavating, Inc. v. Michigan Dep't of Natural Resources, 732 F. Supp. 761 (E.D. Mich. 1990), *aff'd*, 931 F.2d 413 (6th Cir. 1991), *rev'd sub nom.* Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019 (1992). Thus, it is important not to get confused by the different names and understand that both names refer to the same entity.

21. *Fort Gratiot*, 112 S. Ct. at 2022.

22. *Id.* The waste import restrictions provide: "A person shall not accept for disposal solid waste . . . that is not generated in the county in which the disposal area is located unless the acceptance of solid waste . . . that is not generated in the county is explicitly authorized in the approved county solid waste management plan." MICH. COMP. LAWS ANN. § 299.413a (West Supp. 1992). "In order for a disposal area to serve the disposal needs of another county, state, or country, the service . . . must be explicitly authorized in the approved solid waste management plan of the receiving county." MICH. COMP. LAWS ANN. § 299.430(2).

23. The County Solid Waste Planning Committee had the responsibility of developing and updating St. Clair County's Solid Waste Management Plan. However, the committee acted only in an advisory capacity and lacked the authority to give final approval to the plan. For the plan to become effective, it needed to gain approval from the County Board of Commissioners, two-thirds of the county's municipalities, and finally the Michigan Department of Natural Resources. *Bill Kettlewell*, 931 F.2d at 414-15.

24. *Fort Gratiot*, 112 S. Ct. at 2022.

25. *Id.* According to the staff report of the St. Clair County Metropolitan Planning Commission, the 1988 amendments to the SWMA combined with the absence of any authority in the county's solid waste management plan to allow the importation of out-of-county waste gave the Commission no choice but to reject Ft. Gratiot's application. *Bill Kettlewell*, 732 F. Supp. at 762.

tions were unconstitutional under the Commerce Clause.[26] Ft. Gratiot argued that the 1988 amendments together with the county's failure to provide for the acceptance of out-of-county waste in its management plan and the Planning Commission's denial of its application constituted impermissible discrimination against interstate commerce.[27] The district court denied Ft. Gratiot's motion for summary judgment and dismissed the complaint.[28]

The district court found that the SWMA amendments survived Commerce Clause scrutiny for three reasons. First, the statute did not discriminate on its face because the import restrictions applied both to counties within Michigan and to out-of-state exporters of waste.[29] Second, the statute did not discriminate in "practical effect" because each county was given discretion to accept out-of-state waste.[30] Third, any incidental effect on interstate commerce was not clearly excessive in relation to the public health and environmental benefits derived from the statute.[31] The Court of Appeals for the Sixth Circuit agreed with the

26. *Fort Gratiot*, 112 S. Ct. at 2022. In the district court and in the Court of Appeals for the Sixth Circuit, Fort Gratiot also argued that even if the statute was constitutional its due process rights under the 5th and 14th Amendments were violated. *Bill Kettlewell*, 931 F.2d at 418; *Bill Kettlewell*, 732 F. Supp. at 765. The two lower courts dismissed this part of Ft. Gratiot's argument in summary fashion. *See Bill Kettlewell*, 931 F.2d at 418; *Bill Kettlewell*, 732 F. Supp. at 765. The court of appeals determined that there was no taking of property since Ft. Gratiot could still operate the landfill for local waste. *Bill Kettlewell*, 931 F.2d at 418. In reaching its conclusion, the court found the burdens placed on Ft. Gratiot analogous to permissible burdens imposed by zoning laws. *Id.* Second, the court said that Fort Gratiot could not claim that it had been denied notice and an opportunity to be heard since it had failed to pursue available statutory remedies. *Id.* The lower courts were probably correct in their determination. However, since this aspect of the case was not preserved on appeal to the Supreme Court and is not relevant to the present discussion of the Commerce Clause, it will not be examined further.

27. *Fort Gratiot*, 112 S. Ct. at 2022; *Bill Kettlewell*, 732 F. Supp. at 762.

28. *Bill Kettlewell*, 732 F. Supp. at 766.

29. *Id.* at 764. Of course, this is not literally true since the Michigan county imposing the restriction is not limited in its exportation of solid waste by its own disposal plan.

30. *Id.* at 764-65. Under the Michigan statute, no county was forbidden from accepting out-of-county waste. In fact, each county was entitled to independently adopt a comprehensive plan which allowed the importation of out-of-county waste. Thus, the district court distinguished the statute from the one struck down by the Supreme Court in City of Philadelphia v. New Jersey, 437 U.S. 617 (1978), discussed *infra* notes 51-58 and accompanying text, where a single state official was given unlimited authority to completely ban the importation of out-of-state waste. *Bill Kettlewell*, 732 F. Supp. at 764.

31. *Bill Kettlewell*, 732 F. Supp. at 765.

district court's analysis and affirmed the decision.[32]

The United States Supreme Court granted Ft. Gratiot's petition for certiorari[33] because of an apparent conflict between the circuit court's decision and the standard set forth in *City of Philadelphia v. New Jersey*.[34] The Court reversed the court of appeals in a 7-2 decision,[35] concluding that the 1988 amendments to the SWMA were facially discriminatory to interstate commerce.[36] Therefore, the Court rejected the lower courts' determination that *City of Philadelphia* was not controlling and struck down the waste import restrictions as an unconstitutional infringement on the Commerce Clause.[37]

III. BACKGROUND

When the Constitution was written, it is difficult to imagine even its most ardent supporters ever contemplating that the federal government would become involved in deciding problems of municipal solid waste.[38] Today, the responsibility for managing the problems of solid waste in the United States remains, by and large, a matter of local concern.[39] Furthermore, the Tenth Amendment to the Constitution[40] would appear to give the states the authority to institute their own policies in the realm of solid

32. *Fort Gratiot*, 112 S. Ct. at 2023 (citing *Bill Kettlewell*, 931 F.2d at 417-18). Both the district and appellate courts found that the statute did not discriminate against interstate commerce on its face. *Id.* Therefore, it was not subject to the test set forth in *City of Philadelphia*. Rather, the courts applied the more lenient test of Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), discussed *infra* notes 59-61 and accompanying text.

However, the court of appeals did note in dictum that if all counties in Michigan had in fact banned out-of-state waste, then under the *City of Philadelphia* standard the case might very well have been decided differently and in favor of Ft. Gratiot. *Bill Kettlewell*, 931 F.2d at 418.

33. Certiorari was granted at 112 S. Ct. 857 (1992).

34. *Fort Gratiot*, 112 S. Ct. at 2023.

35. *Id.* at 2021. Justice Stevens gave the opinion of the Court, joined by Justices White, O'Connor, Scalia, Kennedy, Souter, and Thomas. Chief Justice Rehnquist, joined by Justice Blackmun, wrote a dissenting opinion, discussed *infra* notes 104-11 and accompanying text.

36. *Fort Gratiot*, 112 S. Ct. at 2028.

37. *Id.* at 2025-26.

38. *See* THE FEDERALIST No. 17 (Alexander Hamilton).

39. *See* Bruce Aber, Note, *State Regulation of Out-Of-State Garbage Subject to Dormant Commerce Clause Review and the Market Participant Exception*, 1 FORDHAM ENVTL. L. REP. 99, 101 (1989). The predominant role of local and state government in this area is illustrated by enterprises ranging from municipal trash collection to modern recycling programs. *Id.*

40. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

waste management while at the same time precluding interference in this regard from the federal government.[41] Nevertheless, the apparent sovereignty of the states in this area has been drastically limited and curtailed by the Commerce Clause.[42] This erosion has been the result of both affirmative acts of Congress[43] as well as judicial interpretation of the Constitution.[44]

Under the Dormant Commerce Clause, the Supreme Court has consistently maintained that the states may not isolate themselves economically from their sister states.[45] When Congress has

41. In Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), however, the Supreme Court demonstrated its unwillingness to find Congressional legislation enacted under the Commerce Clause unconstitutional on 10th Amendment grounds. The Court in *Garcia* held that a state-owned bus company was not immune from federal minimum wage laws under the 10th Amendment. *Id.* For a general discussion of the impact of *Garcia* on efforts to restrict the interstate transportation of solid waste, see James Hinshaw, Note, *The Dormant Commerce Clause After* Garcia*: An Application to the Interstate Commerce of Sanitary Landfill Space*, 67 IND. L.J. 511 (1992).

42. The Constitution, under the Commerce Clause, grants Congress the power "to regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8. For an overview of the limitations placed on the states by the Commerce Clause, see Meyers, *supra* note 2.

43. The best example of federal legislation tackling the problem of solid waste is the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6942-6949 (1988). Unfortunately, in comparison with the federal government's active regulation of other environmental problems, e.g., nuclear and hazardous waste, the supervision of solid waste management has been largely neglected. *See* Meyers, *supra* note 2, at 569. Thus, while the Commerce Clause enables Congress to institute a comprehensive national system for the disposal of solid waste, presently no such system exists. *See id.* The result is a conflicting pattern of state regulations. *See id.* In addition to the inefficiencies created by conflicting regulatory schemes, states lack the power to effectively solve the solid waste crisis because of the restrictions placed on them by the Dormant Commerce Clause, discussed *infra* notes 45-50 and accompanying text.

44. In *City of Philadelphia*, the Court summarized its role in interpreting the Commerce Clause vis-a-vis the states as follows:

> Although the Constitution gives Congress the power to regulate commerce among the States, many subjects of potential federal regulation under that power inevitably escape congressional attention "because of their local character and their number and diversity." In the absence of federal legislation, these subjects are open to control by the States so long as they act within the restraints imposed by the Commerce Clause itself. *The bounds of these restraints appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court giving effect to its basic purpose.*

City of Philadelphia, 437 U.S. at 623 (citations omitted) (emphasis added).

45. In H. P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949), Justice Jackson, in an often quoted passage, articulated the reasoning for the Court's position:

> The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state. While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may

not directly addressed an issue concerning interstate commerce, the states are implicitly limited in their power to pass legislation which infringes on that area.[46] However, this limitation on the states does not amount to a complete prohibition. If a state is exercising a legitimate police power, for example, the Court will ordinarily find such action constitutional if it creates merely an incidental and minimal effect on interstate commerce.[47]

Although Congress' right to preempt state regulation of solid waste is not seriously challenged today, the limits which the Dormant Commerce Clause places on the states are not so clear.[48] Whether a particular state law is found to violate the Commerce Clause depends to a large extent on a subjective balancing of competing state and federal interests.[49] Thus, although the Court has developed guidelines to distinguish permissible from impermissible state regulations, it is hard to predict with much certainty which laws will pass constitutional scrutiny.[50]

> not do in the absence of congressional action, nor how to draw the line between what is and what is not commerce among the states. Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution. . . . This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of health and safety. . . . This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units.

Id. at 534-38.

46. *See* Southern Pac. Co. v. Arizona, 325 U.S. 761, 779-80 (1945) ("[W]ithout controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation . . . .").

47. *See* Pike v. Bruce Church, Inc., 397 U.S. 139, 142 (1970). The *Pike* decision is discussed *infra* at notes 59-61 and accompanying text.

48. *See City of Philadelphia*, 437 U.S. at 622-23.

49. The Court explained the reasoning behind its balancing approach in *Southern Pac. Co.* as follows:

> In the application of these principles [underlying the commerce clause] some enactments may be plainly within and others plainly without state power. But between these extremes lies the infinite variety of cases in which regulation of local matters may also operate as a regulation of commerce, in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved.

Southern Pac. Co., 325 U.S. at 768-79.

50. *See Pike*, 397 U.S. at 142.

The benchmark case in the area of solid waste import bans is *City of Philadelphia v. New Jersey*.[51] In that case, Philadelphia challenged a New Jersey law which prohibited the importation of most solid waste into the state.[52] In determining that the New Jersey law was an impermissible restriction on interstate commerce, the Court explained the standard under which regulations governing the interstate transportation of waste were to be judged.[53] The Court differentiated between two types of barriers against interstate commerce: 1) those which are protectionist in nature, and 2) those which are evenhanded but have an incidental effect on interstate commerce.[54]

In *City of Philadelphia*, the Court found the statute to be protectionist.[55] As such, it fell under a per se rule of invalidity. Even

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51. 437 U.S. 617 (1978). For commentaries on *City of Philadelphia*, see Susan Adams Brietzke, Note, *Hazardous Waste in Interstate Commerce: Minimizing the Problem After* City of Philadelphia v. New Jersey, 24 VAL. U. L. REV. 77 (1989); Johnson, *supra* note 10; Pomper, *supra* note 2.

52. The statute under review in *City of Philadelphia* provided:

> "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 regulating the treatment and disposal of such waste in this State."

City of Philadelphia, 437 U.S. at 618-19 (citing N.J. STAT. ANN. § 13:1I-10 (West Supp. 1978)). Pursuant to this statute, the Commissioner promulgated regulations which, except for four narrowly defined categories, prohibited the importation of all out-of-state waste. *Id.* at 619 & n.2.

53. As a preliminary matter, the Court rejected the New Jersey Supreme Court's finding that the transportation of waste regulated by the statute did not constitute an "article of commerce" and thus did not warrant Commerce Clause protection. The Court repudiated the idea that the transportation of solid waste did not constitute commerce simply because the waste itself lacked any commercial value. *Id.* at 621-23. The Court clarified the apparent contradiction between this view and that of previous cases as follows:

> In [those cases which were found to withstand commerce clause scrutiny], the Court held simply that because the articles' worth in interstate commerce was far out-weighed by the dangers inhering in their very movement, States could prohibit their transportation across state line. Hence, we reject the state court's suggestion that the banning of "valueless" out of state wastes . . . implicates no constitutional protection. Just as Congress has power to regulate the interstate movement of these wastes, States are not free from constitutional scrutiny when they restrict that movement.

Id. at 622-23.

54. *Id.* at 623-24; *see also* Jonathan R. Stone, *Supremacy and Commerce Clause Issues Regarding State Hazardous Waste Import Bans*, 15 COLUM. J. ENVTL. L. 1, 16 (1990).

55. *City of Philadelphia*, 437 U.S. at 627.

if the legislative purpose behind the act was to protect the environment,[56] the Court said that such legitimate ends are not justified, absent extraordinary circumstances, if they are achieved through discriminatory means.[57] The only way to overcome the presumption of invalidity is for the state to show that the statute serves a legitimate local interest under the police power and that there are no alternative, less discriminatory means of promoting these interests.[58]

The Court distinguished the strict standard used to decide *City of Philadelphia* from the less stringent standard enunciated in *Pike v. Bruce Church, Inc.*[59] In *Pike*, the statute under scrutiny regulated evenhandedly and imposed only an incidental burden on interstate commerce.[60] When determining the constitutionality of statutes of this class, the Court uses a balancing test and will "uph[o]ld [the legislation] unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."[61]

Although the *City of Philadelphia* and *Pike* tests provide the

56. *Id.* at 626-27. The Court found that the purpose of the act was immaterial for determining its legitimacy. "[T]he evil of protectionism can reside in legislative means as well as legislative ends. Thus, it does not matter whether the ultimate aim . . . is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution." *Id.* at 626.

57. *Id.* at 626-27. In the words of the Court: "[W]hatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Id.*

58. This standard has long been recognized by the Court, most notably in cases involving "quarantine laws," discussed more fully *infra* notes 62-64 and accompanying text. For example, in Maine v. Taylor, 477 U.S. 131 (1986), a Maine statute placed an outright ban on the importation of live baitfish. *Id.* at 132. Since this constituted facial discrimination, the Court applied the strict scrutiny test used in *City of Philadelphia*. *See id.* at 138. Nevertheless, the statute was upheld because it protected native species from parasitic infection and there were no alternative means by which to achieve the same legitimate state interest. *Id.* at 151-52; *see also* Mintz v. Baldwin, 289 U.S. 346 (1933) (upholding New York statute prohibiting importation of cattle unless they were certified as being free from Bang's disease).

59. *City of Philadelphia*, 437 U.S. at 624. In Pike v. Bruce Church, Inc., 397 U.S. 139 (1970), an Arizona statute requiring the in-state packaging of cantaloupes before they could be shipped out-of-state was found to discriminate in effect against an Arizona grower. *Id.* at 146. Previously, the grower had relied on a nearby California packaging plant. *Id.* at 139. In order to comply with the statute, the grower would have had to expend $200,000 to establish his own facility. *Id.* at 140. The Court found that the burden outweighed Arizona's interest in protecting the general reputation of its cantaloupe industry, especially considering the superior quality of Church's crop. *Id.* at 144-46.

60. *Pike*, 397 U.S. at 142-43.

61. *Id.* at 142.

general parameters for Dormant Commerce Clause analysis of solid waste regulations promulgated at the state level, there are several important exceptions to these rules.

First, the Court has consistently recognized the legitimacy of quarantine laws.[62] In so doing, it has differentiated between improper attempts at economic protectionism and valid health and safety regulation under the police power.[63] Although the validity of quarantine laws has been established primarily in agriculture cases, there is nothing preventing states from imposing similar regulations in other contexts.[64]

A second type of restriction on interstate commerce which the courts have upheld is state regulations attempting to prevent the depletion of scarce natural resources.[65] Cases involving these

62. For example, in Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951), the Court struck down a city ordinance which required all milk sold within the city limits to be pasteurized within a five mile radius of the center of Madison. The Court found that the goal of insuring safe milk for city residents, laudable as it may have been, could have been achieved through other non-discriminatory means. *Id.* at 354-55. The Court, relying on Brimmer v. Rebman, 138 U.S. 78 (1891) (holding Virginia statute requiring inspection of all meats slaughtered more than one hundred miles from place of sale unconstitutional), rejected the view that the ordinance was non-discriminatory since it burdened Wisconsin milk suppliers outside the five mile radius as well as suppliers from out-of-state. *Dean Milk Co.*, 340 U.S. at 354 n.4.

63. *See, e.g., Dean Milk Co.*, 340 U.S. 349 (1951); Baldwin v. Seelig, 294 U.S. 511 (1935); *Brimmer*, 138 U.S. 78 (1891); Minnesota v. Barber, 136 U.S. 313 (1890).

64. *See H. P. Hood & Sons*, 336 U.S. at 531-32 ("[The Court recognizes the] broad power in the State to protect its inhabitants against perils to health or safety, fraudulent traders and highway hazards even by use of measures which bear adversely upon interstate commerce.").

65. *See* Sporhase v. Nebraska, 458 U.S. 955 (1982). In *Sporhase*, the Court struck down a statute which prohibited the transport of ground water to another state which did not have a reciprocal agreement with Nebraska. *Id.* at 960. Nevertheless, the Court recognized in dictum that states have a heightened interest in protecting their water resources. *Id.* at 956. The Court stated:

> [T]he legal expectation that under certain circumstances each state may restrict water within its borders has been fostered over the years not only by our equitable apportionment decrees, but also by the negotiation and enforcement of interstate compacts. Our law therefore has recognized the relevance of state boundaries in the allocation of scarce water resources.

Id. (citations omitted).

Water, being essential for human life, has traditionally enjoyed a privileged status. *See id.* However, the courts, especially in modern cases, have been less deferential towards state regulation of other natural resources. *See, e.g.*, Pennsylvania v. West Virginia, 262 U.S. 553 (1923) (finding West Virginia statute unconstitutional which required natural gas producers to supply all domestic needs before exporting any of their supplies to out-of-state parties); Hughes v. Oklahoma, 441 U.S. 322 (1979) (finding law prohibiting out-of-state sale of minnows unconstitutional) (overruling Geer v. Connecticut, 161 U.S. 519 (1896), holding that state's control over wild animals fell beyond reach of Commerce

types of restrictions are relevant to the discussion at hand if landfill space is characterized as a natural resource.[66]

Perhaps the most important way in which states have avoided the strictures of the Dormant Commerce Clause is through what has become known as the Market Participant Exception.[67] Under the Market Participant Exception, a state in its business dealings may discriminate against out-of-state interests in favor of its own citizens.[68] Thus, a state-owned enterprise may in some instances legitimately choose not to conduct business with out-of-state parties.[69] This is true even though regulations restricting privately owned businesses engaged in exactly the same activity would violate the Commerce Clause.[70]

Clause). Although the preservation of landfill space is undoubtedly an important conservation measure, it is unlikely that the courts, absent Congressional legislation, would find that states have the same inherent right to protect landfill space as they do to preserve the state water supply.

66. In *City of Philadelphia*, the Court did not directly address the issue of whether landfill space is a natural resource. *See City of Philadelphia*, 437 U.S. at 627. However, the decision in *City of Philadelphia* strongly points to such a conclusion. *Id.*

67. The three major cases involving the Market Participant Exception are White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204 (1983) (upholding requirement by City of Boston that all construction projects funded with aid of city money employ at least 50% city residents); Reeves, Inc. v. Stake, 447 U.S. 429 (1980) (upholding South Dakota's policy of restricting sales from state-owned cement factory to state residents under Market Participant Exception); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) (upholding Maryland program designed to rid state of abandoned automobiles by paying bounties to scrap processors even though it favored in-state processors over those from out-of-state).

68. *See Hughes*, 426 U.S. at 810. The Court has determined that "[n]othing in purposes animating the Commerce Clause prohibits a state, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.*

69. *Id.* at 809-10.

70. *Id.* at 806. Nevertheless, if the state's actions go beyond that of a market participant and have the effect of regulating the entire industry, they will in all likelihood be invalidated by the courts. The limits of the Market Participant Exception are described in South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984) (holding sales of trees by state-owned corporation conditioned on trees being processed in-state did not fall under Market Participant Exception). The Court said:

> The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market. Unless the "market" is relatively narrowly defined, the doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry.

Id. at 97-98.

When a state passes legislation which establishes one standard for its own citizens and another standard for those outside its borders, it is fairly clear that the *City of Philadelphia* test should be applied.[71] How, though, should municipal or county regulations be judged when they discriminate against non-local interests, both in-state and out-of-state, in favor of local interests? Some courts have held that local regulations of this kind are uniform since they apply equally to intrastate and interstate commerce.[72] Under this view, these local regulations would be judged according to the less stringent *Pike* test.

The majority view, though, appears to be that for the purposes of Commerce Clause analysis, it is irrelevant whether the regulations in question are promulgated by the state or by local government.[73] If a regulation discriminates against interstate commerce and gives preferential treatment to in-state parties, it is facially defective and will be struck down unless it can survive scrutiny under *City of Philadelphia*.[74] The regulation is no less susceptible to scrutiny under the Commerce Clause because it has the added feature of discriminating against in-state individuals as well as out-of-state parties.[75]

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71. *See City of Philadelphia*, 437 U.S. at 627.

72. *See, e.g.*, Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist., 820 F.2d 1482 (9th Cir. 1987); Glassboro v. Gloucester County Bd., 495 A.2d 49 (N.J. 1985); Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia, 417 N.E.2d 78 (N.Y. 1980).

73. *See, e.g.*, B.F.I. Medical Waste Sys., Inc. v. Whatcom County, 756 F. Supp. 480 (W.D. Wash. 1991); Industrial Maintenance Serv., Inc. v. Moore, 677 F. Supp. 436 (S.D. W. Va. 1987); Shayne Bros., Inc. v. Prince George's County, 556 F. Supp. 182 (D. Md. 1983). These decisions correspond with long established principles of constitutional law. Over a century ago, in Minnesota v. Barber, 136 U.S. 313 (1890), the Court said:

> [A] statute may upon its face apply equally to the people of all the states, and yet be a regulation of interstate commerce which a state may not establish. A burden imposed by a state is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the state enacting such statute.

Id. at 326. The modern Court has continued to adhere to this position. For example, in Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951), discussed *supra* note 62, relying on Brimmer v. Rebman, 138 U.S. 78 (1891) (holding Virginia statute requiring inspection of all meats slaughtered more than one hundred miles from place of sale unconstitutional), the Court rejected the view that the milk ordinance was non-discriminatory since it burdened Wisconsin suppliers outside the five mile radius as well as suppliers from out-of-state. *Dean Milk Co.*, 340 U.S. at 354 n.4.

74. *See City of Philadelphia*, 437 U.S. at 627. The key to the analysis is not whether there are in-state parties which are discriminated against but whether there are out-of-state parties who are discriminated against.

75. *See Dean Milk Co.*, 340 U.S. at 354; *Barber*, 136 U.S. at 326.

IV. DISCUSSION

In deciding *Fort Gratiot*, the Supreme Court focused its inquiry on the specific question of "the validity of the [Michigan] Waste Import Restrictions as they apply to privately owned and operated landfills."[76] It is important to recognize that the impact of the Court's decision on state efforts to restrict the importation of out-of-state waste is limited from the outset by a narrow framing of the issue. The Court explicitly refrained from deciding any questions pertaining to the constitutionality of three important issues: 1) Michigan's 1978 SWMA as enacted and implemented prior to the 1988 Waste Import Restrictions amendments;[77] 2) restrictions on the importation of hazardous waste based on public health and safety considerations;[78] and 3) states acting as market participants.[79]

In reaching its decision, the Court relied extensively on *City of Philadelphia*.[80] Initially, the Court dismissed any claims that the Michigan regulations fell outside the power of the Commerce Clause. The Court recognized that no matter how the business activities of Ft. Gratiot and its out-of-state customers are characterized, the transportation of solid waste over state lines falls under the rubric of interstate commerce.[81]

The Court, following the Dormant Commerce Clause analy-

76. *Fort Gratiot*, 112 S. Ct. at 2023.

77. *Id.*

78. *Id.* Although not directly addressing the validity of hazardous waste regulations in *Fort Gratiot*, the Court in Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992), demonstrated that the strict scrutiny test of *City of Philadelphia* would be applied in hazardous waste cases as well. *Id.* at 2015 & n.6. The major distinction between regulations controlling hazardous waste and those controlling nonhazardous waste is factual. Although the same constitutional standard is applied to both, the former may present health and safety considerations which warrant protection under the "quarantine" exception of the Commerce Clause while the latter does not. *See Fort Gratiot*, 112 S. Ct. at 2027.

For an analysis of the specific problems associated with state efforts to ban hazardous waste imports, see Brietzke, *supra* note 51; Stone, *supra* note 54.

79. *Fort Gratiot*, 112 S. Ct. at 2023. For a discussion of the Market Participant Exception, see *supra* notes 67-70 and accompanying text. Also, the impact of the Court's failure to address this issue is discussed *infra* notes 121-23 and accompanying text.

80. *Fort Gratiot*, 112 S. Ct. at 2023. For a discussion of *City of Philadelphia*, see *supra* notes 51-58 and accompanying text.

81. *Fort Gratiot*, 112 S. Ct. at 2023. In the words of the Court: "Whether the business arrangements between out-of-state generators of waste and the Michigan operator of a waste disposal site are viewed as 'sales' of garbage or 'purchases' of transportation and disposal services, the commercial transactions unquestionably have an interstate character." *Id.*

sis set forth in *City of Philadelphia*,[82] applied a strict scrutiny test to the Michigan statute.[83] The Court said that the statute facially discriminated against interstate commerce since it authorized every county in Michigan to "isolate itself from the national economy."[84] Furthermore, the Court found that Michigan had failed to give any reason, other than the waste's point of origin, for discriminating against out-of-county waste.[85] Therefore, the Michigan statute did not pass constitutional muster under the strict scrutiny test of *City of Philadelphia*.[86]

Michigan attempted to distinguish the Waste Import Restrictions at issue from those struck down in *City of Philadelphia*.[87] It maintained that the statute regulated evenhandedly to promote local interests and that the Court should therefore uphold the restrictions under the less stringent standard of *Pike*.[88] Under that test, Michigan maintained that the regulations should be upheld since "the burden on interstate commerce is not clearly excessive in relation to the local benefits."[89]

Nevertheless, the Court did not determine whether the regulations would have passed scrutiny under the *Pike* test since it rejected Michigan's claim that the regulations were "evenhanded."[90]

In determining that the statute did not regulate evenhandedly, the Court compared the Michigan statute to state regulations imposed on the food industry which have consistently been

82. For a discussion of the Dormant Commerce Clause test set forth in *City of Philadelphia*, see *supra* notes 51-58 and accompanying text.

83. *Fort Gratiot*, 112 S. Ct. at 2024.

84. *Id.* at 2024. The Court emphasized this point as follows: "Indeed, unless a county acts affirmatively to permit other waste to enter its jurisdiction, the statute affords local waste producers complete protection from competition from out-of-state waste producers who seek to use local waste disposal areas." *Id.*

85. *Id.*

86. *Id.* at 2028.

87. *Id.* at 2024.

88. For a discussion of the standard under *Pike*, see *supra* notes 59-61 and accompanying text.

89. *Fort Gratiot*, 112 S. Ct. at 2024 (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

90. *Id.* It is worth noting that even if the court had applied the *Pike* test, the regulations would probably still have been struck down in light of the opinion that Michigan had failed to identify any reason apart from origin why solid waste coming from outside the county should be treated differently from solid waste within the county. *See id.*; *cf.* Diamond Waste, Inc. v. Monroe County, 731 F. Supp. 505 (M.D. Ga. 1990), *aff'd*, 939 F.2d 941 (11th Cir. 1991) (holding ban of out-of-county waste unconstitutional under *Pike* test even though it was not invalid per se under *City of Philadelphia*).

found to violate the Commerce Clause.[91] A common characteristic of those food regulations is that they gave preferential treatment to local interests at the expense of both in-state and out-of-state non-local interests.[92] However, the Court has refused to find that the discriminatory character of such regulations is diminished solely because they penalize both in-state and out-of-state interests.[93] In *Fort Gratiot*, the Supreme Court reaffirmed this long held position.[94]

The Court also noted that the discriminatory character of the Michigan statute was not changed merely because it did not require counties to ban out-of-state wastes or because some counties in Michigan permitted the importation of out-of-county and out-of-state wastes.[95] As in *City of Philadelphia*, flexibility built into the statute allowing exceptions to the general restraints imposed on interstate commerce was found not to negate the discrimination, but merely to limit the scope of the discrimination.[96]

Michigan also tried to distinguish this case from *City of Philadelphia* on the grounds that the SWMA is not an economic protectionist measure but rather a "comprehensive health and safety regulation."[97] Michigan argued that landfill space was a natural resource which needed to be preserved for the benefit of its citizens.[98] Although the Court conceded that "in times of severe shortage" states may implement policies to protect certain natural resources[99] such as groundwater, it determined that Michigan had neither shown a severe shortage of a natural resource nor that the statute served to protect that resource in the most non-

91. *Fort Gratiot*, 112 S. Ct. at 2025. The Court relied on *Brimmer* and *Dean Milk*, discussed *supra* note 62.

92. *See Fort Gratiot*, 112 S. Ct. at 2025.

93. *Id.*

94. *Id.* at 2025-26. In the words of the Court: "[O]ur prior cases teach that a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself." *Id.* at 2024.

95. *Id.* at 2025.

96. *Id.* Apparently, when determining whether a law discriminates against interstate commerce, the extent of the discrimination is of little import: either the law discriminates or it does not. *See id.*

97. *Fort Gratiot*, 112 S. Ct. at 2026.

98. *Id.* Michigan relied extensively in their argument on Sporhase v. Nebraska, 458 U.S. 955 (1982), discussed *supra* note 65.

99. The Court never definitively answered the question of whether landfill space would ever be classified in this category. *See Fort Gratiot*, 112 S. Ct. at 2026-27. Nevertheless, it recognized that states have traditionally enjoyed a legitimate expectation of control over private landfills. *Id.* at 2027 n.7.

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discriminatory fashion.[100]

However, the Court recognized that if the banned out-of-state waste possessed other characteristics which made importing it inherently dangerous, the result could have been different.[101] For example, restrictions on the importation of certain animals and agricultural products have been upheld where there was a risk of contaminating native species.[102] Thus, after the decision there remained the possibility that the banning of other types of waste, such as hazardous wastes, might be justified notwithstanding the Commerce Clause.[103]

Chief Justice Rehnquist, in his dissent, criticized the majority's disposition of the case on the grounds that the SWMA is directed at what are arguably "legitimate local concerns."[104] Although his opinion provides a forceful argument for implementing restrictions on the interstate transportation of solid waste,[105] it does not persuasively refute the majority's view. Given the discriminatory effect of the Michigan statute, the legislature's purpose in enacting it is largely irrelevant.[106] The major-

100. *Id.* at 2027. The Court said that there were other means by which Michigan could slow the influx of waste into its landfills. *Id.*

101. *Id.* The dissent, in fact, argued that the case should be remanded so that Michigan could have the opportunity to show that the statute addressed legitimate concerns of local health and safety. *Id.* at 2028 (Rehnquist, C.J., dissenting). Of course, to a certain extent solid waste is inherently dangerous. Obviously, a major impetus behind the creation of landfills and the unwillingness of many communities to provide sites for new landfills is the recognition of the undesirability and potential health risks associated with garbage. *See id.*

However, there is a significant difference between the dangers posed by solid waste and those posed by tainted agricultural products. The former are readily apparent and are no greater than those presented by in-state solid waste. In contrast, contaminated agricultural products transported into a state cause more troubling consequences. First, safeguards imposed by the state to protect consumers are undermined when out-of-state products are introduced into the marketplace. Second, and most importantly, infectious products have the potential of not only spreading disease directly but also of contaminating entire industries by creating an epidemic.

102. *See Fort Gratiot*, 112 S. Ct. at 2027 (citing Maine v. Taylor, 477 U.S. 131 (1986), discussed *supra* note 58).

103. *Id.* As indicated by Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992), discussed *supra* note 12, though, the Court is unlikely to sanction discriminatory state legislation involving hazardous waste unless the state demonstrates a health and safety interest related to the waste's point of origin. *Id.* at 2016.

104. *Fort Gratiot*, 112 S. Ct. at 2028 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist would have remanded the case to allow Michigan to argue this point. *Id.*

105. *See id.* at 2028-32.

106. *See City of Philadelphia*, 437 U.S. at 626. For Commerce Clause analysis, differences between purposes and ends have been found to be largely irrelevant. *Id.* Rehnquist appears to conclude that the nature of solid waste shows in and of

ity was therefore correct in following *City of Philadelphia* and holding the Michigan statute unconstitutional.

Furthermore, Chief Justice Rehnquist appears to overlook the narrowness of the majority's holding. His suggestion that the Court's decision will "encourag[e] each state to ignore the waste problem in the hope that another will pick up the slack"[107] overdramatizes the impact of the majority's position.[108] First, the Court's holding does not preclude the continuation of most forms of environmental regulation at the state level.[109] Second, the Court apparently would uphold import restrictions in the future if they promoted sufficient health or safety concerns not present in *Fort Gratiot*.[110] Third, Chief Justice Rehnquist apparently discounts the ability of Michigan's citizens to address their concerns through the national political process.[111]

In the final analysis, Chief Justice Rehnquist's argument is not so much wrong as it is irrelevant. The fundamental question in *Fort Gratiot* is not whether state restrictions on the importation of solid waste are the best way to solve a mounting environmental crisis. Rather, it is whether under our federal system, the states are the proper forum in which to address the problem. The majority recognized that the role of the Court is not to impose its views of correct economic and environmental policy on the

itself that there are legitimate local purposes. *Fort Gratiot*, 112 S. Ct. at 2028-29. However, the majority opinion makes clear that such an argument was never raised, let alone substantiated, by the State of Michigan. *Id.* at 2026-27 & n.8.

107. *Fort Gratiot*, 112 S. Ct. at 2030-31.

108. Given Chief Justice Rehnquist's conservative judicial philosophy, one must question whether he is as much concerned with the future of the environment as he is with the encroachment on states' rights by the federal government. *See* Glenn A. Phelps, *The Myth of Jurisprudence: Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan*, 31 SANTA CLARA L. REV. 567 (1991).

109. In both *Fort Gratiot* and *Chemical Waste Management, Inc.* the Court gives examples of what would be valid regulations. *Fort Gratiot*, 112 S. Ct. at 2027; *Chemical Waste Management, Inc.*, 112 S. Ct. at 2015. Although the effectiveness of environmental regulation may arguably be diminished by the decision, there remain large incentives to implement environmental regulation. Imposing uniform standards for the disposal of solid waste within Michigan would indirectly force out-of-state parties to raise their standards. This type of regulation, although still subject to scrutiny under the *Pike* standard, would be much more likely to be found constitutional.

110. *Fort Gratiot*, 112 S. Ct. at 2027.

111. Chief Justice Rehnquist is not alone in thinking that the national political process may be an inadequate forum in which to solve the solid waste problem. *See, e.g.*, Pomper, *supra* note 2, at 1316-17. However, the ability of Congress to pass environmental legislation addressing a wide variety of problems including water pollution, air pollution, and nuclear waste disposal demonstrates that it is possible to get this type of legislation enacted. *See* Harpring, *supra* note 2, at 861.

states.[112] A major impetus behind the adoption of our federal system was the realization that a system of free trade was imperative if our country was to survive.[113] Under the Constitution, the states have relinquished their power to regulate interstate commerce to Congress.[114] In *Fort Gratiot*, the Court reaffirmed its long held position that states may not, except under extraordinary circumstances, act in contradiction to this general prohibition.[115] Whatever the ultimate merits of a state policy discriminating against interstate commerce may be, the Court lacks the authority to sanction that which is void *ab initio*.[116]

V. CONCLUSION

By striking down Michigan's SWMA in *Fort Gratiot*, the Supreme Court has sent a message not only to Michigan but to all fifty states that environmental legislation which imposes restric-

112. Of course, Michigan approves of the policy. However, the Court in its decision is protecting not only the interests of Ft. Gratiot but also the interests of out-of-state parties who may wish to do business with Ft. Gratiot. While Rehnquist may be correct that the statute places a burden on Michigan's residents, this has not and should not be the test for determining whether a law is discriminatory. In theory, all restrictions on free trade place burdens on in-state residents. *See* R. LIPSEY & P. STEINER, ECONOMICS 732-59 (6th ed. 1981) (discussing general economic principles of free trade). History has demonstrated, most notably in the context of racial discrimination, that in-state political restraints are not always sufficient to prevent discrimination. *See* John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1420 (1986) ("[I]t is the government—which may resort to pernicious legislation such as the apartheid laws in South Africa—not the free market, that stands as the potential enemy of the victims of discriminatory conduct."); Martin J. Katz, *The Economics of Discrimination: The Three Fallacies of* Croson, 100 YALE L.J. 1033, 1038-39 (1991). Often, a majority of state residents may be willing to shoulder a slightly increased burden which subjects a small minority of the state's population to an even greater hardship. *See, e.g.*, Katz, *supra*, at 1038-39 ("Consumers may be willing to pay more for white-made products; or white workers may be willing to accept a cut in pay to work in an all-white work environment. Any of these forms of discrimination will raise the cost of hiring blacks, so that a profit-maximizing employer will prefer to hire whites."); *see also* LIPSEY & STEINER, *supra*, at 368-77 (discussing general economic principles of discrimination).

Presumably, the dissenters believe that they are protecting the fundamental state right of Michigan to govern its own affairs. However, if the Court had upheld the MSWA, it would have been abridging the rights of other states to have access to open markets. *See* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 535 (1949). If the Court begins making exceptions to the general principle of free trade between the states based on its own policy considerations, there will be very little preventing the states from setting up substantial trade barriers in a multitude of other contexts.

113. *See H.P. Hood & Sons*, 336 U.S. at 533.

114. *Id.* at 533-34.

115. *See Fort Gratiot*, 112 S. Ct. at 2023-24.

116. *Id.*

tions on interstate commerce will undergo rigorous scrutiny by the courts. The rules enunciated in *City of Philadelphia* have become firmly entrenched principles of Constitutional law. Any indication that the Court might retreat from the core holding of *City of Philadelphia* has been repudiated.[117]

Undoubtedly, some commentators may view the *Fort Gratiot* decision as a terrible defeat for environmentalists.[118] However, a more optimistic view towards the prospects of solving the nation's solid waste crisis is warranted. States still have several significant avenues available by which they can not only regulate the influx of solid waste into their existing landfills today but can also plan for their solid waste disposal needs of the Twenty-First Century. First, states like Michigan, as long as they do not discriminate against out-of-state interests in favor of their own citizens, may continue to impose rigorous environmentally based regulations for solid waste disposal within their borders.[119] By raising their own environmental standards, landfill states may indirectly cause garbage exporting states to promote conservation.[120] Thus, while states may not place blanket prohibitions on the importation of out-of-state waste, they may still be able to substantially ebb the flow of such waste.

Second, states which are concerned about their future ability to provide landfill space for their own citizens may actively preserve landfill space under the Market Participant Exception.[121] *Fort Gratiot* in no way prevents publicly-owned landfills from discriminating against out-of-state parties.[122] Also, through the

117. *Id.* at 2021.

118. *See, e.g.*, Ruth Marcus, *High Court Rejects State Waste Disposal Limits*, WASH. POST, June 2, 1992, at A3; David G. Savage, *High Court Rejects Curbs on Waste Dumps; Law: States Are Barred from Imposing Bans and Higher Fees on Garbage and Toxic Materials from Outside Their Borders*, L.A. TIMES, June 2, 1992, at A12.

119. This will undoubtedly raise the costs of solid waste disposal. There may be limits to how far a state can go in this direction. However, the Court has indicated that the limits are fairly broad. *See City of Philadelphia*, 437 U.S. at 626-27. Presumably, intra-county planning would be permissible as well, as long as it did not impinge on out-of-state interests.

120. This is accomplished in two ways. First, if a state wants to continue to export solid waste to the landfill state, they will have to comply with the heightened standards. Second, if a state chooses not to comply, it will be forced to either find another state which will accept the waste or increase its own landfill capacity. If enough landfill states raise their standards, finding alternative out-of-state landfill sites will not be a viable option. Conversely, if the state chooses to use in-state landfills to handle the surplus waste, in-state political pressure to adopt conservation measures will increase.

121. *See Fort Gratiot*, 112 S. Ct. at 2023.

122. *Id.*

power of eminent domain, states may take control of some or all privately-owned landfill facilities within their borders.[123] Thus, as a market participant, a state may very well be able to accomplish what Michigan was unable to do through regulation.

Third, the *Fort Gratiot* decision does not preclude Congress from enacting a comprehensive, national policy for solid waste management which would alleviate many, if not all, of the problems which have prompted states like Michigan to implement waste import restrictions.[124] Of course, there may continue to be substantial political resistance to the implementation of a national solid waste management plan, especially from states which currently are relying heavily on out-of-state landfill space.[125] Nevertheless, Congressional regulation of similar environmental problems, including the disposal of hazardous and nuclear wastes, demonstrates that such obstacles are not necessarily insurmountable.[126]

Rather than being a roadblock for the environmental movement, it is quite possible that *Fort Gratiot* will prove to be a catalyst for change. Prior to the 1992 decisions of the Court, a persuasive argument could have been made that a national solid waste management plan was unnecessary since state and local government could more easily and more efficiently address the problem.[127] However, after *Fort Gratiot*, the validity of such an argument has lost much of its force. Therefore, both the need for Congressional action and the likelihood of such action is now much greater than it was prior to the decision.

Regardless of how, or indeed whether, this issue is resolved in the national political arena, the Court was correct in refusing to sanction Michigan's solution to the problem. If Congress is unable to develop a national policy for solving the growing environmental crisis of solid waste disposal in our country, it may well deserve to be blamed for the result. However, the apparent failure of the national political process to address important issues does not give the Supreme Court powers which under our Constitution have been delegated to another branch of government.

Howard G. Hopkirk

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123. *See* Meyers, *supra* note 2, at 580-81.
124. *See supra* note 111.
125. *See* Harpring, *supra* note 2, at 872 & n.122.
126. *See supra* note 43.
127. *See, e.g.*, Hinshaw, *supra* note 41.