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Hazardous Waste in Interstate Commerce: Minimizing the Problem After City of Philidelphia v. New Jersey

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NOTES

HAZARDOUS WASTE IN INTERSTATE COMMERCE: MINIMIZING THE PROBLEM AFTER *CITY OF PHILADELPHIA V. NEW JERSEY*

> Will you teach your children what we have taught our children? That the earth is our mother? What befalls the earth befalls all the sons of the earth.
> This we know: The earth does not belong to man, man belongs to the earth. All things are connected like the blood that unites us all. Man did not weave the web of life, he is merely a strand in it. Whatever he does to the web, he does to himself.
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> Chief Seattle's letter to President Franklin Pierce, 1853[1]

I. INTRODUCTION

Hazardous waste[2] disposal is a relatively recent threat to the environmental web. While the problem posed by hazardous waste disposal dates

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1. *Quoted in* J. CAMPBELL & B. MOYERS, THE POWER OF MYTH 32-35 (1988). Chief Seattle was the chief of the Dwamish, Suquamish, and allied Indian tribes. He befriended the early white settlers and signed the Treaty of Point Elliott in 1855, which surrendered land to agency administration. DICTIONARY OF AMERICAN BIOGRAPHY 542 (1935).

2. The Resource Conservation and Recovery Act of 1976 defines hazardous waste as:
> solid waste, or combination of solid waste, which because of its quantity, concentration, or physical, chemical, or infectious characteristics, may A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

Resource Conservation and Recovery Act 42 U.S.C. § 6903(5) (1982) [hereinafter RCRA]. *Cf.* W. FREEDMAN, HAZARDOUS WASTE LIABILITY 70 (1987): "[E]ven garbage in this 'throwaway' society can become hazardous waste; everyday products such as plastics,

from the increase in the use of fossil fuels during the Industrial Revolution,[3] it began to assume monstrous proportions with the rapid growth of the chemical industry following World War II.[4] At the end of World War II, the United States produced an estimated one billion pounds of hazardous waste per year, and this figure has increased yearly by approximately 10 percent.[5] By 1985, the United States had produced some 275 million metric tons (over 600 billion pounds) of hazardous waste.[6] For many years disposal was accomplished thoughtlessly and dangerously,[7] but now a proliferation of state and federal laws[8] governs the classification, transportation, use, and disposal of hazardous wastes.

At present, the Commerce Clause of the United States Constitution[9]

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medicines, paints, oils and gasolines, metals, leather and textiles can generate hazardous waste." *Id.* For purposes of this note, however, hazardous waste is defined in accordance with the above RCRA standard. *Cf.* Toxic Substances Control Act, 15 U.S.C. § 2606(f) (1982) (defining "imminently hazardous chemical substance or mixture"); Federal Water Pollution Control Act, 33 U.S.C. § 1321(b)(2)(A) (1982) (defining hazardous discharges) and 33 U.S.C. § 1317(a) (1982) (defining toxic pollutants); and Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9602(a) (1982) (additional hazardous substances and reportable released quantities).

3. S. EPSTEIN, L. BROWN & C. POPE, HAZARDOUS WASTE IN AMERICA 9 (1982) [hereinafter S. EPSTEIN] (development of coal tar dyes and advancements in metallurgy made substantial contributions to the volume of dangerous wastes).

4. *Id.* at 7.

5. *Id.*

6. OFFICE OF SOLID WASTE, U.S. ENVIRONMENTAL PROTECTION AGENCY, THE HAZARDOUS WASTE SYSTEM 2-2 (June 1987) [hereinafter WASTE SYSTEM] (RCRA hazardous wastes). *But see* S. EPSTEIN, *supra* note 3, at 7 (80 billion pounds of hazardous waste annually). Estimating the rate of hazardous waste generation is a notoriously difficult task:

> In the initial years of the RCRA program, EPA said that about 40 million metric tons of hazardous waste were generated annually. Then in the early 1980s, beginning with OTA [Office of Technology Assistance], the Congressional Budget Office and an EPA contractor study raised the estimated level to some 250 million metric tons annually. However, a survey of 1984 practices taken by Chemical Manufacturers Association of its members suggested that total RCRA waste generation for the Nation might be as high as 1 billion tons annually.

OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, (OTA-ITE-347), FROM POLLUTION TO PREVENTION 19 (June 1987) [hereinafter FROM POLLUTION]; OFFICE OF SOLID WASTE, U.S. ENVIRONMENTAL PROTECTION AGENCY, I 1985 NATIONAL BIENNIAL REPORT OF HAZARDOUS WASTE GENERATORS AND TREATMENT, STORAGE AND DISPOSAL FACILITIES *Regulated Under RCRA* 5 (Mar. 1989) [hereinafter BIENNIAL REPORT] (271 million tons in 1985). There are an estimated 115,000 generators of hazardous waste in the U.S. W. RODGERS, JR., 3 ENVIRONMENTAL LAW 520 (1988).

7. *See infra* note 161. *See also* W. FREEDMAN, *supra* note 2, at 72-75 (for a description of the Love Canal Crisis); S. EPSTEIN, *supra* note 3, at 153-78 (midnight dumping still practiced despite regulations).

8. *See infra* notes 42-45 and accompanying text.

9. U.S. CONST. art. I, § 8, cl. 3. "The Congress shall have Power to Regulate Commerce . . . among the several States . . . ." The Commerce Clause seeks to insure free trade throughout the Union through its "positive" aspect (Congress' plenary power to regulate) and

has been interpreted to require that hazardous waste be allowed to move freely across state lines. As the volume of hazardous waste increases and the availability of safe disposal sites decreases, many states export their waste problems rather than institute measures to minimize their production and volume of hazardous waste[10] and to site necessary waste disposal and processing facilities.[11] Such an unrestrained waste export alternative may run counter to the Nation's need for a unified approach to hazardous waste production and disposal issues.

While Congress has long considered waste disposal as essentially a state responsibility, Congress does acknowledge the national implications of the problem.[12] Rather than preempt[13] the field of hazardous waste disposal completely, the federal government has delegated authority to the states to control their own disposal matters when the states demonstrate that their hazardous waste legislation is as comprehensive and stringent as federal laws.[14] The federal government has promulgated an ever-tightening series

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its "dormant" aspect (the courts' ability to strike down state legislation that conflicts with free movement of commerce). "It would be difficult to overstate the breadth and depth of the commerce power . . . . The Commerce Clause, we have long held, displaces state authority even where Congress has chosen not to act." Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989). The Commerce Clause is the "chief source of congressional regulatory power and, implicitly, a limitation on state legislative power." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 306 (1988). Congress has such broad power under the Commerce Clause that "judicial review of the affirmative authorization for congressional action is largely a formality." *Id.* at 316. An attempt was made to invoke the tenth amendment to trump congressional control of interstate commerce in *National League of Cities v. Usery*, 426 U.S. 833 (1976). But in *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 557 (1985), a closely divided Court overruled *Usery* and reaffirmed the broad federal powers. *See generally* Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977) (analyzing the interaction of the states and the federal government in environmental regulations in light of *Usery*).

10. *See infra* notes 72-76 and accompanying text.

11. *See infra* notes 66-70 and accompanying text.

12. [W]hile collection and disposal of solid waste should continue to be primarily a function of state, regional, and local agencies, the problems of waste disposal . . . have become a matter national in scope and in concern and necessitate Federal action through financial and technical assistance and leadership in the development, demonstration, and application of new and improved methods and processes . . . .

RCRA, 42 U.S.C. § 6901(a)(4).

13. The Supremacy Clause authorizes federal preemption of state action when Congress has been delegated the power to act in an area and has done so or might have done so, or when federal legislation has deliberately created a vacuum. TRIBE, *supra* note 9, at 479. U.S. CONST. art. VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *See, e.g.*, Ray v. Atlantic Richfield, 435 U.S. 151 (1978) (federal law preempts tanker design); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) (no night curfew of jet flights from private airport).

14. 42 U.S.C. § 6226, 40 C.F.R. § 262.21 (1987). There is a trend toward federal dele-

of rigorous hazardous waste regulations;[15] however, the interaction between the states and the federal government in implementing federal environmental legislation is problematic.[16] Bowing to the demands of federalism[17] and recognizing that the Environmental Protection Agency (EPA)[18] has insufficient resources to oversee the entire hazardous waste disposal program without state assistance,[19] much federal environmental legislation is implemented through federal supervision of the states in what the EPA calls "environmental federalism."[20] However, federal supervision of state hazardous

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gation of responsibility to the states that is expected to continue with regard to various hazardous waste, pollution discharge, drinking water standards, and air quality standards. As of August 1988, forty-three states ("states" include the District of Columbia, Puerto Rico, the Virgin Islands, U.S. commonwealths and territories) have been delegated authority under the pre-1984 RCRA program. While the EPA can withdraw this delegated authority (RCRA § 6926(e)), it will only do so in the most extreme circumstances. Under the 1984 Hazardous and Solid Waste Act of 1984 (HSWA), Pub. L. No. 98-616, 98 Stat. 3221 (Nov. 8, 1984) amendments to RCRA, new stricter standards must be met to achieve state delegation, and only Georgia has met the HSWA standard. Frustration reigns because states view HSWA requirements as squeezing out any local controls. Complaints regarding this stricter standard include the lack of nationally consistent standards, the lack of state authority in implementation, and the excessive use of state resources to meet federal priorities that may not reflect state needs. *The State/Federal Partnership to Implement RCRA: Is It Working?*, INSIDE EPA, Nov. 20, 1987, at 10; U.S. GENERAL ACCOUNTING (GAO/RCED-88-101), PROTECTING HUMAN HEALTH AND THE ENVIRONMENT THROUGH IMPROVED MANAGEMENT [hereinafter PROTECTING HUMAN HEALTH] 144-48 (Aug. 1988). Ironically, where state law is *more* rigorous than federal law, delegation may be withdrawn as it was recently in North Carolina. The EPA determined that because North Carolina's disposal law was inconsistent with programs in other states, it interrupted the interstate flow of waste. EPA began RCRA withdrawal proceedings against North Carolina in 1987 after finding that the state's strict surface water discharge law impeded the flow of waste across state borders. Greenwood, *Not in My Backyard*, 3 NAT. RESOURCES & ENV'T 33, 35 (1988). *See also* Snyder, *The EPA-North Carolina Dispute: The Right of States to Pass Stricter Laws Under the Resource Conservation and Recovery Act*, 8 VA. J. NAT. RESOURCES L. 171 (1988) (arguing that withdrawal of RCRA authority would violate RCRA). *See generally* S. GREER, INDIANA'S HAZARDOUS WASTE PROGRAM, PROMISES MADE . . . PROMISES BROKEN (1988) (unhappiness of environmental groups with hazardous waste primacy in Indiana because of inadequate facilities and staff. Copy on file at Valparaiso University Law Review office).

15. *See infra* notes 40-51 and accompanying text.

16. *See infra* notes 21-22 and accompanying text.

17. Federalism is the balance of power between the states and the federal government and is central to the American system. The judiciary monitors state legislation on behalf of Congress. Congress may reallocate power, especially under the Commerce, Supremacy, or Privileges and Immunities clauses. "Without Commerce Clause, Supremacy Clause, and Privileges and Immunities Clause, the Union as we know it would be unthinkable." TRIBE, *supra* note 9, at 401.

18. The EPA was created December 2, 1970 by Reorganization No. 3, Pub. L. No. 91-90, 83 Stat. 852 (1970) (codified at 42 U.S.C. § 4321 (1982)).

19. PROTECTING HUMAN HEALTH, *supra* note 14, at 144-45.

20. *Id.* at 144. The Government Accounting Office (GAO) recognizes that the states seek a more equal partnership with the federal government. States feel that the federal government does not trust them. A 1988 GAO report notes that the tension in the relationship re-

waste programs has often been ineffective,[21] and state non-compliance[22] with federal mandates is widespread.

In 1978, the Supreme Court decided in *City of Philadelphia v. New Jersey*[23] that state laws banning the importation of waste violate the Commerce Clause.[24] The requirement that wastes be permitted to move freely as items in interstate commerce[25] has meant that hazardous waste often moves great distances around the country by rail and road to disposal sites far beyond the generating state.[26] This unimpeded movement has created increasing friction among the states.[27]

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mains unremedied since a similar 1983 GAO study. *Id.* at 160. *See also* S. EPSTEIN, *supra* note 3, at 176 (The fragmentation of responsibility among agencies and between the states and the federal government is a critical problem.).

21. The GAO and Office of Inspector General reviews have shown inadequacies in EPA guidance and in EPA monitoring inspections. In addition, between 1983 and 1987 EPA grants to states for hazardous waste controls rose only 18 million constant dollars. PROTECTING HUMAN HEALTH, *supra* note 19, at 152-57; U.S. GENERAL ACCOUNTING OFFICE (GAO/RCED-88-20), HAZARDOUS WASTE: FACILITY INSPECTIONS ARE NOT THOROUGH AND COMPLETE 46 (November, 1987) (Neither EPA headquarters nor regional offices are overseeing state compliance effectively and adequately.); OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, PROTECTING THE NATION'S GROUNDWATER FROM CONTAMINATION 90-91 (Oct. 1984) [hereinafter PROTECTING] (a survey finding that states perceive the state-federal partnership to have problems and see federal help as both inadequate and a hindrance to state efforts); W. FREEDMAN, *supra* note 2, at 3 (Hazardous waste "is an environmental risk of the greatest magnitude because decisions regarding environmental risk are generally reactive and not anticipatory."). *See generally* S. EPSTEIN, *supra* note 3, at 221-56, 353-55 (Other implementation problems involve conflicts of interest and inadequate training of staff and executives). For a succinct catalog of the administrative problems during Ms. Gorsuch's tenure as EPA administrator, see W. RODGERS, *supra* note 6, at 532-33.

22. State compliance with groundwater monitoring, financial responsibility, landfill closure, and post-closure regulations is very poor. The GAO found that approximately one-half of all landfills are not in compliance and that the EPA was very far from achieving the targeted 90% compliance. U.S. GENERAL ACCOUNTING OFFICE (GAO/RCED-88-115), HAZARDOUS WASTE: NEW APPROACH NEEDED TO MANAGE THE RESOURCE CONSERVATION AND RECOVERY ACT 33-47 (July 1988) [hereinafter NEW APPROACH]. Recently a federal District Court for the first time permanently closed a hazardous waste landfill for RCRA violations. U.S. v. Environmental Waste Control, Inc., 710 F. Supp. 1172 (N.D. Ind. 1989).

23. 437 U.S. 617 (1978).

24. *Id.* at 629. *See infra* notes 80-108 and accompanying text.

25. *See* discussion of *City of Philadelphia v. New Jersey*, *infra* notes 80-108 and accompanying text.

26. In 1985, 3.1 million tons of RCRA hazardous wastes were sent out of state for disposal. BIENNIAL REPORT, *supra* note 6, at 16. The final 1985 BIENNIAL REPORT was released in Spring, 1989; the statistics were received from the states in order to produce a 1983 report, but the figures were so sketchy and unreliable that the report was never released. In fact, export figures in the 1985 report are unreliable and "delivered 1985 export amounts were generally unverifiable." BIENNIAL REPORT, *supra* note 6, at 22.

27. For example, South Carolina and North Carolina are currently waging a pitched battle over each other's hazardous waste. North Carolina banned the disposal of all hazardous wastes in the state because of failure to site new facilities, and South Carolina retaliated by

This note suggests that the need for an effective national program to control hazardous waste production and disposal is so compelling that schemes must be developed to restrict the interstate movement of hazardous waste and to encourage waste minimization. This note first briefly examines national environmental policy,[28] the burgeoning federal regulatory activity in the field of hazardous waste disposal,[29] the uneasy partnership between the states and the federal government,[30] and the lack of federal leadership in waste minimization.[31] This note then explores the Supreme Court's decision in *City of Philadelphia v. New Jersey* with regard to the Court's Commerce Clause analysis.[32] The next section outlines the few means of circumventing the Commerce Clause problem of waste importation that have been successful.[33] The note then suggests that the judicial doctrine mandating the free interstate flow of hazardous waste is frustrating national policies of hazardous waste transportation safety as well as state initiatives in waste disposal planning and waste minimization.[34]

Finally, this note examines possible judicial[35] and legislative[36] options to restrict hazardous waste migration. The Supreme Court has demonstrated a growing awareness of the hazardous waste threat and should give more weight to state environmental concerns arising in the context of Commerce Clause challenges.[37] In addition, this note suggests that the federal government should be willing to exercise its Commerce Clause power to promote the formation of interstate hazardous waste compacts.[38] Congress should also allow those states that do not choose to join a compact, but have instituted stringent hazardous waste minimization requirements, to prohibit

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banning all hazardous waste imports that the exporting state would itself prohibit. Recently, North Carolina repealed its ban on hazardous waste disposal and is engaged in considering a regional approach much like the compact system suggested *infra* notes 205-19. *North Carolina: Legislature Passes Waste Management Act*, 20 Env't. Rep. (BNA) 208 (June 2, 1989); *North Carolina*, 19 Env't. Rep. (BNA) 2378 (Mar. 10, 1989). In an effort to stem the westward flow of all wastes, Ohio is urging Congress to institute measures to put the brakes on, including a $40 per ton state tax on imported garbage. Bukro, *Ohio Fighting Garbage Ruling That Leaves it Holding the Bag*, Chicago Tribune, July 9, 1989, at 21.

28. *See infra* notes 40-42 and accompanying text.

29. *See infra* notes 47-57 and accompanying text.

30. *See infra* notes 78-79 and accompanying text.

31. *See infra* note 72 and accompanying text.

32. *See infra* notes 80-108 and accompanying text.

33. *See infra* notes 111-45 and accompanying text.

34. *See infra* notes 146-50 and accompanying text.

35. *See infra* notes 151-86 and accompanying text.

36. *See infra* notes 187-219 and accompanying text.

37. *See infra* notes 168-76 and accompanying text.

38. Compacts are congressionally approved bi-state or multi-state organizations designed to make a unified attack on a common problem. *See infra* notes 205-18 and accompanying text.

the importation of wastes not subject to similar strict requirements.[39] Such legislation would restrict the movement of hazardous wastes across state borders, thereby forcing states to take responsibility for their own wastes, to pursue waste minimization seriously, and to work together in compacts to achieve national environmental goals.

II. Proliferation of Federal Regulations and the Struggle to Find National Uniformity in Addressing Hazardous Waste Issues

A major shift in American legislative orientation toward environmental concerns began in 1969 with the enactment of the National Environmental Policy Act (NEPA).[40] NEPA reflected the growing awareness of the American people and their leaders regarding potential and actual threats to the environment. The Act mandated a broad examination of many federal projects, taking into account the project's environmental impact and requiring that these considerations be formalized in an Environmental Impact Statement (EIS).[41] NEPA set the tone for the fledgling EPA and for the great quantity of environmental legislation to follow.

Within the two decades since the enactment of the NEPA,[42] the

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39. *See infra* note 219 and accompanying text.

40. National Environmental Policy Act of 1969 [hereinafter NEPA] Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. § 4321-4370 (1982 to 1986 Supp. IV)).

> The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

41. 42 U.S.C. § 4332:

> (2) all agencies of the Federal Government shall . . .
>
> (c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
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> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action.

42. NEPA, *supra* note 40. Agencies shall "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on the human environment." 40 C.F.R. § 1507.2(a) (1986). Regulation of the environment is clearly a necessity. The market cannot control pollution:

> [M]uch of the harm done by a polluter falls upon others. In his rational self-interest, the polluter may be willing to destroy an entire county to make an extra dime. He would not do so if the victim offered him twenty cents to stop, but in the real world the victim cannot always make the offer. In the typical pollution case, the harm is suffered not by

United States Congress has begun to address the problem of groundwater contamination, the principal environmental threat posed by the disposal of hazardous wastes. Groundwater[43] is the source of drinking water for approximately one-half of the nation's population,[44] and all states have reported contamination of some private and public water supplies.[45] Despite the enactment of much federal environmental legislation during the past decade, no uniform groundwater legislation has appeared.[46] A number of

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one but by thousands.

Currie, *State Pollution Statutes*, 48 U. CHI. L. REV. 27, 28 (1981).

43. Groundwater is "water that occurs in saturated, non-consolidated geologic material (sand or gravel) and is in fractured or porous rock." R. PATRICK, E. FORD & J. QUARLES, GROUNDWATER CONTAMINATION IN THE UNITED STATES 2 (2d Ed. 1987) [hereinafter R. PATRICK]. Contamination occurs when rainwater mixes with hazardous substances and the resulting mixture, called leachate, migrates out of the land disposal site. *Id.*

44. PROTECTING, *supra* note 21, at 5.

45. S. EPSTEIN, *supra* note 3, at 69-151 (regarding groundwater contamination). *See also* R. PATRICK, *supra* note 43, at 46 (percentage of groundwater use is as low as 2% in Montana and as high as 85% in Iowa). While no comprehensive national drinking water survey has been made, contamination has been reported in every state. The most common pollutants are heavy metals, organics, microorganisms, and nitrates. *Id.* at 7; Gordon, *Legal Incentives for Reduction Reuse and Recycling: A New Approach to Hazardous Waste Management*, 95 YALE L.J. 810, 811 n.5 (1986) (unreleased EPA study showing 29% of the underground drinking water in 954 cities is contaminated). Adding to the regulation problem is the fact that we have no information regarding the health effects of 70% of the 60,000-70,000 chemicals to which we are exposed. CONSERVATION FOUNDATION, STATE OF THE ENVIRONMENT: AN ASSESSMENT AT MID-DECADE 65 (1984) (quoting a National Academy of Sciences report).

46. R. PATRICK, *supra* note 43, at 12. Groundwater issues are addressed by several Acts: Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1982 & Supp. IV 1986) (includes procedures for the registration, classification, sale, use, monitoring, and disposal of pesticides); Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2654 (1982 & Supp. IV 1986) (regulates the manufacture, use, and disposal of chemicals that pose a significant risk of injury to the environment and human health); Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1982 & Supp. IV 1986) (protects the environment from the adverse effects of surface mining); Clean Water Act of 1977 (CWA), 33 U.S.C. §§ 1251-1376 (1982 & Supp. IV 1986) (controls pollutant discharge into navigable waters); Safe Drinking Water Act of 1974, 42 U.S.C. §§ 300f-300j-11 (1982 & Supp. IV 1986) (protects drinking water supplies, establishes MCLs (maximum contaminant levels), and regulates deep well injection); Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6991i (1982 & Supp. IV 1986) (regulates disposal of hazardous wastes); Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-75 (1982 & Supp. IV 1986) (federal government's response to the release or threatened release of hazardous substances). *See also* Lutz, *Interstate Environmental Law: Federalism Bordering on Neglect?*, 13 SW. U.L. REV. 571, 594-601 (1983) (discussing federal statutes in light of interstate groundwater pollution problems); PROTECTING, *supra* note 21, at 81 ("The multiplicity of both groundwater-related laws and the agencies responsible for their implementation has fragmented federal protection of groundwater quality."); and PROTECTING, *supra* note 21, at 6:

> Despite growing Federal and State efforts, programs are still limited in their ability to protect against [environmental] contamination. For example, there is no explicit national

acts bear directly on the threat that hazardous waste poses to groundwater supplies. The Clean Water Act of 1972[47] was the first legislation to address the problem of hazardous waste handling directly. The Hazardous Materials Transportation Act of 1975[48] followed The Clean Water Act and addressed the need to protect against accidents involving vehicles moving health-and environment-threatening substances.

The Resource Conservation and Recovery Act of 1976[49] (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980[50] (CERCLA), as amended,[51] mark the government's most concerted efforts to date to address past and future threats posed by the disposal of hazardous wastes. RCRA calls for the recycling and reduction[52] of wastes whenever possible and has progressively tightened controls on landfill operation[53] as well as the landfill disposal and deep well injection of certain types of hazardous wastes.[54] RCRA also mandates the phasing out

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legislative mandate to protect groundwater quality; and although the groundwater protection strategy of the United States Environmental Protection Agency acknowledges the need for comprehensive resource management, the details of the strategy do not fully provide for it.

Id. at 6.

47. 33 U.S.C. §§ 1251-1376 (1982 & Supp. IV 1986).

48. 49 U.S.C. §§ 1801-1813 (1982 & Supp. IV 1986); Dep't of Transp. Reg. 45 U.S.C. §§ 421-444; 46 U.S.C. §§ 170-170b.

49. 42 U.S.C. §§ 6901-6991i (1982 & Supp. IV 1986). The 1984 RCRA amendments, Hazardous and Solid Waste Amendments Act of 1984 (HSWA) Pub. L. No. 98-616, 98 Stat. 3221 (Nov. 8, 1984), (codified at 42 U.S.C. § 6901, § 6991), were Congress' reaction to EPA's administrative lapses. W. RODGERS, *supra* note 6, at 513.

50. CERCLA, 42 U.S.C. §§ 9601-9675 (1982 & Supp. IV 1986).

51. The Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. § 9601; 26 U.S.C. § 4611; 42 U.S.C. § 11001); The Hazardous and Solid Waste Amendments of 1984 (HSWA), Pub. L. No. 98-616, § 224(c), 98 Stat. 322 (1984) (codified at 42 U.S.C. § 6982(r)).

52. (a)The objectives . . . are to promote the protection of health and the environment and to conserve valuable material and energy resources by . . .

(6) minimizing the generation of hazardous waste and the land disposal of hazardous waste by encouraging process substitution, material recovery, properly conducted recycling and reuse, and treatment; . . .

(b) The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible.

RCRA 42 U.S.C. § 6902(a)(6), (b). *But see* OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS (OTA-ITE-317), SERIOUS REDUCTION OF HAZARDOUS 157 (Sept. 1986) [hereinafter SERIOUS REDUCTION]. OTA criticizes EPA's implementation of this statute because "[t]he clear statement giving priority to waste reduction that was provided by the RCRA national policy statement . . . is not repeated in the regulations [promulgated by EPA]." *Id.*

53. RCRA 42 U.S.C. § 6924 (strict recordkeeping, monitoring, siting and design regulations).

54. *Id.* at § 6924(c)-(g) (minimizes land disposal of liquids and prohibits the disposal of many hazardous wastes in both landfills and deep wells).

of landfilling generally[55] and instituted a cradle-to-grave manifest system[56] to track the movements of hazardous waste.

CERCLA, more commonly known as Superfund, attacks the problem of leaking landfills and helps states finance the identification and cleanup of dangerous sites.[57] Most recently, the Superfund Amendments and Reauthorization Act of 1986 (SARA) included § 104(c)(9),[58] mandating that the states receiving federal money for the cleanup of dangerous hazardous waste sites take inventory of their hazardous waste production and disposal facilities. States must give assurances to the federal government by October, 1989, that they have the capacity, through their own disposal facilities and through agreements with other states, to accommodate projected hazardous waste production for a twenty-year period. Failure to provide such assurances will result in the federal government withdrawing remedial assistance to the state. The EPA instituted this provision in recognition that some states are not accepting the responsibility for their own hazardous waste production.[59] Rather, some states are exporting hazardous

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55. [C]ertain classes of land disposal facilities are not capable of assuring longterm containment of certain hazardous waste, and to avoid substantial risk to human health and the environment, reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment, should be the least favored method of managing hazardous waste.

Id. at § 6901(b)(7).

56. *Id.* at 42 U.S.C. § 6922 ("Cradle-to-grave" refers to a recordkeeping system that follows the progress of the waste from its generation site to its ultimate disposal site.).

57. CERCLA, 42 U.S.C. §§ 9601-9675.

58. CERCLA, 42 U.S.C. § 9604(c)(9) [CERCLA § 104(c)(9)], Pub. L. No. 99-499, 100 Stat. 1613 (1986):

(9) Siting

Effective 3 years after October 17, 1986, the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which—

(A) have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agreement and to be disposed of, treated, or destroyed,

(B) are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority,

(C) are acceptable to the President, and

(D) are in compliance with the requirements of subtitle C of the Solid Waste Disposal Act.

Id.

59. The legislative purpose behind CERCLA § 104(c)(9) is clear:

Superfund money should not be spent in states that are taking insufficient steps to avoid the creation of future Superfund sites. The Congress recognized that a safe and rational hazardous waste management program for the nation depended in part on the creation of new facilities. . . . While many States enacted or planned to enact siting legislation, . . .

waste instead of facing tough political decisions regarding industrial waste reduction and minimization[60] and disposal facility siting.[61]

The Capacity Assurance Program (CAP) has caused a considerable measure of discomfort to state governors in the major hazardous waste importing states.[62] They fear that some exporting states may be content to

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few, if any, were developing policies and siting programs that would assure continued facility capacity in the long term.

53 Fed. Reg. 33,619 (1988). *See also supra* note 27.

60. SERIOUS REDUCTION, *supra* note 52, at 8-10. Waste reduction is defined by the Office of Technology Assessment (OTA) as "in-plant practices that reduce, avoid, or eliminate the generation of hazardous waste so as to reduce risks to health and environment." *Id.* Waste minimization, the term used in this note, is broader and encompasses the type of waste management that reduces the amount of waste to be land disposed through reclamation and recycling. For a comprehensive proposal for a national waste reduction policy stimulated by the OTA and the responsive EPA reports, see Blomquist, *Beyond the EPA and OTA Reports: Toward a Comprehensive Theory and Approach to Hazardous Waste Reduction in America*, 18 ENVTL. L. 817 (1988). *See also* Gordon, *supra* note 45 (proposing model federal reduction and recycling legislation).

61. *See generally* M. GREENBERG & R. ANDERSON, HAZARDOUS WASTE SITES: THE CREDIBILITY GAP (1984) (detailing the scope of the abandoned waste site problem and the problem involved in siting new landfills); *infra* notes 66-70 and accompanying text. In fact, all states export some portion of the wastes they generate. The top five exporting states are Massachusetts, New Jersey, Ohio, Pennsylvania, and Texas. BIENNIAL REPORT, *supra* note 6, at III-16.

62. Louisiana, Michigan, New York, Ohio, and Pennsylvania accounted for 49.5% of hazardous waste imports in 1985. BIENNIAL REPORT, *supra* note 6, at III-16.

The National Governors' Association (NGA) has taken an active role in creating the guidelines for states to comply with the requirements of CERCLA § 104(c)(9). The combined NGA recommendations and EPA reactions were published in Draft State Hazardous Waste Capacity Assurance Guidance, 53 Fed. Reg. 33,618 (1988) [Draft Guidance]. The final version of the guidelines appeared in December 1988 after going through a rocky rulemaking process. OFFICE OF SOLID WASTE, U.S. ENVIRONMENTAL PROTECTION AGENCY, ASSURANCE OF HAZARDOUS WASTE CAPACITY (Dec. 1988) [hereinafter ASSURANCE]. The assurances from the states were due at EPA by October 17, 1989; the guidelines went through many drafts and the final version was approved in December 1988. The major sticking point was the fear of Commerce Clause problems attendant on interstate agreements that would put controls on waste flow. Telephone conversation with Mike Burns, Senior Program Analyst, Information Management Staff, Office of Solid Waste, Environmental Protection Agency, Washington, D.C. (Dec. 7, 1988).

The NGA had proposed that the federal government referee disputes between states and help to determine what constitutes "reasonable" exports. Draft Guidance, at 33,619. The final guidelines, however, indicate that the federal government will provide no such service. In fact, the final document merely alludes to potential conflicts:

> States may choose to enter into agreements to assure access to facilities in bilateral or multi-lateral documents signed between or among states. Clearly, such agreements will reflect substantial dialogue regarding actual and projected waste flows. Further, discussions among states are likely to raise distributional and equity concerns. . . . EPA anticipates that this agreement would be signed every two years, as the state updates its data and planning documents.

ASSURANCE, *supra* note 62, at 8-9.

forego Superfund money rather than enter interstate disposal agreements and make tough siting decisions in their own states.[63] Environmentally responsible states with abundant landfill space fear that they will find their facilities rapidly filling with less prudently handled wastes from other states.[64] In addition, long-term state capacity planning for the most responsible importing states would become impossible.[65]

Strict federal guidelines and the growing NIMBY (not-in-my-backyard) Syndrome[66] complicate hazardous waste disposal facility siting for many states. Because of Americans' growing awareness of hazardous waste dangers, they are increasingly distrustful of official assurances of site safety,[67] and indeed such assurances may be misleading.[68] Hazardous waste

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Many states responded to the final guidelines with outrage. Dennis Muchnicki, Chief of Environmental Enforcement for the Ohio Attorney General's Office, predicts "suits and civil warfare between states" because the federal government has "defaulted on its obligation" to provide a method to resolve disputes. *Hazardous Waste: State Officials Blast EPA Capacity Guidance, Predict Suits, 'Civil War' Over Hazardous Waste*, 19 Env't Rep. (BNA) 1899 (Jan. 27, 1989).

63. Telephone conversation with Jim Frank, Illinois Superfund, Illinois Environmental Protection Agency (Oct. 28, 1988). Under the new Superfund amendments, states must agree to assure future maintenance of the remedial actions, assure availability of a site to share removed materials, and pay 10% of the remedial costs of a non-state-owned facility. CERCLA § 9604(c)(3). Presumably, states without acceptable capacity assurances will have to shoulder the entire financial burden of site cleanup.

64. For example, in 1983 Illinois imported as much hazardous waste as it exported, but now imports far exceed exports. At this importation rate, Illinois can probably only assure disposal of its own waste for some six years despite abundant facilities. Telephone conversation with Jim Frank, *supra* note 63. *See also* Florini, *Issues of Federalism in Hazardous Waste Control: Cooperation or Confusion?*, 6 HARV. ENVTL. L. REV. 307 (1982) (noting the "reverse commons problem in hazardous waste disposal").

65. Telephone conversation with Jim Frank, *supra* note 63.

66. A number of commentators have suggested schemes to facilitate siting against public opposition: Bacon & Milkey, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, 6 HARV. ENVTL. L. REV. 265 (1982) (encourages community compensation rather than state preemption of the siting process); Davis, *Approaches to the Regulation of Hazardous Waste*, 18 ENVTL. L. 505, 517-18 (1988) (advocates intensive public education regarding siting); Stewart, *Interstate Resource Conflicts: The Role of the Federal Courts*, 6 HARV. ENVTL. L. REV. 241, 263 (1982) (suggests federal-site selection boards); Tarlock, *Anywhere But Here: An Introduction to State Control of Hazardous Waste Facility Location*, 2 U.C.L.A. J. ENVTL. L. & POL'Y 1 (1981) (Statewide bodies must be able to preempt local land use regulations.).

67. *See, e.g.*, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, I ENVIRONMENTAL REGULATION IN INDIANA 11-5 (May 1988) [hereinafter ENVIRONMENTAL REGULATION]. The state recognizes the need to overcome public mistrust of public officials' assurances and stresses the need for education.

68. U.S. GENERAL ACCOUNTING OFFICE (GAO/RCED-88-29), HAZARDOUS WASTE: GROUNDWATER CONDITIONS AT MANY LAND DISPOSAL FACILITIES REMAIN UNCERTAIN 8 (Feb. 1988). (Landfill and construction monitoring regulations can only *minimize* the pollution threat.). It is commonly believed that state-of-the-art landfill technology is absolutely foolproof, but

landfill space is dwindling rapidly across the country; in 1984 there were 1,500 facilities, and in June 1987 there were only 500.[69] CAP seeks to lessen this siting burden by requiring that the reporting states demonstrate state legislation that would facilitate siting.[70] Such changes in state legislation could prove to be unpopular with many vigilant environmentalists and legislators who are anxious to get rid of the problem, and such conflicts would again make the option of waste export an attractive alternative for state governments.

Similarly, waste minimization[71] is a technique that the federal government has strongly recommended, but has failed to *require* that states adopt.[72] Although RCRA has made it clear that waste minimization is the way of the future,[73] the federal government has left the initiation of minimization policies to the individual states because of the complexity of making nationwide standards apply to all hazardous waste industries and because of the perception that the states are better situated to address the problem.[74] The federal government also has devoted a very small percentage of its budget to waste minimization,[75] but has promised to provide technical and educational support to the states.[76]

A [landfill] liner is a barrier technology that prevents or greatly restricts migration of liquids into the ground. No liner, however, can keep all liquids out of the ground for all time. Eventually liners will either degrade, tear, or crack and will allow liquids to migrate out of the unit. . . . Some have argued that liners are devices that provide a perpetual seal against migration. . . . EPA has concluded that the more reasonable assumption . . . is that any liner will begin to leak eventually.

47 Fed. Reg. 32,284-85 (1982).

69. WASTE SYSTEM, *supra* note 6, at 3-1.

70. ASSURANCE, *supra* note 62, at 67-78.

71. *See supra* note 60 and accompanying text.

72. SERIOUS REDUCTION, *supra* note 52 (OTA quotes many examples of EPA calling for aggressive waste minimization but making little real commitment.). While many would like to believe that the clear trend is away from disposal and toward waste minimization, the HSWA amendments continue to show a clear disposal bias. W. RODGERS, *supra* note 6, at 522. Currently there are bills in both houses of Congress to increase funding for waste reduction. The bills have some industry support because reduction would be strictly voluntary. *Hazardous Waste: Waste Reduction Bill With 234 Backers Stalls During House Subcommittee Makeup*, 19 Env't. Rep. (BNA) 175-76 (June 3, 1988).

73. *See supra* note 52 and accompanying text.

74. SERIOUS REDUCTION, *supra* note 60, at 29-37. *But see* Blomquist, *supra* note 60, at 821 (arguing that Congress must consider "first principles" in formulating a comprehensive national waste reduction theory and that "a responsible, prescriptive, federal approach to hazardous waste reduction should be coordinated with the non-regulatory approach proposed by the EPA and OTA reports").

75. FROM POLLUTION, *supra* note 6, at 37 (In fiscal year 1988, the minimization budget was .03% of the total EPA budget.).

76. Under RCRA § 6902(a)(1) the federal government will

[provide] technical and financial assistance to state and local governments and interstate agencies for the development of solid waste management plans—including resource recovery and resource conservation systems—which will promote improved solid waste

Again, this lack of a firm federal initiative has created another set of hard political choices for states that are reluctant to discourage industry from locating within their borders. The option of exporting hazardous waste, rather than requiring and policing serious waste minimization or implementing tax incentives, has given states a convenient way to avoid the minimization issue. The proposed guidelines for the capacity assurance program require states to report their minimization efforts, if any, in the computation of hazardous waste production,[77] but do not propose any required guidelines for minimization levels.

While the volume of legislative enactments is impressive in its scope, the federal-state partnership in implementation of federal minimum standards has been less than uniformly effective. Reports of the states' failure to comply with minimum standards are legion,[78] and such failure is largely due to lapses in federal supervision and unwillingness to apply tough sanctions for non-compliance.[79] The Capacity Assurance Program is the first federal law to recognize that the voluminous federal hazardous waste legislation has the effect of encouraging states to export their waste rather than prepare for the future. However, any serious efforts to slow interstate commerce in hazardous waste may run headlong into the teaching of the Supreme Court in *City of Philadelphia v. New Jersey*.

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management techniques . . . new and improved methods of collection, separation, and recovery of solid waste, and the environmentally safe disposal of nonrecoverable residues. . . .

Id.

The federal government will "[provide] training grants in occupations involving the design, operation and maintenance of solid waste disposal systems;" RCRA § 6902(a)(2); and the federal government will "[establish] a cooperative effort among the federal, state and local governments and private enterprise in order to recover valuable materials and energy from solid waste." RCRA § 6902(11).

77. ASSURANCE, *supra* note 62, at 39-53.

78. *See supra* note 22 and accompanying text.

79. *See* NEW APPROACH, *supra* note 22, at 43-44:

[I]n June 1988 we [GAO] reported that EPA and the states had met EPA's criteria for taking timely and appropriate enforcement actions in only 37 percent of the over 800 enforcement cases we reviewed. For example, in some cases penalties, although called for by EPA criteria, had not been assessed. In that report we concluded that until EPA's enforcement performance is improved, no assurance exists that threatening environmental conditions are being dealt with in a timely, consistent and equitable manner and that the deterrent effect of enforcement actions could be weakened. . . . After observing 26 inspections around the country, we reported in November 1987 that inspectors missed almost as many violations as they found[.]

Id.

III. *City of Philadephia v. New Jersey*: WASTES IN INTERSTATE COMMERCE

In the early 1970s, New Jersey began to recognize that incoming waste was adding to its great disposal problem. In response, New Jersey enacted a law in 1973[80] that prohibited the importation of out-of-state solid or liquid wastes intended for disposal in New Jersey's dwindling landfill space.[81] New Jersey enacted this ban after finding that its landfill space was severely limited and that its environment and public health and safety would be best served by limiting the volume of waste disposal in the state.[82] New Jersey landfill operators, and cities in states that relied on New Jersey landfills, sued the New Jersey Department of Environmental Protection, alleging that the law violated the Commerce Clause.[83] The New Jersey Supreme Court upheld the law as a proper exercise of state police powers.[84] The decision was appealed to the United States Supreme Court.

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80. Waste Control Act, N.J. STAT. ANN. § 13:1I-10 (West Supp. 1978).

81. "No person shall bring into this state any solid or liquid waste which originated or was collected outside the territorial limits of the State. . . ." *Id.*

82. The Legislature finds and determines that . . . The volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatment and disposal within the state of all wastes generated outside of the State be prohibited.

N.J. STAT. ANN. § 13:1I-9 (West 1979). *See also* Cain, *Routes and Roadblocks: State Controls on Hazardous Waste Imports*, 23 NAT. RESOURCES J. 767, 768 (1983) (advocating waste import restrictions to reduce public opposition to facility siting, to give benefit to the risk-bearers, and to reduce illegal disposal); Note, *Waste Embargoes Held a Violation of Commerce Clause: Philadelphia v. New Jersey*, 11 CONN. L. REV. 292 (1979) (quoting from Appellee's brief and affidavit regarding landfill space and health dangers).

83. The trial court agreed, granting summary judgment to the plaintiffs. The New Jersey Supreme Court agreed, consolidating this action with Hackensack Meadowlands Development Commission v. Municipal Sanitary Landfill Authority, 127 N.J. Super. 160, 316 A.2d 711 (N.J. Super. Ct. Ch. Div. 1974). The New Jersey Supreme Court found that federal law did not preempt the New Jersey statute and that the state's great interest in health and safety, compared to the small burden on interstate commerce, made the law acceptable. Hackensack Meadowlands Dev. Comm'n v. Philadelphia, 68 N.J. 451, 348 A.2d 505 (1975). The dispute reached the United States Supreme Court and was remanded to the state on the question of preemption by the newly-enacted Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-87 (1976). The New Jersey Supreme Court again found no federal preemption. City of Philadelphia v. State Dep't. of Envtl. Protection, 73 N.J. 562, 376 A.2d 888 (1977).

84. *Hackensack*, 68 N.J. at 472, 348 A.2d at 516. The police powers of the states were first recognized in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (The Gibbons court defines police powers as "that immense mass of legislation, which embraces everything within the territory of the state, not surrendered to the general government."). *Id.* at 89. *See also* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442 (1960) (Police powers may be exercised to protect public health.).

After finding that the recently enacted RCRA did not preempt the disposal issue,[85] the Court turned to the Commerce Clause issue and struck down New Jersey's exclusion law as a clear violation of interstate commerce.[86] The New Jersey Supreme Court had relied on earlier cases[87] in concluding that wastes are not articles in commerce, but the United States Supreme Court determined that "[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset."[88] The Court interpreted earlier decisions to apply only to articles whose *movement* created a very high risk.[89]

Having conferred on wastes the legal status of articles in commerce, the Court reiterated the fundamental purpose of the Commerce Clause to prevent economic isolation[90] and protectionism[91] while respecting the states' police powers to safeguard health and safety.[92] Noting the two prongs of Commerce Clause analysis, that is, the *per se* rule of invalidity in cases of economic protectionism[93] and the *Pike v. Bruce Church, Inc.*[94] balancing

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

86. *Id.* at 629.

87. Baldwin v. G.A.F. Seelig, 294 U.S. 511, 525 (1935) (upholds quarantine exception to the Commerce Clause); Bowman v. Chicago & Northwestern Ry. Co., 125 U.S. 465, 489 (1887) (Waste that is not merchantable and is worthless is not in commerce.). *But see* the current approach in Illinois v. General Electric Co., 683 F.2d 206, 213 (7th Cir. 1982) (Waste is commerce even if "traffic is in 'bads' rather than goods.").

88. *Philadelphia*, 437 U.S. at 623.

89. The court cited *Bowman*'s definition of noxious articles "which, on account of their existing condition, would bring in and spread disease, pestilence, and death." *Philadelphia*, 437 U.S. at 623 (quoting Bowman v. Chicago & Northwestern Ry. Co., 125 U.S. 465, 489 (1887)).

90. *See Baldwin*, 294 U.S. at 523 (Cardozo's famous remark regarding isolationism was that "people of the several states must sink or swim together.").

91. *See, e.g.*, Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) (The court found the purported health measure to be a guise for protectionism.).

92. Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978).

93. H.P. Hood and Sons, Inc. v. DuMond, 336 U.S. 525 (1949) (striking down New York law meant to protect the local milk industry); *Foster-Fountain*, 278 U.S. at 13 (striking down Louisiana statute designed to bring shrimp canning industry into Louisiana).

94. 397 U.S. 137, 142 (1970).

> Where the statute regulates *evenhandedly* to effectuate a *legitimate local public interest*, and its *effects on interstate commerce are only incidental*, it will be upheld unless the *burden imposed* on such commerce *is clearly excessive in relation to the putative local benefits*. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on *whether it could be promoted as well with a lesser impact on interstate activities*. [emphasis supplied].

Id. at 142.

The balancing test does not sit well with some members of the Court. *See* Bendix Autolite Corp. v. Midwestco Enterprises, Inc., 108 S.Ct. 2218, 2223 (1988) (Scalia, J., concurring) ("[The *Pike* balancing] is more like judging whether a particular line is longer than a particular rock is heavy."); CTS Corp. v. Dynamics Corp., 481 U.S. 69 (1987) (Scalia, J., concur-

test where discrimination is not patent and where legitimate state interests are advanced, the Court asserted that protectionism can be found in both legislative means and ends.[95] The Court never reached the balancing test because it found *per se* discrimination and determined that New Jersey's primary purpose was to gain economic advantage at the expense of interstate commerce.

The Court further held that New Jersey's ban on incoming solid waste was protectionist, discriminated against out-of-state waste solely on the basis of its origin,[96] and impermissibly put the entire burden of preserving landfill space on out-of-state dumpers while not restricting New Jersey residents' use of landfill space.[97] In so holding, the Court deemed landfill space to constitute a natural resource[98] that could not be reserved to the exclusive use of state residents.[99] Justice Stewart, writing for the majority, did say that New Jersey could achieve its end by slowing the flow of *all* waste into its landfills.[100]

The Court took a very restricted view of New Jersey's analogy to state quarantine laws, which are upheld despite their burden on interstate commerce.[101] Finally, the Court noted that New Jersey might one day wish to export its own waste and would be inconvenienced if neighboring states closed their borders to imported wastes.[102]

Justice Rehnquist, joined by Chief Justice Burger, wrote a strong dissent, finding the quarantine law analogy dispositive[103] and stressing the dangers of landfill leachate,[104] methane explosions (from decaying organic waste material), rodents, fires, and scavengers.[105] The dissenters noted that New Jersey could not eliminate the need to dispose of its own waste.[106] In

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ring) ("[S]uch an inquiry is ill-suited to the judicial function and should be undertaken rarely if at all.").

95. City of Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978).

96. *Id.* at 629. The Court said there was no reason, apart from the origin of the waste, to ban it.

97. *Id.* at 627. *But see* Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 463 (1982) (In fact, less than 100% of the burden fell on out-of-state producers in *Philadelphia*, and under Eule's scheme, the burden on New Jersey landfill operators would be taken into account in Commerce Clause analysis.).

98. *Philadelphia*, 437 U.S. at 626. *See infra* notes 118-23 and accompanying text.

99. *Philadelphia*, 437 U.S. at 628.

100. *Id.* at 627. *See infra* note 179 and accompanying text.

101. *See supra* note 89. *See also* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521 (1935) (minimum milk pricing not without the quarantine exception); Asbell v. Kansas, 209 U.S. 251, 256 (1908) (state may regulate importation of unhealthy animals or decayed foods).

102. *Philadelphia*, 437 U.S. at 629.

103. *Id.* at 631-32.

104. *See supra* note 43 and accompanying text.

105. *Philadelphia*, 437 U.S. at 630.

106. *Id.* at 632. "The physical fact of life that New Jersey must somehow dispose of its

addition, the dissent rejected the majority's notion that the quarantine laws concerned movement rather than disposal: "Solid waste which is a health hazard when it reaches its destination may in all likelihood be an equally great health hazard in transit."[107] Finally, Rehnquist asserted his contention that New Jersey should be allowed to avoid the aggravation of its waste disposal problems and the threat to public health and safety posed by accepting others' wastes.[108]

In the years since *Philadelphia*, many states have made various attempts to restrict incoming waste.[109] Options are limited, however, and both hazardous and non-hazardous waste continues to flow freely among the states.[110]

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own noxious items does not mean that it must serve as a depository for those of every other state." *Id.*

107. *Id. See infra* note 146.

108. *Philadelphia*, 637 U.S. at 633. Following *Philadelphia*, New Jersey's waste disposal problems have continued because of the very poor geography for the siting of landfills. The northern third of the state has hard rock formations; the southern two-thirds are comprised mainly of sandy porous materials and transmit pollutants to the aquifers very readily. Morris, *Hazardous Waste in New Jersey: An Overview*, 38 RUTGERS L. REV. 623, 625 (1986). As of 1986, 97 New Jersey sites had been identified for federal Superfund cleanup, while the New Jersey Department of Environmental Protection has listed 1,200 sites. *Id.* at 629. The *Philadelphia* Court proved to be prophetic about New Jersey's future export needs as the volume of hazardous waste exports from New Jersey ranks that state among the top five. BIENNIAL REPORT, *supra* note 6, at 16. In fact, New Jersey now has in place some of the strictest environmental laws of any state in the Union. For example, the Environmental Cleanup Responsibility Act (ECRA), N.J. STAT. ANN. §§ 13:1K-6 - 13:1K-14 (1983) requires all owners and operators of industrial establishments to clean up any environmental contamination before conveying an industrial property. *See generally* Wagner, *Liability for Hazardous Waste Cleanup: An Examination of New Jersey's Approach*, 13 HARV. ENVT'L L. REV. 245 (1989) (elaborating on New Jersey's regulations).

109. *See, e.g.*, N.H. REV. STAT. ANN. § 147:28-a (repealed 1971, 272:3, eff. Aug. 22, 1971); OKLA. STAT. ANN. tit. 63 § 2764 (West 1973) (repealed by Laws 1981 C.322 § 17, eff. July, 1981). *See also* Washington State Bldg. & Constr. Trades Council v. Spellman, 518 F. Supp. 928 (E.D. Wash. 1981), *aff'd*, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) (striking down public initiative banning import of radioactive wastes). Oregon has enunciated a "priority" in acceptance of out-of-state hazardous wastes that may, *in practice*, violate the Commerce Clause:

> [T]he Legislative Assembly declares that it is the purpose of [these sections] to:
>
> [l]imit to the extent possible the treatment or disposal of hazardous waste and PCB in Oregon to materials originating in the states that are parties to the Northwest Interstate Compact on Low-Level Radioactive Waste Management.

OR. REV. STAT. ANN. § 466.010(c) (Supp. 1988).

110. *See infra* notes 112-38 and accompanying text.

IV. COPING WITH *Philadephia*

Since the 1978 *Philadelphia* decision, states have struggled with the problems created by the uncontrolled interstate flow of wastes.[111] While incoming waste constitutes an enormous hardship for the traditional "garbage" dump,[112] the environmental dangers of *hazardous* waste disposal are considerably more threatening[113] and require a careful nationwide assessment. State and federal courts have recognized several limited approaches to discouraging waste importation, including economic disincentives,[114] emergency exceptions,[115] and the market participant exception.[116] The most significant scheme is the market participant exception to the Commerce

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111. *See supra* note 109 and accompanying text.

112. W. FREEDMAN, *supra* note 2 and accompanying text. The interstate movement of "sanitary" waste (municipal garbage) is causing much friction in all parts of the country and is a special problem in areas like Northwest Indiana that are near a large out-of-state urban center. *See infra* notes 132-38 and accompanying text.

Desperate about the steady flow of garbage into Ohio, that state has approached Congress asking for federal controls including a $40 per ton state tax on garbage imports. In 1988, Ohio received 2.4 million tons of imports, double the 1987 figure. Chicago Tribune, July 9, 1989, at 21, col. 1.

113. *See supra* note 45 and accompanying text. *See also* RCRA § 6901(b)(5): "[T]he placement of inadequate controls on hazardous waste management will result in substantial risks to human health and the environment[.]" *Id.*

114. *See infra* notes 125-31 and accompanying text.

115. *See infra* notes 132-38 and accompanying text.

116. The market participant exception is invoked when the state is seen to be participating in the market rather than merely regulating it. *See* White v. Massachusetts Council of Constr. Employers, 469 U.S. 240 (1983) (upholding executive order favoring hiring of 50% instate residents for state-funded projects); Reeves, Inc. v. Stake, 447 U.S. 429 (1980) (upholding preference for state residents to purchase cement from state-owned facility); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) (upholding Maryland bounty program for abandoned Maryland car hulks); "Nothing in the 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.* at 805. The language in *Reeves* is particularly apt: To deny the exception "would interfere significantly with a [s]tate's ability to structure relations with its own citizens. It would also threaten the future fashioning of effective and creative programs for solving local problems. . . ." *Reeves*, 447 U.S. at 441. *See also* Campbell, *State Ownership of Hazardous Waste Disposal Sites: A Technique for Excluding Out of State Wastes?*, 14 ENVTL. L. 177 (1983) (warning of dangers if every state were to bar wastes). Others object to this exception. *See, e.g.*, South-Central Timber Dev. Inc. v. Wunnicke, 467 U.S. 82 (1984) (Rehnquist, J., dissenting) (Rehnquist is troubled by the majority's assertion that the distinction between market participant and regulator is a matter of intuition.). *See also* Note, *The Commerce Clause and Federalism: Implications for State Control of Natural Resources*, 50 GEO. WASH. L. REV. 601, 616 (1982) (objecting to the exception as an unwarranted sidestepping of the Commerce Clause); Note, *Recycling Philadelphia v. New Jersey: The Dormant Commerce Clause, Postindustrial "Natural" Resources, and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309 (1989) (referring to the market participant exception as a "questionably drawn constitutional doctrine" and a threat to the national interest unless strictly circumscribed).

Clause, which pre-dates the *Philadelphia* decision.

Under the market participant exception, a state or local government entity that owns or operates a landfill and *participates* in the waste disposal market rather than merely *regulating* that market may be able to exclude out-of-state waste from its facility on the theory that a state may operate in the free market and favor its own citizens.[117] Just as an out-of-state person may not freely take advantage of another state's education system, so, too, may an out-of-state dumper be restricted in his use of a state-operated disposal facility.

While the *Philadelphia* Court mentioned the market participant theory of waste exclusion in dicta,[118] the Court in *Reeves, Inc. v. State*[119] subsequently suggested in dicta that a state could not hoard natural resources under the market participant theory.[120] In recent years this limitation on the market participant theory has been eroding, and in 1987 the District Court in *Le Francois v. State of Rhode Island*,[121] ruled that Rhode Island's statute excluding out-of-state waste from its Central Landfill[122] did not violate the Commerce Clause because the State was a participant in the landfill *services* market.[123] The court stated that ownership of the resources, the landfill sites themselves, was not restricted to state residents, but the state

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117. *See Reeves*, 447 U.S. at 436-37. *See also* LeFrancois v. Rhode Island, 669 F. Supp. 1204, 1212 (D.R.I. 1987):

> While Rhode Island admittedly holds a monopoly in landfill services, I can see no distinction between this monopoly and the monopoly the State and its municipalities hold in educational services, or in police and fire protection. Certainly, Rhode Island is not expected to extend these services to out-of-state residents; the same is true of landfill services.

Id. LeFrancois upheld Rhode Island's statute (R.I. GEN. LAWS § 23-19-13.1 (Supp. 1988)) prohibiting the dumping of out-of-state waste in Rhode Island's state-operated landfill.

118. *Philadelphia*, 437 U.S. at 628 n.6.

119. 447 U.S. 429 (1980).

120. *Id.* at 433. *See also Philadelphia*, 437 U.S. at 626 (The *Philadelphia* court found landfills to be a natural resource.).

121. LeFrancois v. Rhode Island, 669 F. Supp. 1204 (D.R.I. 1987). *See supra* note 117 and accompanying text. *See also* cases from Oregon, Maryland, and the District of Columbia excluding waste from state- or locally-owned facilities: Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist., 643 F. Supp. 127, 132 (D. Or. 1986); County Comm'rs v. Stevens, 299 Md. 203, 221-22, 473 A.2d 1221-22 (1984); and Shayne Bros., Inc. v. District of Columbia, 592 F. Supp. 1128, 1134 (D.D.C. 1984).

122. R.I. GEN. LAWS §§ 23-19-13.1(a) (Supp. 1988):

> (a) No person, firm, or corporation engaged in the business of collecting and disposing of solid waste shall deposit solid waste that is generated or collected outside the territorial limits of this state at the central landfill. Each deposit in violation of the provisions of this subsection shall be punishable by imprisonment for up to three (3) years and/or a fine not to exceed five thousand dollars ($5,000.00).

123. *LeFrancois*, 669 F. Supp. at 1211.

reserved the benefit of the *service* to its own residents.[124] Here the statute applied only to the sole landfill in the state, which was operated by the state.

States have formulated a number of schemes to discourage out-of-state waste importation by making it financially unattractive either for the would-be importer or the in-state disposal facility owner. There are strict limitations, however, on the extent to which a state can impose higher taxes on out-of-state wastes than it does on in-state wastes.[125] Similarly, the Court struck down a statute providing tax credits to in-state natural gas consumers but not to out-of-state consumers as violative of the Commerce Clause.[126] However, a coal severance tax that applied to both in and out of state consumers, but incidentally applied most often to out of state consumers, was upheld in *Commonwealth Edison v. Montana*.[127] These cases suggest that a state could raise its dumping fee to a very high level to discourage out-of-state dumpers, but must impose the same fee on its in-state users, an unappealing prospect to many states that are anxious to encourage industry.[128]

Other schemes include Indiana's,[129] which assesses out-of-state hazardous waste dumpers at the rate they would have paid in their home state or

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124. Owning or operating hazardous waste facilities on a large scale has not appealed to many states, however, because the siting, maintaining, and monitoring of such facilities under the increasingly complex federal guidelines are tasks that many states would prefer to pass on to the private sector. ENVIRONMENTAL REGULATION, *supra* note 67, at 11-4 (Indiana recognizes that the increased sophistication required of siting, operation, and maintenance is better provided by the private sector); Hadden & Veillette & Brandt, *State Roles in Siting Hazardous Waste Disposal Facilities: From State Preemption to Local Veto*, THE POLITICS OF HAZARDOUS WASTE MANAGEMENT 196, 202-03 (J. Lester & A. Bowman, eds. 1983) [hereinafter J. Lester & A. Bowman] (The problems of public ownership include passing costs on to the taxpayer and the political undesirability of the activity; at present seven states permit public purchase of sites and five permit state operation.). *See also* Cain, *supra* note 82, at 792 (citing financial risk and exposure to liability as undesirable). *But see* N.C. GEN. STAT. § 130A-292 (1986) (Fee simple title to commercial hazardous waste facilities must be conveyed to the state, which then enters into a long term lease with operators; the operators bear the liability.).

125. The Court will uphold state taxes that burden interstate commerce only if the tax "1) has a substantial nexus with the State; 2) is fairly apportioned; 3) does not discriminate against interstate commerce; and 4) is fairly related to the services provided by the State." Washington Revenue Dept. v. Washington Stevedoring Ass'n, 435 U.S. 734, 750 (1978). In addition, a state tax cannot survive Commerce Clause analysis if it "discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." Maryland v. Louisiana, 451 U.S. 725, 754 (1981).

126. *Maryland*, 451 U.S. at 760.

127. 453 U.S. 609 (1981).

128. Another evenhanded approach would be to tax only the most hazardous substances at a higher rate to discourage dumping.

129. Indiana's hazardous waste dumping fee is $10.50 per ton. Telephone conversation with Thomas Russell, Chief of Hazardous Waste Management, Indiana Department of Environmental Management (IDEM) (Oct. 14, 1988).

at Indiana's rate, whichever is higher. This technique is designed to deprive the would-be exporter of any financial advantage. On the other hand, Georgia has adopted a scheme that requires an in-state facility importing solid waste to pay $1 into the Solid Waste Trust Fund for every ton of out-of-state waste received.[130] New Jersey assesses treatment, storage, and disposal (TSD) operators for out-of-district waste on a steadily increasing scale for an eleven-year period.[131] Since the net effect of such legislation in New Jersey, Georgia, and Indiana is to discourage the flow of waste into these states, either directly or indirectly, on the basis of the origin of the waste, these schemes may meet with Commerce Clause challenges.

The Court is also beginning to recognize some possible emergency exceptions to a strict Commerce Clause application. In 1982, the Court in *Sporhase v. Nebraska ex rel. Douglas*[132] struck down a state statute requiring a reciprocity agreement between states before water could be exported.[133] While the reciprocity[134] element doomed the statute, the Court did not object to the state's water conservation measure requiring that would-be exporters seek permission to export after a finding that the withdrawal of water is reasonable.[135] The Court said that "in the absence of a contrary view expressed by Congress, we are reluctant to condemn as unreasonable, measures taken by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage."[136] The Court went on to say that such protection of health is a legitimate use of the state's police power.[137] *Sporhase* offers some hope that the Court will look favorably on critical landfill problems in the future.[138] However, many states that hope to address the problem of waste disposal *before* a crisis is reached will find little comfort in the *Sporhase* decision.

Nearly a dozen years after the Supreme Court decided *Philadelphia*, the only effective option for excluding out-of-state hazardous waste may be the market participant exception,[139] but local or state ownership of hazard-

130. GA. CODE ANN. § 12-8-44(c) (1988).

131. N.J. REV. STAT. § 13:1E-138(c) (West Supp. 1988).

132. 458 U.S. 941 (1982).

133. *Id.* at 960.

134. *See infra* notes 183-84 and accompanying text regarding reciprocity agreements.

135. *Sporhase*, 458 U.S. at 955-56.

136. *Id.* at 956.

137. *Id.*

138. In fact, in Borough of Glassboro v. Gloucester County Board of Chosen Freeholders, 100 N.J. 134, 495 A.2d 49 (1985), the court relied on *Sporhase* in permitting the operators of a private landfill to ban imports from outside the three-county area (including the balance of the state of New Jersey). The ban was approved because landfill space was rapidly dwindling and siting was a critical problem in the area. As an emergency health measure, therefore, the court permitted such an evenhanded ban until the counties could find alternative disposal means. *Id.* at 139, 495 A.2d at 57.

139. *See supra* notes 116, 117, 123 and 124.

ous waste landfills has not proved to be a popular option.[140] Consequently, environmentally responsible states[141] and industries[142] will struggle with recycling and reduction, while facing the reality that their disposal space may well be usurped by their less judicious neighbors. States that have abundant landfill space, on the other hand, are relatively unconcerned and look complacently about them at the available disposal capacity offered by their neighbors. For example, while acknowledging that Illinois poses a threat to its landfill space, Indiana looks to the available capacity in Michigan, Ohio, and Kentucky.[143] At the same time, Indiana has made no legislative moves to encourage waste minimization, and the hazardous waste dumping fee of $10.50 per ton[144] is still attractive to in-state dumpers relative to the national average of $33.64 per ton or even the Midwest average of $12.71 per ton.[145]

In addition to the problems of final disposal, hazardous waste often moves long distances across the country and presents an ever-increasing threat of dangerous spills.[146] For example, in 1985 Illinois imported hazardous wastes from thirty-nine states; neighboring states sent Illinois the greatest amounts, but high amounts were also received from Kansas, Michigan, North Carolina, Nebraska, New York, and Ohio.[147] In 1985, Alabama took in waste from an even broader area with customers sending large amounts

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140. *See supra* note 124.

141. Currently twenty states actively encourage waste minimization, but their programs are highly variable. *Hazardous Waste: Waste Minimization Programs Popular But Implementation Approach Said Unclear*, 19 Env't Rep. (BNA) 37 (May 13, 1988).

142. *E.g.*, 3M has been profitably engaged in waste reduction since 1975. SERIOUS REDUCTION, *supra* note 60, at 7.

143. ENVIRONMENTAL REGULATION, *supra* note 67, at II-12. This complacency is all the more distressing because Indiana ranks sixteenth nationally in hazardous waste production. BIENNIAL REPORT, *supra* note 6, at 23.

144. *See supra* note 129 and accompanying text.

145. ENVIRONMENTAL REGULATION, *supra* note 67, at II-13.

146. OFFICE OF TECHNOLOGY ASSESSMENT, TRANSPORTATION OF HAZARDOUS MATERIALS 241 (July 1986). The Hazardous Materials Transportation Act and RCRA Title C are primary regulations controlling waste transportation; 96% of hazardous wastes are disposed of on the generation site, but those that are transported are usually moved by truck. Information regarding road, rail, and water shipments is limited. *Id. See also* S. EPSTEIN, *supra* note 3, at 32 (some corridors especially risky for hazardous material spills, e.g., the Nashville-Louisville rail link); INTERAGENCY GROUNDWATER TASK FORCE, PROTECTION OF INDIANA'S GROUNDWATER 48-49 (1986) (One-half of all water contamination involves spills, and 23% of the reported spills in 1986 involved transportation accidents.). The National Response Center in Washington should be notified of all spills. CERCLA § 9603; 49 C.F.R. §§ 171-171.17 (1988).

147. OFFICE OF SOLID WASTE, U.S. ENVIRONMENTAL PROTECTION AGENCY, *1985 National Biennial Report of Hazardous Waste Generators and Treatment Storage and Disposal Facilities* III-15 [DRAFT BIENNIAL REPORT] (Nov. 1988) (a late draft of the final National Report). *See also* ILLINOIS E.P.A., SUMMARY OF ANNUAL REPORTS ON HAZARDOUS WASTE FOR 1983-1985 48-52 (Dec. 1987) (Imports rose very sharply between 1985 and 1986.).

from Wisconsin, New Jersey, Colorado, Indiana, Illinois, Minnesota, and North Carolina.[148]

The untrammelled movement of hazardous waste around the country is reaching crisis proportions and does not serve the national interest in a well-managed environment.[149] At least one state official suggests that in certain parts of the country there may be guerrilla warfare at the state borders unless some means are offered to control waste movement.[150] The next section explores possible judicial and legislative controls on hazardous waste movement and disposal.

V. CONTENDING WITH THE COMMERCE CLAUSE

A. *The Judicial Options*

While the *Philadelphia* waste embargo failed under the conventional Commerce Clause analysis in 1978,[151] there is reason to hope that the Court will begin to recognize the grave environmental consequences of the decision. The classification of hazardous waste as an article in commerce may be questioned,[152] and the Court would now have before it abundant environmental data to show that a state's concerns about the effects of hazardous waste disposal are real.[153] While it may be unwise, for environmental policy reasons,[154] to overturn *Philadelphia*, this note suggests that states might be able to restrict the importation of hazardous waste by instituting

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148. BIENNIAL REPORT, *supra* note 147, at III-15.

149. *Supra* notes 24, 59, 61, 146-48 and accompanying text.

150. Telephone conversation with Jim Frank, Illinois Superfund (Oct. 28, 1988). *See also supra* note 27 (South Carolina and North Carolina face off regarding hazardous waste imports). *See generally* McKinney, *A Panel Discussion on Interstate Conflicts Over Hazardous Waste*, 4 NAT. RESOURCES & ENV'T 3 (Summer 1989) (a fictitious debate featuring EPA officials, governors waste handlers, a citizen activist, and a Congressman that introduces the reader to hottest issues and aptly identifies the flashpoints).

Native American lands and federal lands are not immune from hazardous waste disposal problems. Indian reservations present interesting problems, as hazardous waste landfills are not subject to the host state regulations but to the often less stringent EPA standards. There is much concern that EPA enforcement has been inadequate in many hazardous waste facilities in the millions of acres of Native American land in the western states. Allen, *Who Should Control Hazardous Waste on Native American Lands? Looking Beyond Washington Department of Ecology v. E.P.A.*, 14 ECOLOGY L.Q. 69 (1987).

Legislation has been introduced to curb the tendency for western authorities to use grants of federal land for hazardous waste dumps and then to return the land to the federal government, thus avoiding responsibility. 46 CONG. Q. 3163 (Oct. 29, 1988) (On Oct. 21, 1988, the House cleared a bill preventing reversion of federal lands granted under the Recreation and Public Purposes Act of 1926.).

151. City of Philadelphia v. New Jersey, 437 U.S. 617, 630 (1978).

152. *See infra* note 156 and accompanying text.

153. *See infra* note 161 and accompanying text.

154. *See infra* note 179 and accompanying text.

evenhanded controls on the nature of the waste they accept.[155]

A frontal attack on the Court's application of the Commerce Clause in *Philadelphia* would question whether the case's holding that waste is part of the stream of commerce comports with the Framers' intent.[156] No detailed legislative history sheds light on the formulation of the Commerce Clause,[157] but it is clear that the Framers intended to address a defect in the Articles of Confederation by fostering mutually beneficial trade.[158] However, they could not have foreseen the potentially catastrophic national environmental effects of an uncontrolled trade that permits states to ignore sound environmental management.[159] The quarantine analogy[160] that Rehnquist supports in his *Philadelphia* dissent may have greater force today in light of the more complete data about hazardous waste production and the contamination of the environment that would be available to the Court.[161]

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155. *See infra* notes 180-84 and accompanying text.

156. Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign states will by customs, duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the nation to protect him from exploitation from any. Such was the vision of the Founders.

H.P. Hood & Sons v. DuMond, 336 U.S. 525, 539 (1949). *See also* Maine v. Taylor, 477 U.S. 131 (1986) (Commerce Clause does not elevate free trade above all other values); Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) (Commerce Clause power stems from the need for union, not free trade.); L. TRIBE, *supra* note 9, at 404 (detailing the Madisonian interpretation of the Commerce Clause); Smith, *State Discrimination Against Interstate Commerce*, 74 CALIF. L. REV. 1203, 1207-09 (1986) (Framers' intent was to limit reprisals and provide all citizens with representation.). *Cf.* Eule, *supra* note 97, at 430 (Few words were spent on the subject of free trade at the Constitutional Convention.).

157. Hamilton's Federalist No. 22 outlines the inspiration behind the Clause:

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.

THE FEDERALIST No. 22, at 144-55 (A. Hamilton) (C. Rossiter ed. 1961). In fact, it is the free movement of hazardous waste that is now creating "serious sources of animosity and discord" among the states.

158. *Id.* at 143.

159. *See supra* notes 66-72 and accompanying text.

160. *See supra* note 101 and accompanying text.

161. A number of legislative acts and events since 1978 have brought the magnitude of the threat of hazardous waste contamination into public focus. For example, Superfund and the 1980 and 1984 RCRA regulations have addressed the growing realization that our environment is seriously threatened; nationwide hazardous generation and disposal reporting regulations have resulted in the publication of the 1985 BIENNIAL REPORT; the press has highlighted a number of particularly distressing instances of neighborhood pollution, including Love Canal and Times Beach, Missouri. L. GIBBS, LOVE CANAL: MY STORY (1982) (In 1978 Love Canal residents were evacuated when their homes and their health were undermined by

Even if the Court were to continue to view waste as an article in commerce, the "dormant" Commerce Clause[162] analysis may begin to tip in favor of controls on the movement of hazardous waste. While the Constitution gives express power to Congress to regulate interstate commerce,[163] the Court has long recognized the complementary negative implications for the states' power to do the same.[164] Although the Court's application of this principle has varied widely, the current *Pike v. Bruce Church, Inc.* balancing test generally sums up the analysis.[165] The dissenters in *Philadelphia* recognized the compelling state health and safety purpose[166] behind the law and dismissed the lack of evenhandedness as an unrealistic requirement.[167]

The Court is increasingly inclined to use the balancing test to favor state interests in Commerce Clause cases involving non-market considerations, especially matters of health, safety, and the environment.[168] For ex-

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buried hazardous chemical waste.). *See generally* M. BROWN, LAYING WASTE: THE POISONING OF AMERICA BY TOXIC CHEMICALS (1979) (a popular and readable volume detailing the Love Canal tragedy and similar ecological threats around the country); S. EPSTEIN, *supra* note 3; TIME, Jan. 2, 1989 (the endangered earth as Planet of the Year).

162. Much ink has been expended on the Commerce Clause over the years. Many commentators remark on its vacillations and some would restrict its scope as a limit on state power. *See* Eule, *supra* note 97 (Eule favors a diminished role of the dormant Commerce Clause and the Court as its interpreter; he sees the only role of the dormant Commerce Clause as protecting representational government and feels that the Privileges and Immunities Clause would do as well.). *See also* Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 418-20 (1946). The Commerce Clause "is not the simple clean-cutting tool supposed. . . . [I]ts implied negative operation on state power has been uneven, at times highly variable. . . . [T]he history of the Commerce Clause has been one of very considerable judicial oscillation." *Id.*; Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMMENTARY, 395 (1986) (would reduce the role of the judiciary in settling disputes and leave it to the agencies, which are better equipped for the job); Redish, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569 (1987) (Redish sees no textual foundation for the dormant Commerce Clause and would eliminate the dormant Commerce Clause analysis in order that Congressional inertia would favor state power rather than work against state power as it now does; he would favor Congress only overturning state regulations that are grossly protectionist.); Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986) (would restrict the reach of the Commerce Clause to laws that have a protectionist purpose rather than merely a protectionist effect and those that benefit locals at the expense of foreign competitors); Smith, *supra* note 156, at 1203 (finds the judicial handling of Commerce Clause matters "irretrievably muddled" and notes that between 1941 and 1986 there were only ten regulations invalidated on Commerce Clause grounds, while between 1976 and 1986, there were also ten).

163. *See supra* note 9.

164. *See supra* note 162.

165. *See supra* note 94.

166. City of Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978). *See also* Maine v. Taylor, 477 U.S. 131, 138 (1986) (States have authority under their police powers to regulate matters of local concern even if there is an effect on interstate commerce.).

167. *Philadelphia*, 437 U.S. at 630.

168. R. FINDLEY, ENVIRONMENTAL LAW IN A NUTSHELL 216 (1988) (balancing tests in Commerce Clause cases often favor environmental concerns). *See also* Stewart, *supra* note 66,

ample, the Court upheld the first "bottle law" in Oregon,[169] finding persuasive the state's argument that such a law would substantially reduce litter and conserve energy.[170] The Court found the law to be a non-discriminatory use of police powers, which did not excessively burden the flow of interstate commerce.[171]

Only three years after *Philadelphia*, the Court considered Minnesota's ban on the use of plastic milk containers,[172] a measure to preserve landfill space and to protect the environment from the proliferation of non-biodegradable materials.[173] The Minnesota Supreme Court had rejected the law on Equal Protection grounds[174] as the law favored the local paper industry over the largely out-of-state plastic industry. The U.S. Supreme Court disagreed, upholding the law against both Equal Protection and Commerce Clause challenges.[175] The Court saw the ban as non-discriminatory and fulfilling evenhandedly, and in the least restrictive manner, a compelling state environmental purpose.[176]

In reviewing a similar waste ban, the Court would be unlikely to find a purely economic protectionist motive, especially if the state showed itself to be actively engaged in sound waste management practices. Any such law, however, would still run aground on the evenhandedness portion of the *Pike*

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at 264:

> Non-market values have become more precious as a result of industrial development and commercial homogenization. It is hardly surprising that the judicial techniques developed to maintain an open market economy cannot carry over to environmental and natural resource controversies where the market often fails to allocate resources equitably or wisely.

Id. See generally Regan, *supra* note 162 (citing the Court's recent tendency to favor protectionism in natural resources cases) and Levy & Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343 (1989) (contending that the Court is less protective of the environment than Congress intended).

169. OR. REV. STAT. §§ 459.810-459.890 (1985) (requiring beverage retailers and distributors to accept empty containers and pay a refund).

170. Note, *The Oregon Bottle Bill*, 54 OR. L. REV. 175, 190-91 (1975) (paraphrasing American Can v. Oregon Liquor Control Comm'n, 15 Or. App. 618, 517 P.2d 691 (1974)).

171. *American Can*, 15 Or. App. at 630, 517 P.2d at 702. *But see* Note, *State Environmental Protection Legislation and the Commerce Clause*, 87 HARV. L. REV. 1762, 1768 (1974) (criticizes the Oregon Supreme Court for a rather facile Commerce Clause analysis).

172. Minnesota v. Clover Leaf Creamery, 449 U.S. 456 (1981).

173. MINN. STAT. ANN. § 116F.21 (West Supp. 1980) (repealed by Laws of Minn. 1981 ch. 151, § 2, eff. May 9, 1981).

174. Minnesota v. Clover Leaf Creamery, 289 N.W.2d 79 (1979).

175. *Minnesota*, 449 U.S. at 456. *See* Stewart, *supra* note 66, at 251 (noting that the Court in *Clover Leaf* did not use a rigorous undue burden analysis because of technical complexity, the non-market values at stake, and the regional nature of the conflict).

176. *Minnesota*, 449 U.S. at 471-73. *See also* Commonwealth Edison v. Montana, 453 U.S. 609 (1981) (deference given to matters regarding natural resources); Huron Portland Cement v. City of Detroit, 362 U.S. 440, 448 (1960) (local smoke abatement code not an undue burden on interstate commerce and is a valid exercise of police powers).

test,[177] unless the state could show that the environmental problems engendered by the disposal were already of crisis proportions.[178] In any case, the implications of permitting all states to effect such unilateral bans would work to the severe disadvantage of those states that simply cannot manage the enormous volume of their own hazardous waste because of geological constraints.[179]

In the interests of furthering the national policy objective of waste minimization, one option for the individual states would be to institute and enforce strict recycling and waste reduction legislation[180] and then to ban the disposal of any wastes that do not meet standards at least as stringent as those in effect in the importing state.[181] The Court would no doubt find this measure to be evenhanded as it would apply to in-state and out-of-state dumpers[182] and that it would be the least discriminatory manner in which to limit pollution short of banning disposal of *all* hazardous wastes. Finally, the Court would find that the local benefits in terms of minimizing the volume and toxicity of disposed wastes outweighed the burden to shippers and out-of-state generators.

Under current Commerce Clause analysis, a state cannot require reciprocal agreements[183] in instituting hazardous waste measures. Nor can it require that the exporting state enact similar laws,[184] but it may be able to

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177. *See supra* note 94 and accompanying text.

178. *See supra* notes 132-38 and accompanying text.

179. *See supra* note 108 and accompanying text. *See also* Campbell, *State Ownership of Hazardous Waste Disposal Sites: A Technique for Excluding Out-of-State Wastes?*, 14 ENVTL. L. 177 (1983) (warning of problems resulting from closed state borders).

180. Of course, this scheme could lead to a bewilderment of minimization standards, and the need for national uniformity may then become compelling. However, until national standards are established, states should be able to protect themselves.

A potential problem that goes beyond the scope of this note is the extent to which states could institute minimization standards for wastes not currently generated in their own states. Such broad legislation might be seen as aimed exclusively at barring out-of-state wastes, although its environmental soundness would be unquestioned. *But see* Exxon v. Maryland, 437 U.S. 117, 125 (1977) (Maryland statute preventing gas supply preferences upheld even though the burden fell solely on interstate companies because Maryland had no local producers or refiners).

181. *See Recycling*, *supra* note 125, at 1342-44 (advocating a similar scheme in the solid waste context).

182. *See supra* note 100 and accompanying text.

183. A reciprocity agreement requires that the foreign state promise to provide a service or enact a law to accommodate the regulating state. The failure to do so results in a closing of the state border. *See* Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 954-58 (1982) (no reciprocity requirement in interstate groundwater transfers); Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366, 375-78 (1976) (a *quid pro quo* requirement for interstate milk sales is a reciprocity that violates the Commerce Clause); Hardage v. Atkins, 582 F.2d 1264 (10th Cir. 1978) (reciprocity agreement requirement for import of industrial waste struck down).

184. New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988) (striking down an Ohio law giving a tax credit for sale of ethanol either produced in Ohio or, if produced in

put the burden of compliance on all *generators*, in-state as well as out-of-state. Such a scheme would reward responsible states and generators for instituting the kind of sound hazardous waste management and minimization practices that are called for repeatedly in federal legislation.

While the judicial options to excluding undesirable hazardous wastes are still very limited under the traditional Commerce Clause analysis,[185] Congress has very broad powers regarding matters of interstate commerce. Congress can and should exercise these powers[186] to regulate the interstate flow of hazardous wastes.

B. Legislative Options

Congressional power to legislate in matters touching on interstate commerce is plenary.[187] Indeed, Congress has a long history of legislating in order to prevent the perpetuation of harmful activities or commodities in interstate commerce.[188] Over the years state borders have been closed to lottery tickets,[189] obscene materials,[190] white slave traffic,[191] stolen vehicles,[192] kidnapped persons,[193] flight to avoid prosecution,[194] and adulterated food.[195] In addition, Congress has the power to approve interstate hazardous waste disposal compacts that exclude waste importation.

Congress has used its Commerce Clause power to preempt the field[196] in some environmental areas, including the Hazardous Materials Transpor-

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another state, when that state gives reciprocal tax advantages to Ohio ethanol); Hardage v. Atkins, 619 F.2d 871, 873 (10th Cir. 1980) (*Hardage*, 582 F.2d 1264 on remand) (States may not require substantially similar legislation in the exporting state with the alternative that waste imports are barred.).

185. *See supra* note 94 and accompanying text.

186. *See supra* note 9 and accompanying text.

187. *See supra* note 9 and accompanying text.

188. Stewart, *supra* note 9, at 1230:

> Congressional authority to use the commerce power in the service of moral ideas is long-established. It may only be in the context of a nationwide commitment that individuals or communities will be persuaded mutually to forego consumption in order to fulfill duties to the weak and vulnerable or preserve the inheritance of future generations. The most serious vice of a liberal society is the comfortable complacency that serves as veneer for narrow self-interest. Nationally determined policies may be indispensable engines of moral change.

Id.

189. Champion v. Ames, 188 U.S. 321 (1903).

190. United States v. Popper, 98 F. 423 (N.D. Cal. 1899).

191. Hoke v. United States, 227 U.S. 308 (1913).

192. Brooks v. United States, 267 U.S. 432 (1925).

193. Gooch v. United States, 297 U.S. 124 (1936).

194. Hemans v. United States, 163 F.2d 228 (6th Cir. 1947).

195. Hipolite Egg Co. v. United States, 220 U.S. 45 (1911).

196. *See supra* note 13 and accompanying text.

tation Act,[197] and it certainly could occupy the entire field of hazardous waste management to the exclusion of competing state legislation.[198] Congress will likely continue to erode state authority by promulgating minimum standards, recognizing that the federal government does not have the resources for such an onerous task. While a vastly increased federal commitment to developing waste minimization technologies has been called for,[199] the federal government is still no closer to instituting baseline minimization standards to complement the extensive legislation in the area of hazardous waste management.[200]

Because of the manifest severity of the hazardous waste production and disposal crisis in this country,[201] at least minimal Congressional intervention into the interstate aspects of the problem is warranted. Proposals involving interstate compacts[202] and the hazardous waste exclusion/minimization legislation[203] would require a minimum of federal intervention into state authority. Such proposals would also encourage states to effect the kinds of hazardous waste controls at the production end that federal legislation has recommended.[204]

The Congressionally-approved state compact system, permitting states to enter agreements to address common problems and share resources, was envisioned by the Constitution[205] and is mentioned in RCRA[206] as a viable

197. Hazardous Materials Transportation Act, 49 U.S.C. § 1811 (1982) (state or local requirements regarding hazardous materials transportation preempted). *See also* Schuknecht, Overcast & Dively, *Federal Preemption of State and Local Radioactive Materials Transportation Regulations* IV TEMP. ENVTL. L. & TECH. J. 3 (1985) (discussing HMTA with regard to radioactive wastes).

198. *See* Comment, *Preemption Doctrine in the Environmental Context: A Unified Method of Analysis*, 127 U. PA. L. REV. 197 (1978). It is interesting to note that in reauthorizing both RCRA in 1984 and CERCLA in 1986, Congress has shown itself to have lost confidence in the EPA's discretionary functions, and Congress itself has become the regulator. But Congress is reluctant to make such moves unless some event "such as an environmental disaster, an upsurge in public concern . . . moves the issue to the top of the legislative agenda." Florio, *Congress as Reluctant Regulator: Hazardous Waste Policy in the 1980s*, 3 YALE J. ON REG. 351, 376 (1986). *But see* Rotunda, *Sheathing the Sword of Federal Preemption*, 5 CONST. COMMENTARY 311 (1988) (detailing Reagan's 1987 Executive Order limiting preemption).

199. FROM POLLUTION, *supra* note 6, at 36-38.

200. *Id. See supra* note 46.

201. *See, e.g., supra* note 161.

202. *See infra* notes 205-11 and accompanying text.

203. *See supra* notes 180-81 and accompanying text.

204. *See supra* note 52 and accompanying text.

205. U.S. CONST. art. I, § 10, cl. 3: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . ." Compacts are the joining together of two or more states to share resources and effect joint planning schemes, especially with regard to environmental and natural resource issues. *See also* Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 708 (1925) (advocating compacts as regional solutions to regional problems).

waste management option.[207] Compacts are not often formed, but in the 1982 Nuclear Waste Policy Act,[208] Congress called on the states to band together and form compacts to pool low-level radioactive waste facilities; nine such compacts have been approved to date.[209] The advantages are great: Compacts provide an opportunity to pool state resources, to limit cross-country movement of waste, and to exclude out-of-compact waste.[210] Some public opposition has arisen in two host states, but this has not proved to be a significant obstacle.[211]

Now that states have joined forces to address a common waste disposal problem, the time is ripe to further encourage this practice. The reporting and planning requirements of the Capacity Assurance Program[212] would

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206. RCRA § 6904. Some cooperative efforts have been made to help with regional siting of facilities (New England Regional Commission and Delaware River Basin Commission), but they lack the statutory authority of a compact. GREENBERG & ANDERSON, *supra* note 61, at 175-234.

207. At least one commentator is convinced that compacts are impracticable: "Ideally, regional solutions would be preferable and have indeed been called for by academies. However, given the failure of past attempts in both water and air pollution . . . it would appear to be fruitless to spend much time pursuing this chimera."
Lieber, *Federalism and Hazardous Waste Policy*, in J. Lester & A. Bowman, *supra* note 124, at 68-69.

208. Low-Level Radioactive Waste Policy Act of 1980, Pub. L. No. 96-573, 94 Stat. 3347, *superseded by* Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1986) (codified at 42 U.S.C. §§ 2021(b)-(j) (Supp. IV 1986). States have made unsuccessful attempts, prior to this Act, to exclude their neighbors' radioactive wastes. *See* Washington State Bldg. & Constr. Trades Council v. Spellman, 518 F. Supp. 928 (E.D. Wash. 1981), *aff'd* 684 F.2d 627 (9th Cir. 1982). *But see* Mostaghel, *Who Regulates the Disposal of Low-Level Radioactive Waste under the Low-Level Radioactive Waste Policy Act?*, 9 J. ENERGY L. & POL'Y 73 (1988) (criticizing the Commerce Clause application in *Spellman* and recommending that go-it-alone states be allowed to exclude waste).

209. Telephone interview with Gregg Larson, Executive Director, Midwest Low-Level Radioactive Waste Commission, (Jan. 4, 1989). Eight states have decided not to join compacts.

210. Low-Level Radioactive Waste Policy Act of 1980 (LLRWPA), 42 U.S.C. § 2021(c). But note that states acting alone may not be able to exclude outside waste from their facility. Berkowitz, *Waste Wars: Did Congress "Nuke" State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1985?*, 11 HARV. ENVTL. L. REV. 437 (1987); M. SEITZINGER, CONGRESSIONAL RESEARCH SERVICE, LEGAL ANALYSIS OF WHETHER A STATE CAN EXCLUDE LOW-LEVEL RADIOACTIVE WASTE GENERATED OUTSIDE THE STATE FROM DISPOSAL WITHIN THE STATE (1986).

211. Both Nebraska and Michigan, which have been designated as host states for radioactive waste disposal within their compacts, have met with local opposition. Some citizens found undesirable the prospect of becoming the sole repository for all the wastes generated in the compact. Nebraska voters defeated an initiative in the November 1988 election advocating that the state withdraw from the compact. Wall Street Journal, Oct. 20, 1988, § A, at 18.

212. *See supra* note 65 and accompanying text. Of course, this ban would only apply to wastes entering the state for the purpose of disposal, rather than for processing or recycling. The federal government has acknowledged the wisdom of states bonding together:

The EPA originally interpreted this authority [§ 104(c)(9)] to permit only contracts or

lay an effective foundation for states to assess reliably their long-range mutual needs and resources, and would require states to come to the bargaining table repeatedly to formulate interstate hazardous waste agreements.[213] Congress should take this opportunity to provide additional incentives to the states to form hazardous waste compacts. In fact, some states that have already formed low-level radioactive waste compacts may be inclined to consider a similar hazardous waste option.[214] Incentives should include generous federal grants to aid a would-be compact with planning strategies, with waste minimization studies of industries within the compact, and with the siting, construction, and maintenance of disposal and processing facilities. Most important, however, the federal government must be prepared to permit the compact states to exclude hazardous waste from non-compact states as it has done with the low-level radioactive waste compacts.[215]

In return for such incentives, Congress should require, as preconditions to compact approval, that the compact states demonstrate the following:

1. that they have produced acceptable twenty-year capacity plans involving agreements among the compact states only;[216]
2. that they have instituted uniform waste minimization guidelines and strict enforcement procedures for their hazardous waste producing industries;
3. that they have agreed to construct and maintain jointly-funded facilities, if necessary, especially those that process or recycle wastes, and have enacted similar enabling legislation for facility siting;
4. that they have undertaken the responsibility to dispose of their own hazardous wastes, although the compact states may agree to exchange wastes among themselves;[217]

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cooperative agreements on a site-by-site basis. However, the Agency has subsequently recognized the advantages to both the Federal Government and the States of permitting 'multi-site' cooperative agreements, . . .

One substantial advantage of multi-state cooperative agreements is that they will better enable EPA and the States to more effectively and efficiently use and target their limited resources.

S. Rep. No. 11, 99th Cong., 1st Sess., at 24-25 (1985).

213. Under the proposed guidelines for the capacity assurance the states would enter into agreements to exchange waste and would update the agreements every two years. ASSURANCE, *supra* note 62, at 9.

214. *See supra* note 209 and accompanying text. A multi-state compact arrangement covering *all* hazardous wastes may not be a viable one for certain portions of the country such as EPA Regions III, IV, and VI [the Eastern seaboard and the South], which produced 80.7% of the hazardous waste produced in 1985. BIENNIAL REPORT, *supra* note 6, at 5.

215. LLRWPA, § 2021(c). How far Congress can go in shaping compacts is uncertain. *See* Heron, *The Interstate Compact in Transition: From Cooperative State Action to Congressionally Coerced Agreements*, 60 ST. JOHN'S L. REV. 1 (1985) (criticizing congressional coercion in the formation of the Northwest Power Council).

216. *See* SARA § 104(c)(9), *supra* note 58 and accompanying text.

217. This provision parallels the SARA § 104(c)(9) provision but limits the number of

5. that they have agreed to serve as emergency disposal backup for a reasonable amount of waste from the other compact states;
6. that they have formed an effective governing body to referee disputes with federal assistance;[218] and
7. that they have instituted dumping fee controls that will assure compact industries that they will not be at the mercy of compact facilities.

In addition to such incentives for compact formation, Congress should encourage non-compact states to formulate their own minimization mandates for specific hazardous wastes because the federal government is not prepared to do so. For those states that do not wish to take advantage of the compact system, but who have taken steps to reduce hazardous wastes, Congress should enable them to apply the same rigorous in-state standards to waste that is imported. If Congress were to expressly empower states to enforce across-the-board minimization standards, the Commerce Clause challenges would be foreclosed[219] and states would be able to limit their disposal facilities to hazardous waste generators that have dealt with their waste responsibly.

VI. CONCLUSION

Hazardous waste disposal is one of the most compelling environmental crises facing this country. Both federal legislative and judicial action and inaction, however, have foreclosed a workable, unified national attack. The federal government has proved unable to take the lead in waste minimization, and the Commerce Clause doctrine requires that hazardous wastes move freely among the states as articles of commerce. While the federal regulatory controls tighten with the promulgation of each new act, federal law does not preempt the entire field. Congress has not been an effective leader in requiring strict waste minimization, the only effective long-term technique to alleviate the problem. Rather, the states are left to their own devices and are often content to export wastes rather than take responsibility for both the generation and the disposal of their own hazardous wastes. Options for limiting this flow are very limited.

CERCLA § 104(c)(9), the Capacity Assurance Program, is a starting point in encouraging states to improve their performance with regard to

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states that can dispose of each other's waste.

218. Clearly, the federal government would be reluctant to take part in such disputes if the capacity assurance guidelines are a fair indication. *See supra* note 62. *Cf.* Act of January 15, 1986, Pub. L. No. 99-240, January 15, 1986, 99 Stat. 189 - 99ff. Article III sets up the Midwest States Compact Low-Level Radioactive Waste Commission.

219. As Congress would have exercised its plenary power to grant the states the right to enforce such legislation affecting interstate commerce, the Commerce Clause analysis would be irrelevant. *See supra* note 9.

facility siting and to studying and accounting for the movement of their wastes. This program will force states to assess their own legislation and to forge disposal agreements with other states. But this provision alone is insufficient to address the problem.

The Commerce Clause analysis that the Court currently employs suggests that some justices are giving more weight to state environmental concerns. However, a Court review of a state hazardous waste import ban would almost certainly not survive constitutional scrutiny after *Philadelphia* unless the state environmental problem had already reached crisis proportions. In recognition of the hazardous waste contamination crisis that has been reached in this country, Congress must be willing to exercise its Commerce Clause authority. Federal environmental legislation has long encouraged interstate and regional cooperation as well as compacts, and Congress has the power to put strong incentives in place to encourage such formation. In addition, environmentally responsible non-compact states should have the option of excluding hazardous waste imports that do not conform to the strict minimization standards mandated by the importing state.

Natural resources in the United States are not without limit, and the burden of our stewardship is a heavy one. One hundred and thirty-six years after Chief Seattle wrote to President Pierce, his words may have proved prophetic:

> Your destiny is a mystery to us. What will happen when the buffalo are all slaughtered? The wilderness tamed? What will happen when the secret corners of the forest are heavy with the scent of many men and the view of the ripe hills is blotted by talking wires? Where will the thicket be?. . . The end of living and the beginning of survival.[220]

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220. J. CAMPBELL & B. MOYERS, *supra* note 1. Similarly prophetic are Hardin's famous words: "Ruin is the destination toward which all men run, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all." Hardin, *The Tragedy of The Commons*, 162 SCIENCE 1243, 1244 (1968).