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Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home

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Americans have a throw-away mentality. Americans throw away 179.6 million tons of garbage per year. People in this country generate more garbage per capita than in any other nation. The ease with which we produce garbage is not matched by an eagerness to create places to dispose of it. "The First Law of Garbage is: 'Everybody wants us to pick it up, and nobody wants us to put it down.'" A severe shortage of disposal facilities for waste is an outcome of the nation's littering culture.

1. The Environmental Protection Agency (EPA) describes garbage as: "bottles, cans, disposable diapers, uneaten food, scraps of wood and metal, worn-out tires and used-up batteries, paper and plastic packages, boxes, broken furniture and appliances, clippings from our lawns and shrubs—the varied human refuse of our modern industrial society." OFFICE OF SOLID WASTE, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, THE SOLID WASTE DILEMMA: AN AGENDA FOR ACTION 6 (1989) [hereinafter AGENDA FOR ACTION]. Garbage is only part of what is more technically referred to as solid waste, which according to the Resource Conservation and Recovery Act of 1976, includes "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material." 42 U.S.C. § 6903 (1988).


3. AGENDA FOR ACTION, supra note 1, at 8. NIMBY, the acronym for "Not In My Backyard," is commonly associated with opposition to the siting of new waste disposal facilities of any kind—landfill, combustor, or recycling centers. See id.; see also OFFICE OF TECHNOLOGY ASSESSMENT, CONGRESS OF THE UNITED STATES, FACING AMERICA'S TRASH: WHAT NEXT FOR MUNICIPAL SOLID WASTE? 1 (1989) [hereinafter FACING AMERICA'S TRASH] (noting that people with NIMBY attitudes have opposed siting new landfills in their areas and that the same people would probably oppose incineration and recycling facilities as well); Shipping Out the Trash, 18 ENVTL. FORUM, Sept./Oct. 1991, at 28 (describing the conflict between those states that import wastes and cry out
capacity has resulted in a nationwide garbage disposal crisis.⁴

More than fifteen million tons of garbage cross state lines each year.⁵ Some states, struggling to plan for and accommodate their own solid waste, are attempting to use their regulatory powers to stop or slow the flow of waste imported to their landfills.⁶ In contrast, others are using their regulatory powers “NIMBY,” and those that rely on the Commerce Clause to protect their ability to export).

4. Landfills remain the most common destinations for solid waste, receiving 80% of municipal solid waste. AGENDA FOR ACTION, supra note 1, at 15. Of the nation’s 20,000 landfills, 14,000 closed between 1978 and 1988, and half of those remaining open will close by 1995. Phillips, supra note 1, at A1. New EPA regulations placing stricter constraints on landfills are expected to accelerate landfill closings. Id. Lack of local landfill capacity in some areas has induced private companies to try to purchase large areas of land for long-hauled waste, inciting controversy and resentment. See Dan Fagin, Badlands in Demand, NEWSDAY, Oct. 21, 1991, at 5 (Connecticut-based company trying to purchase land on Indian reservation in South Dakota for largest landfill in the country); Kriz, supra note 2, at 2540 (describing problems caused by imported waste absorbing local capacity). Communities may receive some benefits, however, from “hosting” large private landfills. See Jeff Bailey, Economics of Trash, WALL ST. J., Dec. 3, 1991, at A1 (discussing payment of “host fees” by waste disposal companies in order to entice areas to permit large landfills for imported waste); Phillips, supra note 1, at A1 (community receipt of percentage of “tipping fees” eases local opposition to landfill for imported waste).

5. See Shipping Out the Trash, supra note 3, at 28 (stating that it is often cheaper to haul waste long distances than to dispose of it locally). Interstate transportation of solid waste appears to have increased. FACING AMERICA’S TRASH, supra note 3, at 274-75; see also James E. McCarthy et al., Memorandum to the Senate Environment and Public Works Comm., reprinted in Interstate Transport and Disposal of Solid Waste: Hearing Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works, 101st Cong., 2d Sess. at 235 (1990) (accounting of which states import and which export waste).

6. In 1978 the United States Supreme Court held that a New Jersey regulation prohibiting the importing of solid waste to both public and private landfills violated the Commerce Clause. City of Philadelphia v. New Jersey, 437 U.S. 617 (1978). This decision has not stopped states from taking measures to protect themselves from imported waste. States, however, must take circuitous routes to avoid violating the Commerce Clause if they wish protect in-state disposal capacity by preventing the importing of waste. See Stephen M. Johnson, Beyond City of Philadelphia v. New Jersey, 95 DICK. L. REV. 131 (1990) (discussing Pennsylvania’s efforts to slow the flow of waste to its limited landfill space); Robert Meltz, State Discrimination Against Imported Solid Waste: Constitutional Roadblocks, 20 ENVTL. L. REP. (ENVT'L. L. INST.) 10,383 (Sept. 1990) (discussing the use by states of both the market-participant exception and fee systems to block or inhibit imported waste, and litigation resulting from these efforts); David Pomper, Note, Recycling Philadelphia v. New Jersey: The Dormant Commerce Clause, Postindustrial “Natural” Resources and the Solid Waste Crisis, 137 U. PA. L. REV. 1309, 1337 (1989) (suggesting at least five methods states could use to protect in-state disposal
to preclude waste exports in efforts to create and sustain in-
state waste disposal capacity. These states are implementing
statewide integrated waste management plans that either au-
thorize intrastate regions to keep their waste or institute state-
wide flow control regulations. While integrated waste
management plans in states such as Rhode Island and Minne-
sota promote state goals, they interfere with the interstate ship-
ment of solid waste.

In 1976 Congress enacted the Resource Conservation and
Recovery Act (RCRA) because "the problems of waste dispos-
... [had] become a matter national in scope and in con-
cern." RCRA created a comprehensive regulatory system for
managing the nation's hazardous waste but left the responsi-
ibility for managing nonhazardous solid waste to state, regional,
and local authorities. During the 1980s, American citizens
and lawmakers focused on addressing the nation's hazardous

capacity); Rudy Abramson, Backlash Over Trash Exports Builds, L.A. TIMES,
Nov. 10, 1991, at A28 (reviewing various strategies states employ to keep out
foreign waste).

7. See, e.g., MINN. STAT. §§ 115A.01-.991 (1990); R.I. GEN. LAWS §§ 23-19-1
to -39 (1989); see also AGENDA FOR ACTION, supra note 1, at 16-19 (listing com-
ponents of such a plan).

8. Flow control is a governmental entity's control of the disposal of solid
waste within a specific geographic area. It is accomplished by directing haulers
to deliver waste to a designated solid waste disposal facility. See DEL. CODE
ANN. tit. 7, § 6406(a)(31) (1991). Flow control can be an essential part of effec-
tive planning. See FACING AMERICA'S TRASH, supra note 3, at 304; N.C.
Vasuki, Solid Waste Authorities: Getting Movement on Needed Projects, SOLID
WASTE & POWER, Aug. 1991, at 20; see also C. Baird Brown, A Checklist for
Legally Enforceable Obligations to Use Disposal Services, in MUNICIPAL SOLID
WASTE: DISPOSAL STRATEGIES, ENVIRONMENTAL REGULATION, AND CON-
TRACTS AND FINANCING 323, 325 (ALI-ABA Course of Study: Materials, No.
C355 (1988)) (discussing the importance of ensuring that "tons [of waste] come
through the door" for both financing facilities and fulfilling any recycling or
energy contracts); Kelly Outten, Note, Waste to Energy: Environmental and
Local Government Concerns, 19 U. RICH. L. REV. 373, 381-83 (1985) (discussing
the importance of flow control in financing waste-to-energy facilities).

of 42 U.S.C. §§ 6901-6992k (1988)). RCRA addresses both hazardous and non-
hazardous wastes; this Note focuses on some of the problems surrounding non-
hazardous waste, particularly municipal solid waste.

2d Sess. 3 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6240 (addressing the
problems created by rapidly increasing volumes of discarded materials in asso-
ciation with the growing scarcity of disposal capacity).

11. See FACING AMERICA'S TRASH, supra note 3, at 8. In contrast to the
approach adopted for nonhazardous waste, Congress addressed the hazardous
waste problems facing the nation with a strict "cradle-to-grave" regulatory pro-
gram. See 1A FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 4.03,
at 4-112.3 (1991).
waste problems but paid little attention to the growing problem of how America was handling its garbage. Thus, Congress truly left planning to the states, resulting in a variety of state efforts.

Congress is in the process of reauthorizing RCRA. Interstate transportation of solid waste is the most controversial issue in the reauthorization process. This Note focuses on an important aspect of the interstate transportation debate—a state's use of its police powers to require that waste be disposed of in state. Flow control regulations are often necessary to ensure the financial security of waste disposal facilities and programs. Under current federal law, however, flow control regulations that affect interstate commerce may be unconstitutional.

Part I of this Note briefly examines RCRA's legislative history, Congress's approach to facilitating state planning, and the relevant Environmental Protection Agency (EPA) regulations. Part II describes the Rhode Island and Minnesota solid waste plans. Part III describes relevant Commerce Clause litigation.


13. State plans which have emerged since RCRA's enactment are diverse in "content and utility." Facing America's Trash, supra note 3, at 11; see id. at 303-08 (describing both local and state planning efforts and the limited extent of federal involvement); see also Agenda for Action, supra note 1, at 16-17 (noting that state planning should reflect its unique needs); Jonathan P. Meyers, Note, Confronting the Garbage Crisis: Increased Federal Involvement as a Means of Addressing Municipal Solid Waste Disposal, 79 Geo. L.J. 567, 568-69 (1991) (advocating increased federal role in state planning).

14. The reauthorization process began in 1988 and has involved many proposed amendments and hearings. See Abramson, supra note 6, at A28; Hill, supra note 12, at 10,275-76.

15. See Abramson, supra note 6, at A28.

16. If a municipal government provides waste collection and disposal services, flow control is not controversial. However, when private haulers provide these services, flow control measures affect the free market of waste disposal services. See Brown, supra note 8, at 326-28; Outten, supra note 8, at 382; see also C & A Carbone, Inc. v. Town of Clarkstown, 770 F. Supp. 846, 854 n.2, 855 (S.D.N.Y. 1991) (assuming that a local government can control the flow of local waste, but striking a local law directing the flow of foreign waste hauled and processed by a private business).
Part IV addresses the essential problems raised by the use of flow control to interfere with an existing stream of interstate commerce. Part IV argues that state control of its own waste is consistent with federal waste management goals articulated in RCRA and in subsequent federal policy. This Note proposes that Congress explicitly recognize a state’s right to withdraw its waste from the stream of interstate commerce when doing so furthers local interests and coincides with federal policy.

I. FEDERAL INVOLVEMENT IN SOLID WASTE MANAGEMENT

A. BACKGROUND OF RCRA


18. Congress viewed the waste management problem as one of planning and "anticipate[d] that federal guidelines for planning will foster the necessary cooperation between the federal government, states, and local regions, to meet [the] very broad and flexible objectives of this act." H.R. REP. No. 1491, supra note 10, at 33, reprinted in 1976 U.S.C.C.A.N. at 6271. States historically were minimally involved in waste management and usually delegated responsibility to municipalities. FACING AMERICA'S TRASH, supra note 3, at 348; see 1A GRAD, supra note 11, § 4.02[1].

The SWDA was intended to begin the process of comprehensive state planning. Andersen, supra note 17, at 635-36, 646. Although 48 states formulated some type of plan, the overall approach was piecemeal. Id. at 643. Funding for solid waste management programs under the SWDA decreased
gress concluded that waste management practices were diverse and uncoordinated, "often having less than optimal results."\textsuperscript{19} RCRA shifted the focus of solid waste management from transporting solid waste to the local dump toward a system that encouraged comprehensive state planning. RCRA did not, however, devise any system of federal regulation for municipal solid waste.\textsuperscript{20} Rather, it established an incentive-based program that relied on voluntary state involvement.\textsuperscript{21}

RCRA provided federal assistance to states that developed plans satisfying the statutory and EPA guidelines.\textsuperscript{22} RCRA's federal assistance, the heart of the federal solid waste program, was not especially effective. Federal financial assistance ceased entirely in 1988.\textsuperscript{23}

B. EFFECTIVE STATE PLANNING UNDER RCRA

In developing RCRA, Congress was particularly concerned with the difficulties in financing and constructing waste man-

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\textsuperscript{19} H.R. REP. NO. 1491, supra note 10, at 10, reprinted in 1976 U.S.C.C.A.N. at 6247-48. Although Congress realized that local solutions were not working, it did not remove the responsibility for waste disposal regulation from state and local government. Andersen, supra note 17, at 645.

\textsuperscript{20} See Kovacs & Klucsik, supra note 17, at 223. RCRA did not authorize the federal government to impose plans upon states that failed to devise their own. The only cost of noncompliance is the loss of federal assistance. See 42 U.S.C. § 6947(b)(3) (1988).

\textsuperscript{21} See H.R. REP. No. 1491, supra note 10, at 32-33, reprinted in 1976 U.S.C.C.A.N. at 6270-71 ("[F]ederal assistance should be an incentive for state and local authorities to act to solve the discarded materials problem. At this time preemption of this problem is undesirable, inefficient, and damaging to local initiative."); AGENDA FOR ACTION, supra note 1, at 11 (stating that the ultimate responsibility for waste management falls on state and local government; the federal government only provides goals and assistance).


\textsuperscript{23} See 42 U.S.C. § 6948(a)(1) (1988); see also FACING AMERICA'S TRASH, supra note 3, at 305, 307 (stating that federal attention to and funding for municipal solid waste ended in the early 1980s); Meyers, supra note 13, at 569 & n.18; cf. FACING AMERICA'S TRASH, supra note 3, at 305 (stating that despite the lack of federal funding, most states continued to plan, but those plans did not necessarily follow RCRA guidelines).
WASTE MANAGEMENT

agement facilities. The RCRA provision ensuring that states could enter into long-term contracts for the supply of solid waste to resource recovery facilities,\textsuperscript{24} and the provision for Resource Recovery and Conservation Panels to help state and local governments plan for solid waste management,\textsuperscript{25} indicate that Congress intended to promote effective state planning.

Congress recognized that the ability to guarantee waste volume is necessary to the success of a waste disposal facility.\textsuperscript{26} Congress concluded that private companies were "capable of and willing to enter into resource recovery ventures if a sufficient volume of refuse [could] be guaranteed over a sufficiently long period of time."\textsuperscript{27} The barriers to private involvement primarily stemmed from local governments' inability to guarantee the volume of waste necessary to maintain facilities and thus to attract investors to proposed projects.\textsuperscript{28} Congress attempted to

\begin{itemize}
\item 24. 42 U.S.C. § 6943(a)(5) (1988); see also id. § 6903(11) ("[L]ong term contract' means, when used in relation to solid waste supply, a contract of sufficient duration to assure the viability of a resource recovery facility (to the extent that such viability depends upon solid waste supply).”).
\item 25. Id. § 6913.
\item 26. H.R. REP. No. 1491, supra note 10, at 34, reprinted in 1976 U.S.C.C.A.N. at 6272. One of the major concerns addressed in the long process of developing RCRA was the inability of state or local governments to enter into long-term contracts. Congress stressed the importance of this impediment to improved solid waste management, stating that "the federal government will not commit technical or financial resources to aid states in the establishment of resource recovery systems if the states maintain barriers to the establishment of such systems." Id. at 8, reprinted in 1976 U.S.C.C.A.N. at 6246.
\item 27. H.R. REP. No. 1491, supra note 10, at 34, reprinted in 1976 U.S.C.C.A.N. at 6272. In 1978, however, private investors still hesitated to finance projects. Kovacs & Klusik, supra note 17, at 257-58. In 1977, H.R. 1214 was introduced "to provide financial assistance for waste recovery projects, and ease the capital crunch such projects may face." Id. at 258 (citing H.R. 1214, 95th Cong., 1st Sess. (1977)).
\item 28. "[I]n order to get the facility built, the bond holders require the community delivery requirements or the community delivery contracts." Symposium, supra note 26, at 105 (statement of Stephen Lewis). However, the ability of a government to enter into long-term contracts assumes control over the waste stream; this is not always the case. See Brown, supra note 8, at 326-29; see also Outten, supra note 8, at 382 (a municipality may not have control
ensure that facilities would maintain a consistent waste flow by conditioning federal assistance upon the removal of state or local barriers to long-term contracts for securing volumes of waste.29 Some members of Congress proposed loan guarantee programs for waste recovery projects, but the final version of RCRA did not include these proposals.30 Ultimately, the economics of better waste disposal practices and effective planning were tightly interwoven in both the legislation and in practice.

In addition to requiring the removal of barriers to long-term contracts, RCRA made Resource Recovery and Conservation Panels available to help states develop successful state and local waste management programs.31 Congress recognized that

over its waste stream if it contracts with private haulers for collection). Guarantees of waste volume sufficient to insure viability are critical in marketing bonds for many waste facility projects. See, e.g., Central Iowa Refuse Sys. v. Des Moines Metro. Solid Waste Agency, 715 F.2d 419, 422 (8th Cir. 1983), cert. denied, 471 U.S. 1003 (1985); Hybud Equip. Corp. v. City of Akron, 654 F.2d 1187, 1188-89 (6th Cir. 1981), vacated on other grounds, 455 U.S. 931 (1982); see also Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775, 785 (D.R.I.), aff'd per curiam, 947 F.2d 1004 (1st Cir. 1991) (Rhode Island Solid Waste Management Corp. claimed that its regulation was enacted, in part, to facilitate the sale of bonds for a proposed waste-to-energy facility.). The problems of building a facility based on unguaranteed waste flows were recognized in United States v. O'Rourke:

It is one thing to address, in the planning mode, the overall needs of Westchester County for waste disposal. It is quite another to proceed, in the absence of adequate commitments from municipalities and private carters, to build a facility capable of handling the totality of committed and uncommitted waste. A capital project of this nature is typically financed by the issuance of revenue obligation bonds. How are the bonds to be underwritten and sold in the absence of adequate user commitments to generate the cash flow needed to finance the debt service on the bonds?

943 F.2d 180, 188 (2d Cir. 1991).

29. 42 U.S.C. § 6943(a)(5) (1988); 40 C.F.R. § 256.01(b)(5) (1991) (forbidding state or local law from prohibiting local governments from entering into “long-term contracts for the supply of solid waste to resource recovery facilities”). This requirement is incorporated into state plans. See, e.g., 7 DEL. CODE ANN. tit. 7, § 6401(b)(5) (1991). The 1980 amendments to RCRA stressed materials conservation and recovery and provided federal assistance to “analyze legal, institutional and economic impediments to material and energy recovery.” See 1A GRAD, supra note 11, § 4.03[5].

30. Kovacs & Klucsik, supra note 17, at 257 n.190. The proposed United States Resource Recovery Corporation had two functions related to promoting construction of recovery facilities: to guarantee investments in projects and to sell insurance against losses caused by insufficient waste volumes. Id. Instead of this proposal, funds were made available for demonstration facilities. Id. at 257 n.190.

31. See 42 U.S.C. § 6913 (1988). The panels facilitate local planning efforts by providing expertise and advice, including “evaluation of the proposals; obtaining of a suitable financial package; deciding who should and will dump at
developing projects would involve "large expenditures for the construction [of facilities] . . . or vast legal problems coordinating numerous communities in an effort to obtain sufficient waste volume, so that . . . [the facilities] would be economically viable."32

EPA regulations, promulgated pursuant to RCRA, stress that state planning must reflect the projects' financial feasibility. Thus, "[t]he volume of wastes within a region will influence the technology choices for recovery and disposal . . . ."33 These regulations require that a region generate a sufficient volume of waste to support the objectives of the state plan.34

C. THE CURRENT STATE OF FEDERAL POLICY

Since 1976, the portions of RCRA which address nonhazardous wastes have essentially remained unchanged, marking a

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34. Id. § 255.10(a)(1), (c). In the legislative history of RCRA, Congress referred to Wisconsin's regionalized waste management planning as a model for state planning. H.R. REP. No. 1491, supra note 10, at 2, reprinted in 1976 U.S.C.C.A.N. at 6240. A significant section in Wisconsin's plan was entitled "Required Use of Facilities." Wisconsin Solid Waste Recycling Auth. v. Earl, 235 N.W.2d 648, 656 (1975). This provision empowered the Wisconsin Solid Waste Recycling Authority to require the use of its facilities in order to make them financially viable, among other reasons. Id.
period of inattention to the growing problems of solid waste disposal. In 1989, the EPA redirected its attention to the problems of municipal solid waste. In a report entitled *The Solid Waste Dilemma: An Agenda for Action*, the EPA sought to identify the shortcomings in current solid waste disposal policies and establish national goals for solid waste management.

The *Agenda for Action* encourages states to utilize integrated waste management—involving a combination, in order of desirability, of source reduction, recycling, combustion and landfilling—to meet particular local waste disposal needs.

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35. *Facing America's Trash*, supra note 3, at 347. The establishment of several federal energy programs which provided assistance and funding for waste-to-energy facilities, however, indicates that the government did not entirely ignore waste disposal issues. See id. at 299. Yet, these energy-related activities did not survive into the 1980s when the focus shifted to control of hazardous waste. Id.

36. *Agenda for Action*, supra note 1, at 1-4. The government's current effort to deal with municipal solid waste issues is prompted by the problems arising from the significant decline in landfill capacity nationwide and the difficulties governments face in efforts to site new waste disposal facilities. *Facing America's Trash*, supra note 3, at 8. Controversies surrounding interstate shipments of solid waste are also a factor influencing the government to address the issue. See Meltz, supra note 6, at 10,383 (discussing the enactment of laws to ban or discourage importation of waste).

37. Integrated waste management is the combination of four waste management practices “to safely and effectively handle the municipal solid waste stream with the least adverse impact on human health and the environment.” *Agenda for Action*, supra note 1, at 16-17. A community can “custom-design” a system, employing management methods according to local needs and resources. Id. Several states have included integrated waste management in their waste management plans. See, e.g., MINN. STAT. § 115A.02 (1990 & Supp. 1991); R.I. GEN. LAWS § 23-19-3(11) (1989). The four practices are source reduction, recycling, combustion, and landfilling.

Source reduction efforts focus on manufacturers and call for a reduction in the amount and toxicity of packaging. Consumers are called upon to alter their buying habits to encourage manufacturers to practice source reduction. *Agenda for Action*, supra note 1, at 18.

Recycling directs useful materials away from landfills or waste burning facilities, reducing both waste volume and demand for raw materials. Id. The EPA set a goal of recycling 25% of waste by 1992. *Facing America's Trash*, supra note 3, at 24.

Combustion reduces the bulk of waste, but the resulting ash must be buried in a landfill. Some combustion facilities also produce energy from waste. *Agenda for Action*, supra note 1, at 19.

In 1976, when Congress enacted RCRA, it concluded that “although land is too valuable a national resource to be needlessly polluted by discarded materials, most solid waste is disposed of on land . . . . [A]lternatives to existing methods of land disposal must be developed.” 42 U.S.C. § 6901(b)(1), (8) (1988). Landfilling, the least-favored method of waste disposal, “is essential to handle wastes such as nonrecyclable waste and the noncombustibles . . . . A well-constructed, properly operated landfill should not present a significant
Consistent with the purpose behind RCRA, the EPA intended the *Agenda for Action* to provide national leadership but leave the actual planning and implementation to state and local governments.

In preparing the *Agenda for Action*, the EPA stated that state and local governments “should assume responsibility for the wastes generated within their jurisdictions.” The EPA does not, however, advocate control of the interstate transportation of waste, either imports or exports, because it believes that “[s]uch restrictions could stymie the concept of sub-state or multi-state solid wastes management solutions, which the EPA also encourages.”

Congress is currently in the process of reauthorizing RCRA, focusing on the federal role in solid waste management. In the past three congressional sessions, more than 100 bills that would modify RCRA’s statutory scheme have been introduced. Most proposals would make state planning mandatory.
and would encourage the development of in-state waste disposal capacity. States which now receive large amounts of imported waste are pushing for the ability to ban or charge differential fees for out-of-state waste.\(^4\) The controversy over interstate waste shipments has slowed efforts to pass a comprehensive RCRA package.\(^4\) Regardless of the outcome of the interstate commerce debate, the federal role in solid waste management is likely to increase with any new legislation.\(^4\)

II. STATE PLANS: CONTROLLING WASTE EXPORTS

Although many states have comprehensive waste management plans, there is no uniformity among state approaches.\(^4\) State efforts to address solid waste disposal issues often focus on goals and on methods for financing the facilities needed to carry out the state’s plan.\(^4\) States are necessarily concerned with guaranteeing the volume of waste necessary to sustain solid waste facilities.\(^4\)

Historically, the use of police power to control waste collec-

commerce clause implications of various bills introduced during the 101st Congress).

\(^41\) See Shipping Out the Trash, supra note 3, at 30.
\(^42\) See Kriz, supra note 2, at 2540.
\(^43\) See FACING AMERICA'S TRASH, supra note 3, at 350; Hill, supra note 12, at 10,275-76. However, the federal role in this area is not likely to match its role in regulating hazardous wastes. FACING AMERICA'S TRASH, supra note 3, at 350. The Bush administration does not support changing RCRA. See Abramson, supra note 6, at A28; Kriz, supra note 2, at 2540.
\(^44\) See FACING AMERICA'S TRASH, supra note 3, at 306-07; 1A GRAD, supra note 11, § 4.02[2][a]. As early as 1905 the Supreme Court addressed the problems of waste disposal for cities and densely populated areas, noting that “[m]any of the questions involved in municipal sanitation have proved to be difficult of solution. There is no mode of disposing of garbage and refuse matter, as found in cities and dense populations, which is universally followed.” California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 320 (1905).
\(^45\) FACING AMERICA'S TRASH, supra note 3, at 304-08. Rhode Island and Delaware have centralized waste management in single authorities. Id. Other states, in contrast, leave waste management primarily at the county or municipal level, with varying degrees of state involvement. Id.
\(^46\) See Outten, supra note 8, at 381-82 (stating that the financing of facilities is often contingent on a guaranteed flow); see also Brown, supra note 8, at 325-29 (discussing the need to have control over waste in order to finance projects). Congress was also concerned with guaranteeing volumes of waste. H.R. REP. No. 1491, supra note 10, at 34, reprinted in 1976 U.S.C.C.A.N. at 6272. Flow control is related to successful financing of waste management facilities in many states. See, e.g., DEL. CODE ANN. tit. 7, § 6406(a)(31) (1991); FLA. STAT. §§ 403.7063, 403.713 (1986 & Supp. 1992); ME. REV. STAT. ANN. tit. 38, § 1304-B (West 1989 & Supp. 1991); MINN. STAT. § 115A.80 (1990 & Supp. 1991); R.I. GEN. LAWS § 23-19-10(40) (1989); see also FACING AMERICA'S TRASH, supra note 3, at 338 & n.40 (noting that flow controls “to ensure sufficient re-
tion and disposal served an important health and safety function.\textsuperscript{47} Flow control mechanisms can also serve to ensure that a sufficient volume of waste will enter disposal facilities to make them financially feasible.\textsuperscript{48} Rhode Island and Minnesota included flow control powers in their comprehensive state waste management plans. While these state plans do not approach planning and waste management identically, each utilizes police powers to ensure that the waste management systems are financially viable.

Rhode Island enacted comprehensive legislation which created a single authority responsible for developing and implementing a statewide solid waste management plan.\textsuperscript{49} The Rhode Island Solid Waste Management Corporation (RISWMC) has broad powers to carry out its responsibilities,\textsuperscript{50} including the authority to "require all persons and municipalities . . . to use the services and facilities of the corporation."\textsuperscript{51}

\begin{itemize}
  \item Control of local sanitation, including garbage collection and disposal . . . is a traditional, paradigmatic example of the exercise of municipal police powers reserved to state and local governments under the Tenth Amendment.\textsuperscript{47} Hybud Equip. Corp. v. City of Akron, 654 F.2d 1187, 1192 (6th Cir. 1981), \textit{vacated on other grounds}, 455 U.S. 931 (1982). In two cases concerning designation of facilities to receive waste, the Supreme Court recognized that control over the collection and disposal of waste was a legitimate, non-arbitrary exercise of police powers to protect health and safety. California Reduc-
  \item RISWMC controls all waste disposal services provided in the state, including licensing of facilities. All contracts for waste disposal services are also "subject to the approval of the corporation . . . [and] conditioned upon a finding . . . that the proposed contract will not impair the ability of the corporation to meet its contractual obligations to its bondholders and others." \textit{Id.} § 23-19-13(a)(1). RISWMC also controls licensing of all in-state facilities. \textit{Id.} § 23-18-8 to -9. Additionally, the Act declares RISWMC to be a market participant in the waste services market, enabling it to restrict use of its facilities to in-state waste. \textit{Id.} § 23-19-2(11), (12); \textit{see Lefrancois v. Rhode Island}, 669 F. Supp. 1204, 1212 (D.R.I. 1987) (upholding waste import ban on grounds that Rhode Island is a market participant).
  \item R.I. GEN. LAWS § 23-19-4(c) (1989). Currently, Rhode Island subsidizes
The enabling legislation for RISWMC requires that it rely entirely on income from fees to finance its programs.\textsuperscript{52}

RISWMC used its statutory powers to enact flow control regulations.\textsuperscript{53} Before the enactment of the regulations, residential waste was disposed of at RISWMC's facilities, but a significant amount of commercial waste was hauled out of state.\textsuperscript{54} The flow control regulations were intended to stop the flow of commercial waste out of the state.\textsuperscript{55}

In contrast to the approach taken by Rhode Island, Minnesota's Waste Management Act\textsuperscript{56} provides a comprehensive plan for improving and integrating waste management on a local level.\textsuperscript{57} The Act places waste management responsibility on county government but also encourages regional cooperation and planning within a structured, statewide planning effort.\textsuperscript{58} Importantly, the Legislature designed the Act, in part, to effectuate the "[o]rderly and deliberate development and financial security of waste facilities including disposal facilities."\textsuperscript{59} To this end, the Act provides for localized control over the flow of solid waste to a particular facility.\textsuperscript{60} Any district or county can designate a particular facility to receive all of the waste gener-

\begin{enumerate}
\item municipal solid waste disposal costs and uses commercial waste fees to finance projects. \textit{Id.} § 23-19-13(f)-(h).
\item \textit{Id.} § 23-19-13(a)(2).
\item See \textit{id.} at 777.
\item \textit{Id.} at 778; see also Outten, supra note 8, at 382 (discussing the controversial exercise of police powers over waste not controlled by local government).
\item \textit{Id.} § 115A.02.
\item Under Minnesota law the primary responsibility for the management of solid waste lies with county government. MINN. STAT. § 473.149 (1990). The Act, however, recognizes that the activities of individual political subdivisions are not adequate to implement "integrated and coordinated solid waste management systems." \textit{Id.} § 115A.62. Other states similarly place responsibility for planning on local units of government. See, \textit{e.g.}, ME. REV. STAT. ANN. tit. 38, § 1304-B (West 1989 & Supp. 1991) (requiring each municipality to provide disposal services for domestic and commercial solid waste generated in the municipality); Mich. COMP. LAWS §§ 299.401-.437 (1990 & Supp. 1991) (establishing regulatory powers at the state level, with much of the planning delegated to county governments); N.D. CENT. CODE § 23-29-06 (1991) (requiring all land in the state to be part of a solid waste management district).
\item In order to further the state policies and purposes . . . and to advance the public purposes served by effective solid waste management, the legislature finds and declares that it may be necessary . . .
Both states' waste management legislation enabled responsible bodies to enact regulations that would interrupt interstate commerce by taking the state's waste out of the stream of commerce. The states enacted these regulations to guarantee waste volume and to ensure the financial stability of facilities intended to achieve integrated waste management. Private waste disposal services have challenged the flow control regulations under the Commerce Clause.

61. Id. § 115A.80. The plan must provide a comprehensive analysis of the facility, whether it promotes state policies, the costs of designation, and the necessity of designation in relation to the project, i.e., "whether the designation is necessary for the financial support of the facility; ... [and] whether less restrictive methods for ensuring an adequate solid waste supply are available." Id. § 115A.84.


In the past, private waste disposal services challenged flow control regulations under federal antitrust laws. See Keith C. Hetrick, The Federal Local Government Antitrust Act of 1984 and the 1985 Amendments to the Florida Antitrust Act: A Survey and Analysis of Florida Local Government Antitrust Liability, 13 FLA. ST. U. L. REV. 77, 93-94 (1985) (stating that the control of solid waste "characteristically involve[s] exclusive contracts or regulations restricting competition," and that a survey of Florida local governments revealed that government solid waste disposal services were perceived to be among the most vulnerable to antitrust litigation). However, Community Communications Co. v. City of Boulder, 455 U.S. 40, 52 (1982), extended antitrust immunity to anticompetitive municipal regulations enacted as part of "clearly articulated and affirmatively expressed state policy." See also City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344, 1346 (1991) (holding that federal antitrust laws do not apply to the anticompetitive activities of local governments implementing state policy). Thus, challenges under federal antitrust laws will fail if the flow controls are pursuant to state policy. See Central Iowa Refuse Systems v. Des Moines Metro. Solid Waste Agency, 715 F.2d 419, 420-21 (8th Cir. 1983) (upholding similar regulations), cert. denied, 471 U.S. 1003 (1985); Hybud Equip. Corp. v. City of Akron, 654 F.2d 1187, 1195-96 (6th Cir. 1981) (upholding regulations which barred competition with the public facility and required all haulers and collectors of waste to use the facility), vacated on other grounds, 455 U.S. 931 (1982); C & A Carbone, Inc. v. Town of Clarkstown, 770 F. Supp. 848, 851-54 (S.D.N.Y. 1991) (holding that a town exercising control over the waste stream is immune to claims under antitrust laws but that those parts of the controls affecting interstate commerce violate the Commerce Clause). Many states have clearly granted local governments the authority to control waste flows. See, e.g., DEL. CODE ANN. § 6422 (1991) (specifically barring competitive activities); R.I. GEN. LAWS § 23-19-13(a)(1) (1989).
When it passed RCRA, Congress did not preempt state regulation of municipal solid waste management, but it also did not expressly grant states the power to regulate in ways that interfere with interstate commerce. Thus, litigants have raised Commerce Clause challenges to state waste regulations which interfere with interstate commerce.

A. THE DORMANT COMMERCE CLAUSE

Article I, Section 8 of the Constitution of the United States affirmatively grants Congress the power to "regulate Commerce among the several States." In interpreting the scope of the federal commerce power, the Supreme Court has noted that the Commerce Clause implies limits on state power to inhibit interstate commerce even when Congress has not acted.

(same). The immunity from antitrust laws does not, however, protect state regulations from challenges brought under the Commerce Clause.


64. In City of Philadelphia, the Supreme Court identified New Jersey's waste import ban as consistent with RCRA. Thus, the only question was whether New Jersey's law violated the Commerce Clause. 437 U.S. at 620-21. Absent a congressional grant of authority to states to regulate commerce, the "negative implications of the Commerce Clause... are ingredients of the valid state law." Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 960 (1981).

65. For a concise summary of such cases, see Melz, supra note 6, at 10,384-90. In addition, the Supreme Court affirmed City of Philadelphia in two recent decisions. See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 60 U.S.L.W. 4438 (U.S. June 1, 1992) (No. 91-636) (overturning intercounty restrictions on solid waste disposal as a violation of the dormant Commerce Clause); Chemical Waste Management, Inc. v. Hunt, 60 U.S.L.W. 4433 (U.S. June 1, 1992) (No. 91-471) (overturning a tax on out-of-state hazardous wastes).


Some commentators argue that Congress has the power to review state regulations which burden interstate commerce, and that inaction, or "inertia,"
Because the Constitution does not expressly regulate state commerce power, the Court and commentators have referred to this doctrine as the dormant Commerce Clause.\textsuperscript{67}

Despite the Commerce Clause, the Court has recognized that “in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.”\textsuperscript{68} A state may not, however, use its regulatory power to protect in-state economic interests.\textsuperscript{69} Therefore, this should not be turned against the states by the judiciary. \textit{E.g.}, Martin H. Redish & Shane V. Nugent, \textit{The Dormant Commerce Clause and the Constitutional Balance of Federalism}, 1987 Duke L.J. 569, 592-94; see also Daniel A. Farber, \textit{State Regulation and the Dormant Commerce Clause}, 3 Const. Commentary 395, 412 (1986) (arguing that congressional inactivity in a certain area may be intended to favor the rights of states).

This notion is particularly relevant in assessing the validity of state solid waste management planning. Congress explicitly intended for this to be a state responsibility, and therefore did not preempt state regulations. Rather than limiting judicial review to whether a state law is consistent with RCRA, however, the Court has required conformity with the dormant Commerce Clause. \textit{See City of Philadelphia}, 437 U.S. at 623.

67. The restraints placed upon state regulations “appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court.” \textit{City of Philadelphia}, 437 U.S. at 623. Some commentators have criticized the Supreme Court’s adoption of this role. \textit{See Farber, supra} note 66, at 412 (questioning whether the judiciary should exercise its power to act in the absence of congressional action); Redish & Nugent, \textit{supra} note 66, at 588-90 (criticizing the courts’ use of dormant Commerce Clause theory to infer congressional intent that an area remain unregulated); Mark Tushnet, \textit{Rethinking the Dormant Commerce Clause}, 1979 Wis. L. Rev. 125 (arguing that the Court has stretched the justifications for reviewing state legislation that discriminates or interferes with interstate commerce); \textit{see also} Donald H. Regan, \textit{The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause}, 84 Mich. L. Rev. 1091 (1986) (criticizing the use of the dormant Commerce Clause except to strike protectionist state legislation).


69. \textit{See City of Philadelphia}, 437 U.S. at 624 (It “does not matter that the State has shut the article of commerce inside the State in one case and outside the State in the other. What is crucial is the attempt by one state to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.”); \textit{see also} \textit{Lewis v. BT Inv. Managers}, 447 U.S. 27, 44
"residuum of power" provides a narrow area in which states may impose an "incidental" burden on interstate commerce. 70

The central thrust of the Court's Commerce Clause analysis proscribes economic isolationism and protectionism. 71 In evaluating state regulations challenged under the Commerce Clause, the Court has developed two basic levels of scrutiny. First, regulations which, on their face, discriminate against articles in commerce are subject to strict scrutiny. 72 The Court will look at both the purpose and effect of the regulation. If the regulation discriminates for protectionist purposes the Court applies a virtual "per se rule of invalidity." 73 However, the state has an opportunity to show that the regulation furthers legitimate local interests unrelated to economic protectionism, and that the regulation is the least burdensome means of achieving this interest. 74 If the state carries this burden, its regulation will survive the challenge. 75

70. A state may bar the importation of objects whose value in interstate commerce is "far outweighed by the dangers inhering in their very movement." City of Philadelphia, 437 U.S. at 622. States may also burden interstate commerce when protecting the health and safety of their residents. However, the mere existence of a purported health and safety purpose is not dispositive. See Hunt, 432 U.S. at 350. Additionally, states may regulate in the area of "environmental protection and resource conservation" subject to Commerce Clause limitations. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981).

Courts also recognize a state's limited right to experiment within its own borders. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also Reeves, Inc. v. Stake, 447 U.S. 429, 441 (1980). A purpose of the federal system is to have "diversity of commercial regulation" among the states; however, Congress can step in if diversity becomes too burdensome. Regan, supra note 67, at 1177; see also Farber, supra note 66, at 414 (arguing that state experimentation is important).

71. See Hunt, 432 U.S. at 350 (identifying the Commerce Clause as an "overriding requirement of a national 'common market' ").

72. Under strict scrutiny, the burden of showing the discriminatory nature of a regulation falls on the challenging party; however, once the challenging party makes this showing, the burden of proving a legitimate local purpose shifts to the state. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).


74. New Energy Co., 486 U.S. at 278.

75. See, e.g., Maine v. Taylor, 477 U.S. 131, 147-48 (1986) (upholding Maine's ban on the importation of bait fish because there was no alternative
Second, the Court applies the lenient test outlined in *Pike v. Bruce Church, Inc.* when a state regulation promotes local interests without facially discriminating against goods in interstate commerce.\(^7\) The incidental burden imposed on interstate commerce must not be "clearly excessive in relation to the putative local benefits."\(^7\) States may regulate commerce even-handedly, that is, when the effects fall evenly on both in- and out-of-state interests and the burden imposed on interstate commerce is not clearly excessive relative to the local benefits.\(^8\)

Congress has the power to override the dormant Commerce Clause and grant states the power to regulate commerce in ways which would otherwise be impermissible.\(^9\) In order to remove the threat of challenges brought under the Commerce Clause, Congress must "expressly state" its intent to permit states to regulate in ways which interfere with interstate commerce.\(^10\)

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\(^7\) Bruce Church, 397 U.S. at 142.

\(^8\) Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981). A state may strictly regulate the use of natural resources by its citizens, and thereby regulate use of that resource by others. See, e.g., Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 957 (1981) (discussing the ability of a state to restrict in-state water usage, and thereby restrict out-of-state use); City of Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978) (indicating that a state could "slow[] the flow of all waste into the state's remaining landfills"); see also Nowak & Rotunda, supra note 63, § 8-9, at 297-98 (discussing the ability of states to control natural resources).

\(^9\) That would adequately protect the state’s interest in protecting its native bait fish supply from disease and infection).

\(^10\) White v. Massachusetts Council of Constr. Employers, 460 U.S. 204, 213 (1983); see also Johnson, supra note 6, at 132 n.11 (noting that Congress has the power to grant states the ability to ban imports of solid waste).
B. Commerce Clause Challenges to Flow Controls

In 1978, the Supreme Court decided the landmark case of City of Philadelphia v. New Jersey, holding that solid waste was a legitimate object of commerce protected by the Commerce Clause.81 The Court affirmed City of Philadelphia in two recent decisions.82 In City of Philadelphia, New Jersey had prohibited the importation of solid waste to landfills located in the state. New Jersey's purported legitimate interests in its environment and in health and safety did not insulate the facially discriminatory regulation from Commerce Clause challenge.83 Courts have expanded City of Philadelphia to hold that state flow controls which ban waste exports are also subject to Commerce Clause scrutiny.84

81. 437 U.S. 617, 628 (1978). The Court determined that “[t]he harms caused by waste are said to arise after its disposal in landfill sites, and at that point, as New Jersey concedes, there is no basis to distinguish out-of-state waste from domestic waste.” Id. at 629. But see id. at 632-33 (Rehnquist, J., dissenting) (equating solid waste with articles posing a danger to the health of a state’s citizens and thereby concluding that a ban on importation would be permissible, and further arguing that a state must deal with diseased or hazardous articles produced within its borders, but should not have to accommodate those from elsewhere).

82. See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep’t of Natural Resources, 60 U.S.L.W. 4438 (U.S. June 1, 1992) (No. 91-636) (overturning intercounty restrictions on solid waste disposal as a violation of the dormant Commerce Clause); Chemical Waste Management, Inc. v. Hunt, 60 U.S.L.W. 4439 (U.S. June 1, 1992) (No. 91-471) (applying the dormant Commerce Clause to overturn a tax on out-of-state hazardous wastes). The Court noted that the Fort Gratiot case does not raise questions about policies that “governmental agencies may pursue in management of publicly owned facilities.” 60 U.S.L.W. at 4439-40.

83. See City of Philadelphia, 437 U.S. at 625. The Court decided a resolution of actual legislative purpose was unnecessary because “the evil of protectionism can reside in legislative means as well as legislative ends.” Id. at 626. In this case the means betrayed the ends. Today, New Jersey appears to be the largest exporter of solid waste. See McCarthy et al., supra note 5, at 244.

84. Waste Sys. Corp. v. County of Martin, No. CIV. 3-91-0375, 1992 WL 31418, at *3 (D. Minn. Feb. 14, 1992); Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775, 782 (D.R.I.), aff’d per curiam, 947 F.2d 1004 (1st Cir. 1991). These are not the only challenges to flow control regulations that affected interstate commerce of waste. In J. Filiberto Sanitation, Inc. v. New Jersey Dep’t of Envtl. Protection, 857 F.2d 913, 922 (3d Cir. 1988), the Third Circuit upheld a regulation which required waste to be processed at a state-owned transfer station, prohibiting the direct interstate shipment of waste. The plaintiff did not provide evidence of protectionist intent. Id. at 920. The Filiberto court held that the plaintiff’s failure to show a burden on interstate commerce was dispositive. Id. The regulation did not prevent interstate commerce; instead, it simply made it more efficient, although more expensive. Id. at 921. In C & A Carbone, Inc. v. Town of Clarkstown, 770 F. Supp. 848 (S.D.N.Y. 1991), the local government’s
1. A Preliminary Injunction: Allowing the Flow

RISWMC's flow control regulation was challenged under the Commerce Clause by a Massachusetts business that hauled Rhode Island waste to Massachusetts and Maine for disposal.\(^{85}\) The plaintiff sought a preliminary injunction against the enforcement of Rhode Island's regulation, which prevented it from disposing of Rhode Island waste at out-of-state facilities.\(^{86}\) In *Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp.*, the court looked beyond the regulation's facial, nonprotectionist purpose to its "practical effect."\(^{87}\)

RISWMC argued that the regulations did not discriminate because they applied to all waste haulers, regardless of their origin.\(^{88}\) RISWMC further argued that a significant in-state burden fell on generators of waste who would now be paying more for disposal services provided at RISWMC's central landfill.\(^{89}\) The court acknowledged that the existence of significant in-state burdens provided "..." a powerful safeguard" against legislative discrimination," but determined that the critical factor was the economic benefit the regulation conferred on RISWMC.\(^{90}\)

flow control regulations, which were implemented to secure the viability of a waste transfer station, not only affected local waste, but controlled out-of-state waste imported and processed in the town by a private business. *Id.* at 850. The district court granted a preliminary injunction against enforcement of those provisions which affected a private waste-processing business, holding that the town could not use its regulatory powers to reduce local disposal costs at the expense of interstate commerce. *Id.* at 854. In *Harvey & Harvey, Inc. v. Delaware Solid Waste Auth.*, 600 F. Supp. 1329 (D. Del. 1985), the district court upheld a regulation which precluded exports of waste. *Id.* at 1331. The court held that the in-state plaintiff failed to allege a protectionist purpose and therefore dismissed the Commerce Clause action for failure to state a claim. *Id.*

85. *DeVito Trucking*, 770 F. Supp. at 777. DeVito hauled 400 tons per day of commercial waste to facilities in other states. *Id.* In 1990 RISWMC reduced its “tipping fees” for commercial waste from $59 to $49 dollars per ton, hoping to increase its share of the commercial waste market; it achieved only a short-term increase in the volume of waste coming to its facilities. *Id.* The $49 per ton RISWMC receives from the waste that was being shipped out-of-state significantly increases its revenues. *Id.* at 781. Municipal solid waste is disposed of at RISWMC's Central Landfill at a rate set by law ($14 per ton) and RISWMC has the power to set “tipping fees” for commercial waste at an amount necessary to fulfill its statutory duties. *Id.* at 781.

86. *Id.* at 777.

87. *See id.* at 781-82.

88. *Id.* at 782.

89. *Id.*

90. *Id.* (quoting *J. Filiberto Sanitation, Inc. v. New Jersey Dep't of Envtl. Protection*, 857 F.2d 913, 921 (3d Cir. 1988) (in turn quoting *Minnesota v. Klo-
Having determined that the flow control regulations discriminated against interstate commerce, the court applied strict scrutiny, placing the burden on RISWMC to justify its regulations. The court analyzed each of the purposes RISWMC gave for its flow control measure. The court determined that the only reasonable justification for the regulation was that it would facilitate the construction of publicly-owned waste-to-energy facilities in Rhode Island. The court noted that Rhode Island's ability to harness commercial waste would help finance such a project but held that Rhode Island's plan was not the least burdensome method to fund the waste facility. The court analogized the regulations to those challenged in City of Philadelphia and held that an absolute ban is the greatest indicator of economic protectionism. In light of the apparent protectionist purpose and effect, the court preliminarily enjoined RISWMC from enforcing the flow control regulations.

2. Striking a Local Application of State Law

Under the Minnesota's Waste Management Act, two southern Minnesota counties in 1989 formed a solid waste management board. As part of their plan, Martin and Faribault Counties established a solid waste composting facility.

RISWMC also relied on the Third Circuit's decision in Filiberto. The DeVito Trucking court distinguished Filiberto, noting that in Filiberto the state did not compete with out-of-state facilities, but was in fact a customer. DeVito Trucking, 770 F. Supp. at 782-83. In contrast, RISWMC was using its powers to protect itself from out-of-state competition. Id. See supra note 84 (discussing Filiberto).

92. Id. Although the court acknowledged that RISWMC's judgments on "matters that are fairly debatable" warranted considerable deference, it would not accept RISWMC's assertions to the extent that they were "clearly unsupported or contradicted by the evidence." Id. at 783.
93. Id. at 785. Although plans for a waste-to-energy facility existed, regulatory approval for the project was not guaranteed. Id.
94. Id.
95. Id. at 782. The regulation favored RISWMC as proprietor of a landfill at the direct expense of out-of-state economic interests. Id.
96. Id. at 785-86. The First Circuit affirmed the district court for the reasons stated in the district court's opinion. Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp, 947 F.2d 1004, 1004 (1st Cir. 1991).
98. The counties built the eight million dollar facility to accommodate all of the compostable waste generated within their borders. Waste Systems, 1992 WL 31418, at *1. The composting facility, in conjunction with state mandated
make the facility financially secure, the counties applied for and received permission to “designate” the facility as the sole recipient of all waste generated in Martin and Faribault Counties. Waste Systems Corporation, an Iowa corporation, alleged that the designation ordinances violated the Commerce Clause by discriminating against companies that dispose of waste outside of Minnesota.

In Waste Systems Corp. v. County of Martin, a federal district court held that the designation ordinances violated the Commerce Clause. The court found the designation ordinances to be “strikingly similar” to the flow control regulations enjoined by the DeVito Trucking court, and applied strict scrutiny. The decision to designate the facility was motivated in part by concern for its financial success. The counties’ designation plan specifically identified the plaintiff as a competitor with its facility. The court determined that the designation created a direct economic benefit for the counties' facility by preventing the flow of waste to the plaintiff’s Iowa landfill. While recognizing the importance of improved waste management, the court determined that ensuring the financial viability of the facility was not compelling enough to justify interference with interstate commerce. The court found that less burdensome alternatives for ensuring the financial feasibility of the facility existed. The court permanently enjoined the counties from enforcing the designation ordinances.


Id. at *4 (granting the plaintiff’s motion for summary judgment on the Commerce Clause claim and granting the counties’ motions for summary judgment on the other challenges).

Id. at *2-3.

Id. at *4. Approximately two-thirds of the counties' waste is shipped to Waste Systems's Iowa landfill. Id. The counties' designation plans explicitly stated that designation is necessary because they cannot compete with the plaintiff's landfill. Id. at *3.

See id.

Id. at *4.

Id. This finding is significant because the designation plans must address alternatives and the county receives permission from the state to designate a facility only if this method is “necessary.” See MINN. STAT. § 115A.84 (2), (3)(b) (1990 & Supp. 1991).

1992 WL 31418, at *6. Currently, 20 Minnesota counties either have designation ordinances in place or are in the process of designating waste as a
IV. THE NEED FOR CONGRESSIONAL RECOGNITION OF FLOW CONTROL REGULATIONS

Congress recognized that guaranteed waste flow is crucial to the success of every waste management facility. Many states have premised their solid waste plans on consistent waste flow.\(^{108}\) However, when waste has entered the stream of commerce, a state's attempt to direct its destination may run afoul of the Commerce Clause. This Note contends that Congress should grant states the authority to withdraw waste from the stream of interstate commerce to encourage the planned disposal of waste.

A. THE POLICY IMPLICATIONS OF THE COMMERCE CLAUSE BARRIER TO FLOW CONTROL

Regulations which control waste exports in order to ensure the financial security of in-state waste management programs raise serious Commerce Clause questions. If states enact export control regulations to promote waste management financing, their environmental goals may be tainted by a form of protectionism.\(^{109}\) The \textit{DeVito Trucking} court's invalidation of RISWMC's flow control regulation reveals that a flow control program, even when adopted in furtherance of state waste management plans, violates the proscriptions placed upon state regulation of interstate commerce. The \textit{Waste Systems} court's determination that the designation ordinances enacted pursuant to Minnesota's Waste Management Act were analogous to RISWMC's regulations further confirms the constitutional in-
firmity of flow controls.\textsuperscript{110}

The Devito Trucking and Waste Systems courts perceived that the primary goal of the flow control measures was to confer a direct economic benefit on in-state interests by reserving for them an item in interstate commerce.\textsuperscript{111} This finding is inconsistent with the view that waste collection and disposal are entirely a "local concern." Rather, it reveals that these traditionally local services have not retained a wholly local character.\textsuperscript{112} Because waste increasingly crosses state lines, use of the once-traditional police power to control waste disposal is perceived by courts to violate a long standing precedent in Commerce Clause analysis and therefore to fall outside of the "residuum of power in the state to make laws governing matters of local concern."\textsuperscript{113}

These courts were justifiably concerned about the adverse affects of protectionist state restrictions on interstate waste disposal.\textsuperscript{114} State structured plans, however, avoid many of the evils usually associated with protectionist regulations.\textsuperscript{115} It is

\textsuperscript{110} See Waste Sys., 1992 WL 31418, at *3. However, an export ban enacted by Delaware's Solid Waste Authority survived a Commerce Clause attack. Harvey & Harvey, Inc. v. Delaware Solid Waste Auth., 600 F. Supp. 1369, 1371 (D. Del. 1985). The court's decision to uphold Delaware's regulation rested primarily on the fact that the in-state plaintiff did not mount a successful challenge to the findings contained in Delaware's solid waste management legislation. Id. at 1381. The plaintiff's misunderstanding of the burden of proof was critical to the court's analysis under the Bruce Church balancing test. Id.; see Meltz, supra note 6, at 10,389 (questioning the application of the lenient balancing test to the waste export ban because the regulation was not facially neutral nor was its impact on interstate commerce incidental); cf. Waste Systems, 1992 WL 31418, at *3 (applying strict scrutiny); Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775, 783 (D.R.I.) (same), aff'd per curiam, 947 F.2d 1004 (1st Cir. 1991).

\textsuperscript{111} See Waste Systems, 1992 WL 31418, at *3; DeVito Trucking, 770 F. Supp. at 782.

\textsuperscript{112} See supra note 5 and accompanying text (discussing the long-distance hauling of waste).


\textsuperscript{114} See Regan, supra note 67, at 1092 (arguing that rooting out protectionist intent should be the goal of Commerce Clause analysis).

\textsuperscript{115} See DeVito Trucking, 770 F. Supp. at 779 (noting that businesses have a strong interest in an open waste-disposal market). However, economic efficiency and a free national market, are important, goals, but some commentators argue that they are not driving forces behind the Constitution. See
unlikely that other states will enact retaliatory policies in response to flow controls which prevent waste from crossing into landfills or other facilities located within their borders. The EPA has long intended that waste generators bear the cost for improved waste management; flow controls achieve this result.

The courts' analyses also ignore a more important consideration: states cannot achieve coherent waste management without financing waste disposal facilities. Financing is often achieved by waste export bans needed to guarantee consistent waste volume. For example, RISWMC faced a waste “migration” problem and needed the income from fees on commercial waste in order to prevent a deficit that would hamper its ability to carry out its statutory responsibilities. By enacting flow control regulations, RISWMC captured the commercial waste generated within Rhode Island's borders. The ability to capture waste significantly increased RISWMC's revenues and provided

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116. In addressing the retention of natural resources, the Court concluded that a "singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out." West v. Kansas Natural Gas, 221 U.S. 229, 255 (1911). Waste is neither a natural resource nor in short supply. Therefore, the cumulative effect of states intentionally keeping waste, particularly in furtherance of effective waste management, will only be positive. Importing states generally try to encourage other states to keep their own waste by enacting waste-import taxes or bans. See Casey Bukro, Ohio Fighting Garbage Ruling That Leaves It Holding The Bag, CHI. TRIB., July 9, 1989, at 21.

117. See AGENDA FOR ACTION, supra note 1, at 34.

118. Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775, 781 (D.R.I.), aff'd per curiam, 947 F.2d 1004 (1st Cir. 1991). The court focused on the relationship between the regulations and RISWMC's need for revenues. Id. RISWMC recognized this relationship, admitting that it had failed to attract commercial waste generators to use its facilities. Id. Thus, RISWMC could enforce flow controls or fail to satisfy its duty to implement modern, environmentally acceptable waste disposal and resource recovery facilities. Brief for Rhode Island Solid Waste Management Corp. at 11, Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp., 947 F.2d 1004 (1st Cir. 1991) (No. 91-1683).
investment security for financers of a waste-to-energy facility.\textsuperscript{119} The \textit{DeVito Trucking} court affirmed the long-standing principle of preserving a free national marketplace by recognizing that businesses have an interest in being able to dispose of their waste in an interstate market, rather than one manipulated by state regulations.\textsuperscript{120} The court, however, ignored significant realities in contemporary waste management.

The need to evade the Commerce Clause has also strongly influenced the content of state solid waste legislation.\textsuperscript{121} The threat of a Commerce Clause challenge to regulatory efforts is a significant deterrent to aggressive state solid waste management. While awareness of the effects of state regulations on interstate commerce is important, the Commerce Clause should not present an insurmountable hurdle for waste management planning. Flow control regulations are a means of financing waste facilities and programs. However, the \textit{DeVito Trucking} and \textit{Waste Systems} courts held that they violate the Commerce Clause precisely because of this economic reality.\textsuperscript{122} Whether a given state's current solid waste management plan is the least burdensome means of achieving its goals should not be the decisive factor in flow control litigation. Rather, the concern should be whether a state's actions promote state and federal

\textsuperscript{119} RISWMC bonds are guaranteed through the revenues generated by tipping fees. Thus, loss of commercial waste significantly reduces the level of assurance provided to prospective bondholders. \textit{DeVito Trucking}, 770 F. Supp. at 785. RISWMC explicitly linked financing of a waste-to-energy facility with income generated from "tipping fees" charged for commercial waste, thus combining a standard government obligation with the economics of modern-day waste disposal techniques. This combination of the legitimate exercise of police powers and economic protectionism was challenged in Central Iowa Refuse Sys. v. Des Moines Metro. Solid Waste Agency, 715 F.2d 419, 426 (1983) (plaintiff did not challenge the power of municipalities to regulate solid waste disposal for "any public health or welfare reason," but did challenge the extension of this power to guarantee financial success of a facility), \textit{cert. denied}, 471 U.S. 1003 (1985).

\textsuperscript{120} \textit{DeVito Trucking}, 770 F. Supp. at 779.

\textsuperscript{121} See supra note 6 and accompanying text (noting that states are trying to regulate waste imports but avoid Commerce Clause problems).

policies. Unless Congress opts to permit state export bans, however, state waste management efforts will forever be at the mercy of the dormant Commerce Clause.

B. **Flow Control is Consistent with RCRA**

State or local government control over waste collection and disposal is consistent with RCRA's purposes. Both the legislative history and the legislation itself reveal that Congress was concerned with maintaining a consistent waste flow. For that reason, Congress conditioned federal assistance upon the removal of state or local barriers to long-term contracts for securing volumes of waste and provided panels to advise states on effective planning methods.123

Congress intended RCRA to encourage and facilitate effective planning, but not to interfere with state autonomy. Requiring states to remove all barriers to the formation of long-term contracts was the only provision that necessitated changes in existing state and local laws. The legislative history reveals that Congress explicitly intended this intrusion to be narrow, applying only to state or local laws that would interfere with guaranteeing long term supplies of waste to a resource recovery facility.124 Significantly, the legislative history also reveals that Congress did not intend to "affect state planning which may require all discarded materials to be transported to a particular location."125 When RCRA was enacted, Congress may have assumed that flow control regulations were a legitimate exercise of state police power. Recent litigation, however, casts doubt on that assumption's validity.

Consistently, Congress and the EPA have recognized municipal solid waste disposal as a matter best left to state and local governments. RCRA provided states flexibility in achieving the goals established by Congress. These policies are affirmed in the EPA's *Agenda for Action* and in current congressional efforts to amend RCRA.126 RCRA's purpose is to facilitate the development of effective state plans and facilities, not to derail

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125. *Id.*
126. *See Agenda for Action*, supra note 1, at 9 (describing the federal government's leadership role, while leaving primary responsibility with state and local government); *see also* 137 Cong. Rec. H10,990 (daily ed. Nov. 22, 1991) (statement of Rep. Swift) (stating that H.R. 3865 will "provide a much-needed Federal leadership role in this effort, building on the expertise and re-
state, regional, or local government activities aimed toward achieving those ends.\footnote{127}

\section*{C. Why Flow Control Works}

With landfill capacity disappearing nationwide, waste disposal increasingly has national implications.\footnote{128} Construction of new, environmentally sound waste disposal facilities may be inhibited in some places because of "waste flight." Instead of creating local capacity, waste is hauled to places that have capacity.\footnote{129} While shipping waste to another state is the easiest method of eliminating a serious problem, it inevitably intrudes upon other states' planning efforts.\footnote{130} In addition, it is a short-term option that creates significant hurdles for long-term, local solutions.\footnote{131}

Increasingly, new public waste disposal facilities are publicly owned and financed through the sale of revenue bonds.\footnote{132}
Flow control regulations achieve the same investment security that Congress intended to provide through long-term contracts. However, flow controls can manage waste not otherwise controlled by local or state government. If the option to ship waste elsewhere remains, it will be difficult or impossible to build expensive facilities which require guaranteed volumes of waste in order to be economically viable. Flow control regulations make the development of long-term in-state solutions more feasible by precluding waste-flight. Thus, when enacted as part of a comprehensive state plan, flow controls promote both local and national interests.

Congress is well aware of the need to address the problems posed by the interstate shipments of waste and has focused on the issue during the current reauthorization process. Congress has concentrated on the plight of states currently "bear[ing] the burden of managing another State's municipal solid waste." In addition to requiring state planning and amending the minimum requirements for state plans, proposals currently before Congress would condition state authority to control waste imports upon EPA approval of state waste management plans.

States should have some means of controlling waste imports. Linking this authority with an approved plan would allow the EPA to ensure that each state is meeting its own waste management obligations consistently with federal policies. However, Congress should address the problems states such as Rhode Island and Minnesota face in trying to create in-state waste disposal capacity.

Congress should amend RCRA to authorize states to retain the waste generated within their borders. This authority should be linked to EPA approval. Such a provision would formally recognize the economic connection between the planning and the implementation of integrated waste management, and would end any doubt about the constitutional viability of state waste plans.

States should be able to submit plans to the EPA which include provisions enabling the responsible planning authorities to control waste flow. Congress charged the EPA with approving

\[\text{Vasuki, supra note 8, at 24 (describing how public ownership can include private businesses). Regardless of ownership, in enacting RCRA, Congress was very concerned with guaranteed flows of waste. See H.R. REP. No. 1491, supra note 10, at 34, reprinted in 1976 U.S.C.C.A.N. at 6272.}\]


\[\text{134. Id.}\]
ing plans and the agency has the expertise to determine which types of controls will be effective. States should have the ability to use waste generated within their borders to promote integrated waste management, so long as their regulations remain consistent with federal waste management goals. Enabling states to enact flow control measures free of Commerce Clause challenges will have the positive effect of allowing states to plan for the waste generated within their borders and to rely on that waste to support the facilities intended to augment in-state capacity.

This proposal alone will not solve the nation's many solid waste disposal problems. Further source reduction and recycling are essential elements of a real solution to the nation's solid waste disposal crisis. However, as states begin to take aggressive action to meet their disposal needs, Commerce Clause challenges are likely to increase. Congress can facilitate productive planning by removing the Commerce Clause barrier to flow control regulations.

CONCLUSION

The First Law of Garbage may be changing. Some states are trying to take responsibility for their own waste. Building the facilities necessary to achieve federal goals is an expensive undertaking. Giving states the ability to enact flow control regulations would allow them to regain control over those portions of the waste stream that are leaving the state, thereby putting that waste to work. However, the Commerce Clause effectively bars these efforts. Congress must remove this barrier and provide states with an incentive to undertake effective—but ex-

135. See Farber, supra note 66, at 407-08 (discussing the grant of power to agencies to approve policies that interfere with interstate commerce). Currently, EPA approval of a state plan does not guarantee Commerce Clause immunity, even for regulations that apply to hazardous and nonhazardous wastes. See National Solid Wastes Management Ass'n v. Alabama Dep't of Envl. Management, 910 F.2d 713 (11th Cir. 1991); Meltz, supra note 6, at 10,393. Prior to the Court's City of Philadelphia decision, Johnston, supra note 39, argued that preemption should not be found unless the Administrator of the EPA determines that a state statute which inhibits interstate commerce in waste interferes with the Resource Conservation and Recovery Act. Id. (footnotes omitted). While the Court did not find that RCRA preempted an import ban, it held that RCRA did not grant states the power to regulate commerce, even if the regulations were consistent with RCRA. City of Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978).

136. See supra note 3 and accompanying text.
pensive—projects by allowing them to harness local waste resources. As a result, less wastes will flow to states that do not want to serve as "dumping grounds."