Notes

Chemical Waste Management, Inc. and *Fort Gratiot*—Twin Pronouncements in the Face of Environmental Adversity

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INTRODUCTION

On June 1, 1992, the U. S. Supreme Court announced two related decisions concerning interstate transport of waste. The twin cases, *Chemical Waste Management, Inc. v. Hunt*[1] and *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*,[2] aligned themselves with a nearly two century tradition[3] buttressing the dormant Commerce Clause of the U. S. Constitution,[4] to preserve historic national, economic unity against current, local environmental concerns.

In April 1990, the Alabama Legislature enacted a bill imposing a dual fee structure upon the disposing of hazardous waste at commercial facili-

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1. Chemical Waste Management, Inc. v. Hunt, 112 S.Ct. 2009 (1992).
2. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 112 S.Ct. 2019 (1992).
3. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
4. *See* U.S. CONST. art. I, § 8, cl. 3.

ties.[5] The state charged both a Base Fee, as well as an Additional Fee for all waste generated outside of, but disposed in facilities within the State of Alabama.[6] The operator of the hazardous waste disposal facility brought suit to permanently enjoin Alabama from imposing the Additional Fee structure. The Alabama trial court[7] ruled that the Additional Fees violated the Commerce Clause. The Alabama Supreme Court reversed,[8] upholding the constitutionality of the act. The U.S. Supreme Court reversed the Alabama Supreme Court holding.[9]

In an analogous act, Michigan amended its Solid Waste Management Act ("SWMA") to require explicit county approval for disposal of waste generated outside each county. Fort Gratiot Sanitary Landfill, Inc. brought suit to declare that the revised SWMA was unconstitutional. The federal district court[10] and the Supreme Court of Michigan upheld the legislation;[11] the U.S. Supreme Court reversed.[12]

The Supreme Court released the two decisions simultaneously, internally cross-referenced to each other. One opinion was written by Justice White[13] and the other by Justice Stevens.[14] Chief Justice Rehnquist dissented in both, only joined by Justice Blackmun in *Fort Gratiot Sanitary Landfill.*

This note will analyze a continuing tradition of non-interference with interstate transport culminating in *Chemical Waste Management* and *Fort Gratiot.* In both cases, states had acted to protect local environmental and health interests by imposing fees or restrictions on the transportation and dumping of out-of-state waste. The Supreme Court has consistently struck down statutes interfering with interstate commerce. However, here, each state argued that less burdensome alternatives were not available to protect the health and safety of its citizens.

HISTORICAL CONTEXT

The Commerce Clause of the Constitution confers upon Congress

5. Act No. 90-326 effective July 15, 1990 as Ala.Code § 22-30B-1 to 22-30B-18 (Supp.1990).

6. Hunt v. Chemical Waste Management, Inc., 584 So.2d 1367 (Ala. 1991).

7. Chemical Waste Management, Inc. v. Hunt, No. 90-CV-1098 (Montgomery Cir. Ct., Ala. 1990), *rev'd* 584 So.2d 1367 (Ala. 1991), *rev'd* 112 S.Ct 2009 (1992).

8. *Id.*

9. *Id.*

10. Bill Kettlewell Excavating, Inc. v. Michigan Dept. of Natural Resources, 732 F.Supp. 761 (E.D. Mich. 1990), *aff'd* 931 F.2d 413 (6th. Cir. 1991), *rev'd* Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 112 S.Ct 2019 (1992).

11. *Id.*

12. *Id.*

13. *Chemical Waste Management,* 112 S. Ct. 2009.

14. *Fort Gratiot Sanitary Landfill,* 112 S. Ct. 2019.

the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[15] Joseph Story in his Commentaries, stated, "[t]he want of this power. . . was one of the leading defects of the confederation, and probably, as much as any one cause, conduced to the establishment of the constitution."[16] Justice Story worried that states would, and before the Constitution did, unduly burden commerce "under the stimulating influence of local interests."[17] Thus, states would struggle against each other for the benefit of foreign nations. Justice Story admonished that Switzerland and Germany had enacted similar laws of commerce for identical, historical reasons,[18] and insisted that commerce clause powers were distinct from the states' powers to regulate health, turnpikes, roads and ferries except where in conflict with Congress.[19]

In 1824, the U.S. Supreme Court decided *Gibbons v. Ogden*[20] in which Chief Justice Marshall opined:

> Commerce among the States must, of necessity, be commerce with the States . . . . The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States. The sense of the nation on this subject, is unequivocally manifested by the provisions made in the laws for transporting goods . . . .
>
> It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.[21]

Marshall envisioned a federal power that maintained the country as one economic unit, that ruled over intercourse between states and that reached into the sovereignty of states, themselves.[22] Rather than promoting 'dormant' powers of the Constitution, Marshall, as Justice Felix Frankfurter explains, "furthered the idea that though we are a federation of states we are also a nation and . . . state authority must be subject to the limitations as the Court finds it necessary to apply for the protection of the national community."[23] Justice Frankfurter notes that Marshall practically applied possibilities in *Gibbons*. "Imminent in the commerce clause were

15. U.S. CONST. art. I, § 8, cl. 3.
16. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 507 (1833).
17. *Id.* § 515 at 364.
18. *Id.* § 519 at 365.
19. *Id.* § 519 at 368.
20. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
21. *Id.* at 196.
22. *See, e.g.*, JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 4.4 (4th ed. 1991).
23. FELIX FRANKFURTER, THE COMMERCE CLAUSE: UNDER MARSHALL, TANEY AND WAITE (*reprinted* by Quadrangle Paperbacks 1964) (1937) 19.

severe limitations upon the powers of the states to tax as well as regulate commerce."[24] In a later opinion, Chief Justice Marshall states, "[w]e do not think that the act . . . can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state."[25] Frankfurter suggests that Marshall intended to harmonize free trade among the states,[26] and concludes, "[t]he history of the commerce clause, from the pioneering efforts of Marshall to our own day, is the history of imposing artificial patterns upon the play of economic life whereby an accommodation is achieved between the interacting concerns of states and nations."[27]

In recent times, two cases prior to those at hand have determined the parameters of Supreme Court decisions regarding the dormant Commerce Clause. In 1978, Justice Stewart delivered the majority opinion in *City of Philadelphia v. New Jersey*;[28] (then) Justice Rehnquist, joined by Chief Justice Burger, dissented. The 1973 N.J. Laws[29] read in part: "No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State. . . until the commissioner. . . shall determine that such action can be permitted without endangering the public health, and welfare. . . ."[30] Private landfill operators brought suit to overturn this law. The trial court in New Jersey declared the law unconstitutional. The New Jersey Supreme Court reversed finding that the law "advanced vital health and environmental objectives, with economic discrimination against, and with little burden upon, interstate commerce, and. . . [thus] permissible under the Commerce Clause . . . ."[31]

The New Jersey Supreme Court tried to limit the Commerce Clause from illegitimate objects of commerce that would spread "disease pestilence and death" from other objects of commerce upon which the federal government would have sweeping control.[32] If New Jersey thought that that policy would pass muster, they were wrong. The U.S. Supreme Court noted in reversing the New Jersey Supreme Court: "We think the state court misread our cases, and thus erred in assuming that they re-

24. *Id.*, referring to Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827). *For example:* That which is not supreme must yield to that which is supreme. . . . the taxing power of States must have some limits. . . . It cannot interfere with any regulation of commerce. *Brown v. Maryland*, 25 U.S. (12 Wheat.) at 448-449.

25. Wilson v. The Blackbird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 252 (1829).

26. FRANKFURTER, *supra* note 23.

27. *Id.* at 21.

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

29. 1973 N.J. Laws 363.

30. *Philadelphia v. New Jersey*, 437 U.S. at 618-619 (1978).

31. *Id.* at 620.

32. *Id.* at 622 (referring in part to Bowman v. Chicago & N.W. R. Co., 125 U.S. 465, 489 (1888)).

quire a two-tiered definition of commerce. . . . *All objects of interstate trade merit Commerce Clause protection* . . . . "[33] Although many subjects of potential regulation may escape scrutiny due to "local character . . . number and diversity".[34] Justice Stewart then stated: "[O]ur economic unit is the Nation. . . . [I]ts corollary [is] that the states are not separable economic units."[35] The majority decided not to be concerned with whether New Jersey wished to extend the lives of its landfills, or discriminate against entrepreneur operators, or even to protect the local environment.[36] Rather the "[s]tate has overtly moved to slow or freeze the flow of commerce for protectionist reasons."[37] Although there are certain quarantine laws that "were directed against interstate commerce",[38] their "very movement risked contagion and other evils." The traffic would have been destroyed whatever their origin.[39] Here, since the problems arise only after the waste has been dumped, "there is no basis to distinguish out-of-state waste from domestic waste."[40] The Court concludes that although today Pennsylvania sends its waste to New Jersey, tomorrow the flow may change direction; each state thus is being safeguarded from each other.

The dissent declared that landfills generate currently unsolvable problems.[41] While the volume of garbage continues to grow, incineration may no longer be utilized due to environmental pollution.[42] Thus, growing landfills generate a whole host of environmental and aesthetic problems from rodents to fires, to scavenger birds, to noise, water and air pollution.[43] Justice Rehnquist questioned why the quarantine laws do not apply, such that "a State may ban the importation of items whose movement risks contagion, but cannot ban the importation of items which. . . will simply pile up in an ever increasing danger to the public's health and safety."[44] Justice Rehnquist states that the in-state, out-of-state distinction is pointless.[45]

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33. *Id.* (emphasis added).
34. *Id.* at 623.
35. *Id.* (quoting H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537-538 (1949) (Jackson, J.)).
36. *Id.* at 625-627.
37. *Id.*
38. *Id.* at 628.
39. *Id.* at 629. For example diseased animals would be destroyed whether they came intra- or inter-state.
40. *Id.*
41. *Id.* at 630 (Rehnquist, J., joined by Berger, C.J., dissenting).
42. *Id.*
43. *Id.*
44. *Id.* at 632-633.
45. *Id.* at 633.

Maine v. Taylor[46] is the paradigm quarantine case, distinguishing itself from the flow of essentially 200 years of Commerce Clause protection against legislative impediments to interstate commerce. Robert Taylor operated a bait business in Maine. Despite Maine laws to the contrary, he attempted to have 158,000 live baitfish (golden shiners), delivered to him from out-of-state.[47] Maine argued that its own population of baitfish, including golden shiners, "would be placed at risk by three types of parasites prevalent in out-of-state baitfish, but not common in Maine."[48] Scientific experts explained that Maine's lakes contain "unusually clean water" a "delicate community of just a few fish" and that there was no satisfactory way to inspect shipments of baitfish.[49] Utilizing tests for strict scrutiny and whether alternative means exist, the District Court Magistrate decided that irreparable harm could be done to Maine's pristine waters and that due to scientific uncertainty in testing no alternative means existed.[50] The District Court thus found in favor of Maine.[51]

The Court of Appeals, 1st Circuit reversed.[52] Justice Blackmun speaking for the majority in the U.S. Supreme Court reversed the judgment of the Court of Appeals.[53] Justice Blackmun stated:

> [W]e agree with the District Court that Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible . . . . [T]he constitutional principles underlying the commerce clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences.[54]

Justice Blackmun concluded:

> The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, *but it does not elevate free trade above all other values* . As long as a State does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 [1935] . . . it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources . . . . This is not a case of arbitrary discrimination against interstate commerce . . . . [55]

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46. Maine v. Taylor, 477 U.S. 131 (1986).
47. *Id.* at 132-133.
48. *Id.* at 141.
49. *Id.*
50. *Id.* at 145-146.
51. *Id.*
52. United States v. Taylor, 585 F.Supp. 393 (D.Me. 1984), *rev'd sub nom,* Taylor v. Maine, 752 F.2d 757 (1st Cir. 1985), *rev'd*, 477 U.S. 131 (1986).
53. *Maine v. Taylor*, 477 U.S. 131 (1986).
54. *Id.* at 148 (citing U.S. v. Taylor, 585 F.Supp. at 397).
55. *Id.* at 151 (emphasis added).

Justice Stevens dissented, urging that Maine show with more specificity why it cannot meet its environmental concerns in the same manner as other states.[56]

Maine is distinguished from *Philadelphia v. New Jersey* in that in *Maine*, there was a scientific uncertainty of the existence of alternate means of preserving the state's clean water, and that along with the possibilities of irreparable harm, action against Taylor was apparently justified. *Philadelphia v. New Jersey* was seen to be clearly a case of economic protectionism and local interests that balanced against the needs of the nation for economic unity could not stand.

CASE ANALYSIS

CHEMICAL WASTE MANAGEMENT V. HUNT

As well as imposing a Base Fee of $25.60 per ton and an Additional Fee of $72.00 per ton, the Alabama act also set a cap limiting the total amount of hazardous waste that could be disposed at commercial facilities which dispose of 100,000 tons or more per year.[57] The cap amount would be determined by the amount disposed during the first year the fees were in effect.[58] Only one facility qualified by virtue of the amount of waste disposed: the Chemical Waste Management, Inc. ("CWM") plant in Emelle, Alabama.[59]

CWM filed for declaratory relief against the Alabama Department of Revenue, challenging the constitutionality of the act as violative of the Commerce Clause of the U.S. Constitution, the Equal Protection Clause of the U.S. and Alabama Constitutions, and the Due Process Clause of the Alabama Constitution.[60] CWM contended that the cap provision was preempted by various federal statutes.[61] CWM sought a preliminary and a permanent injunction to enjoin the State from enforcing the act.[62] The trial court declared that the Base Fee and cap provisions were constitutional, but the Additional Fee provisions were "impermissible and invalid," as violative of the Commerce Clause.[63] CWM appealed the trial court holding on the Base Fee and cap to the Alabama Supreme Court.

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56. *Id.* at 153.
57. Act No. 90-326. Ala.Code §§ 22-30B-1 to 22-30B-18 (1990, Supp.1991).
58. Ala.Code § 22-30B-2.3 (1990).
59. *Hunt*, 584 So.2d at 1369.
60. *Id.* at 1369-1370.
61. *Id.* at 1370 n.1.
These are: (1) The Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 (1988); (2) the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601 (1988); (3) the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 (1988).
62. *Hunt*, 584 So.2d at 1369-1370.
63. *Id.*

The State of Alabama appealed the additional fee invalidation.[64] The Alabama Supreme Court upheld the constitutionality of the Base Fee and cap and reinstated the Additional Fee provisions.[65]

This appeared to be a victory for environmentalists. In adopting the decision of the trial court,[66] the Alabama Supreme Court held that "[c]learly, the state of Alabama has a legitimate interest in imposing fees on commercial hazardous waste facilities to address the serious financial, environmental and other risks they create."[67] The Alabama Supreme Court reported the legislative findings that animated the enactment of the bill. The Court noted that the Alabama legislature voiced concern that Alabama was becoming "the final burial ground" for hazardous waste that was primarily generated outside the State.[68] The Court also stressed that, the future, this hazardous waste would present "public health

64. *Id.* at 1370.

65. *Id.*

> The Base Fee does not facially discriminate against out-of-state waste. All waste disposed of at Alabama commercial hazardous waste facilities is subject to the $25.60 fee. Consequently the Pike v. Bruce Church balancing test will be applied to assess the fee's constitutional validity. In balancing the interests at stake, the Court finds that the burden the Base Fee imposes on interstate commerce is not clearly excessive in relation to the benefits it produces. The fee benefits the state, on the other hand, by compensating it for the financial responsibilities and risks it bears on account of commercial hazardous waste disposal activities. Thus, a comparison of the Base Fee's local benefits to its alleged burden on interstate commerce establishes that any such burden is not clearly excessive. Furthermore, to the extent that the Base Fee does deter hazardous waste landfilling, the fee is a proper instrument of deterrence. . . . Finally, in view of the financial, safety, environmental and other objectives of Act No. 90-326 and the fact that the Base Fee falls evenhandedly on interstate and intrastate waste, it is difficult to imagine how these objectives could be accomplished in ways that have a lesser impact on interstate activities. *Id.* at 1377-1378.

66. *Id.*

67. *Id.* at 1376.

68. *Id.* at 1370-1371.

> The Legislature finds that:
>
> (1) The state is increasingly becoming the nation's final burial ground for the disposal of hazardous wastes and materials;
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> (2) The volumes of hazardous wastes and substances disposed in the state have increased dramatically for the past several years;
>
> (3) The existence of hazardous waste disposal activities in the state poses unique and continuing problems for the state;
>
> (4) As the site for the ultimate burial of hazardous wastes and substances, the state incurs a permanent risk to the health of its people and the maintenance of its natural resources that is avoided by other states which ship their wastes to Alabama for disposal;
>
> (5) The state also incurs other substantial costs related to hazardous waste management including the costs of regulation of transportation, spill cleanup and disposal of ever increasing volumes of hazardous wastes and substances;
>
> (6) Because all waste and substances disposed at commercial sites for the disposal of hazardous waste and hazardous substances, whether or not such waste and substances are herein defined as hazardous, contribute to the continuing problems created for the state, and because state and federal definitions of 'hazardous wastes' have regularly changed and are likely to change in the future to include waste not previously defined as hazardous, it is necessary that all waste and substances disposed of at a

problems",[69] and problems in preserving the environment.[70]

The trial court found and the Alabama Supreme Court affirmed the following facts:

> CWM is a Delaware Corporation with Oak Brook, Illinois as the principal place of business. . . .
>
> Emelle, Alabama was one of 74 potential sites for hazardous waste landfills identified by the EPA in a 1973 study. . . .[71]
>
> In 1985, the Emelle CWM facility received 341,000 tons of waste, while in 1989, 788,000 tons were received.[72]

The Supreme Court of Alabama noted that in essentially a quarantine argument, Alabama had been singled out to be a repository for the nation's hazardous waste. Said the Court:

> Although hazardous waste landfills can be designed and engineered to operate in practically every state of the United States, only a very few commercial sites presently exist. *Efforts to obtain permits for new sites in other states are resisted by citizens of those states.* . . . According to the testimony presented at trial, only one additional hazardous waste landfill has been permitted in the United States since. . . November 17, 1980. That facility, in Last Chance, Colorado, has never operated or accepted waste and is presently

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commercial site for the disposal of hazardous waste or hazardous substances be included within the requirements of this act;

(7) The legislature finds that the public policy of the state is to encourage business and industry to develop technology that will eliminate the generation of hazardous waste and substances. . . .

(8) Since hazardous wastes and substances generated in the state compose a small proportion of those materials disposed of at commercial disposal sites located in the state, present circumstances result in the state's citizens paying a disproportionate share of the costs of regulation of hazardous waste transportation, spill cleanup and commercial disposal facilities.

Act No. 90-326, § 1, Ala. Code § 22-30B-1.1 (Supp.1990).

Also see "Legislative Finding Purpose and Intent":

The Legislature finds that increasing quantities of hazardous wastes are being generated in the State and that without adequate safeguards from the point of generation through handling, processing and final disposition, such wastes can create conditions which threaten human or animal health and the environment. The Legislature, therefore, declares that in order to minimize and control any such hazardous conditions it is in the public interest to establish and to maintain a statewide program to provide for the safe management of hazardous wastes.

Acts 1978, 2nd Ex.Sess., No. 129, p. 1843.

69. *Hunt,* 584 So.2d at 1371.

70. *Id.*

To prevent threats to the health of the population of this state and to the soundness of the environment of this state and to prevent an artificial decrease in fees during the twelve-month period beginning July 15, 1990, and ending July 14, 1991, this act provides a cap on the amount of hazardous waste and hazardous substances disposed during the twelve-month period beginning October 1, 1991, said cap being a function of the amount of hazardous waste and hazardous substances disposed during the twelve-month period beginning July 15, 1990, and ending July 14, 1991.

Act § 1, Code § 22-30B-1.1. Legislative findings.

71. *Hunt,* 584 So.2d at 1372.

72. *Id.* at 1373.

> for sale. . . . Eighty-five to ninety percent of the tonnage permanently buried at Emelle is from out-of-state. Emelle received two years ago approximately 17% of all hazardous wastes commercially landfilled in the United States.[73]

The trial court discussed the dangers surrounding the disposal of hazardous waste[74] and the difficulty in containing certain classes of waste.[75] The court noted that the Emelle facility was within an earthquake risk zone and that an earthquake could open one-half cracks allowing movement of leachate and hazardous waste.[76] Of the 40,000 truckloads of waste transported to the facility, the court noted, 90% were from out of state.[77] "Some trucks destined for Emelle have been involved in accidents causing hazardous waste to be spilled or released into the environment."[78] This parade of horribles was reflected in judicially noted scientific findings. Here, the State of Alabama in pressing its sovereign rights wished to avoid high probabilities of eventual toxic damages by finding less objectionable alternatives.

CWM argued that "the trial court erred in finding the Base Fee constitutional and . . . that it clearly discriminates against interstate commerce in violation of the Commerce Clause."[79]

The Alabama Supreme Court adopted the conclusions of law regarding the Base Fee found by the trial court, Judge Phelps:[80] States retain broad authority to regulate matters of legitimate local concern, following

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73. *Id.* (emphasis added.)

74. *Id.* at 1373.

> Such waste consists of ignitable, corrosive, toxic and reactive wastes which contain poisonous and cancer causing chemicals and which can cause birth defects, genetic damage, blindness, crippling and death. Should a sudden or non-sudden discharge or release occur, hazardous wastes could pollute the environment, contaminate drinking water supplies, contaminate the ground water, and enter the food chain. Among these are arsenic, mercury, lead, chromium and cyanide. *Id.*

75. *Id.* at 1374:

> The testimony at trial was that it appears that leakage has already occurred with respect to at least some of the closed trenches. Leachate is presently pumped only from closed Trench 19 and open Trench 21. It is stored in above ground storage tanks with a capacity of 5 million gallons. From 10 million to 15 million gallons annually of leachate and surface water are gathered, stored and transported from Emelle at a cost of $2 to $3 million. . . . EPA has found that absolute prevention of migration of hazardous waste through synthetic trench liners is beyond the current technical state of the art, and that some migration will occur. *Id.*

76. *Id.* at 1375.

77. *Id.*

78. *Id.*

79. *Id.* at 1376.

> CWM further proffered arguments based on Equal Protection and Due Process. CWM argues further that the Base Fee violates the Equal Protection Clause, because, it claims, the classifications are not rationally related to a legitimate state interest. CWM finally argues that the Base Fee violates the Due Process Clause.

Id. (These arguments were not reviewed by the U.S. Supreme Court. *See* discussion *infra*.)

80. *Id.* at 1376-1377.

Maine v. Taylor,[81] and *Hughes v. Oklahoma*.[82].

> When a police power regulation is challenged under the Commerce Clause, one of two tests is applied. If the regulation is discriminatory on its face or in practical effect, the state must show that (1) the regulation has a legitimate local purpose; (2) the regulation serves this interest; and (3) reasonable nondiscriminatory alternatives, adequate to preserve the legitimate local purpose, are not available.[83]

The Alabama courts found the Base Fee evenhanded in its treatment[84] and with respect to the Equal Protection Clause, "rationally related to legitimate state interests."[85] The court proclaimed, "[t]he state has a clear and legitimate interest in conserving its natural resources."[86] Citing *Bill Kettlewell Excavating, Inc. v. Michigan Department of Natural Resources*, the court continued: "[A] statute requiring county approval for disposal of out-of-county solid waste served legitimate purpose of extending lives of the county's landfills . . . ."[87]

The most difficult question that the court countenanced concerned the Additional Fee, since this fee clearly had a regulatory impact.

> This is perhaps just another way of saying that what may appear to be a 'discriminatory' provision in the constitutionally prohibited sense—that is, a protectionist enactment—may on closer analysis not be so.[88]

The Alabama Court of Appeals had declared the Additional Fee to be unconstitutional;[89] here the Alabama Supreme Court reversed. Assuming that hazardous waste is an article of commerce, the Court declared:

> [W]e believe that a statute such as the one before us, which advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives, can be valid under the Commerce Clause.[90]

The Alabama Supreme Court declared that the burden imposed upon interstate commerce must be weighed with regard to state regulatory concern,[91] and that the Additional Fee was merely a means of dealing with legitimate local concerns, and therefore was permissible under the Commerce Clause.[92] The Court distinguished this case from the *City of Phila-*

81. Maine v. Taylor, 477 U.S. 131, 138 (1986).
82. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).
83. *Hunt*, 584 So.2d at 1376-1377.
84. *Id.* at 1378.
85. *Id.* at 1379.
86. *Id.* at 1380.
87. *Id.* at 1381 quoting *Kettlewell*, 732 F.Supp. 761 (E.D.Mich. 1990). *Kettlewell* was appealed, Bill Kettlewell Excavating, Inc. v. Michigan Dept. of Natural Resources, 732 F.Supp. 761 (E.D.Mich. 1990), *aff'd*, 931 F.2d 413 (6th. Cir. 1991), *rev'd*, Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 112 S.Ct 2019 (1992).
88. *Hunt*, 584 So.2d at 1386.
89. *Hunt*, 910 F.2d at 721.
90. *Hunt*, 584 So.2d at 1387.
91. *Id.* at 1386.
92. *Id.* at 1388.

delphia v. New Jersey,[93] stating that here what was protected was not local economy but local environment, health and safety.[94] The Alabama Supreme Court relied on *Maine v. Taylor*,[95] where, the Alabama Supreme Court claimed, the U.S. Supreme Court made a distinction between arbitrary discrimination against inter-state commerce and state measures that endeavor to protect its interests in public health, safety and the environment.[96]

In concurrence, and perhaps in anticipation of the judgment being overturned, Justice Houston of the Alabama Supreme Court, states:

> Until the United States Supreme Court holds that hazardous waste (waste that the trial court found contained poisonous chemicals that can cause cancer, birth defects, genetic damage, blindness, crippling, and death) is an article of commerce protected by the Commerce Clause of the United States Constitution, I refuse to declare the additional fee provision of Act No. 90-326, which was duly enacted by the Alabama Legislature and approved by the Governor of Alabama, unconstitutional as violative of the Commerce Clause of the United States Constitution.[97]

The U.S. Supreme Court granted certiorari only to the Commerce Clause challenge to the Additional Fee, even though CWM had appealed every issue related to the Act. Justice White speaking for the majority[98] reversed and remanded,[99] restating a fundamental idea in the tradition of Commerce Clause cases: "*No State may attempt to isolate itself* from a problem common to the several States by raising barriers to the free flow of interstate trade."[100]

The opinion immediately refers to *Fort Gratiot*,[101] where Justice White reaffirmed a tenet of the *Philadelphia v. New Jersey*[102] opinion of 1978: "The evil of protectionism can reside in legislative means as well as legislative ends."[103] Justice White, allowing that Alabama's needs for controlling are real, warned, "a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy."[104] Justice White analogized this to "parochial legisla-

93. 437 U.S. 617 (1978). (A state may not limit importing of waste as a form of economic protectionism.)

94. *Hunt v. Chemical Waste Management, Inc.*, 584 So.2d at 1387.

95. 477 U.S. 131.

96. *Id.*

97. *Id.* at 1390.

98. Only Chief Justice Rehnquist dissented.

99. *Chemical Waste Management, Inc.*, 112 S.Ct. at 2012.

100. *Id.* at 2012 (emphasis added).

101. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 112 S.Ct. 2019 (1992).

102. Philadelphia v. New Jersey, 437 U.S. 617 (1978).

103. *Id.*

104. *Id.* (*citing Philadelphia v. New Jersey*, 437 U.S. at 627).

tion," which the Supreme Court has consistently been found to be constitutionally invalid.[105]

The Court acknowledged that though there may be legitimate local interests, "only rhetoric, and not explanation, emerges as to why Alabama targets only interstate hazardous waste to meet these goals."[106] Thus, interstate commerce is unduly burdened. Justice White quoted the trial court judge: "[T]here is absolutely no evidence before this Court that waste generated outside Alabama is more dangerous than waste generated in Alabama."[107] Justice White then reasoned that although Alabama's concern for conservation, health and safety is related to the volume of material, a state may not unduly burden interstate commerce.[108]

The Court distinguished the case at hand from *Maine v. Taylor*,[109] in that the danger in the commerce is independent of point of origin, within or outside of the state.[110] More significantly, Justice White, suggested alternatives:

> Less discriminatory alternatives, however, are available to alleviate this concern, not the least of which are a generally applicable per-ton additional fee on all hazardous waste disposed of within Alabama . . . or a per-mile tax on all vehicles transporting hazardous waste across Alabama roads . . . or an evenhanded cap on the total tonnage landfilled at Emelle . . . which would curtail volume from all sources.[111]

Thus, a door is left open to charge various usage fees. But unless the waste from out-of-state sources presents different problems *per se* — such as irreparable harm to the environment,[112] or immediate dangers of health and safety[113] — than local waste, the Additional Fee in its stated

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105. *Id.* at 2013.

> The Court has consistently found parochial legislation of this kind to be constitutionally invalid, whether the ultimate aim of the legislation was to assure a steady supply of milk by erecting barriers to allegedly ruinous outside competition, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522-524 (1935). *Id.*

106. *Id.* at 2014.

107. *Id.* at 2015.

108. *Id.*

109. Maine v. Taylor, 477 U.S. 133 (1986).

110. *Chemical Waste Management*, 112 S. Ct. at 2016.

111. *Id.* at 2015.

112. *See generally* Maine v. Taylor, 477 U.S. 133 (1986).

113. This, in fact, has been Alabama's and the Alabama Supreme Court's rationale all along.

Also see:

> Until the United States Supreme Court holds that hazardous waste (waste that the trial court found contained poisonous chemicals that can cause cancer, birth defects, genetic damage, blindness, crippling, and death) is an article of commerce protected by the Commerce Clause of the United States Constitution, I refuse to declare the additional fee provision of Act No. 90-326, which was duly enacted by the Alabama Legislature and approved by the Governor of Alabama, unconstitutional as violative of the Commerce Clause of the United States Constitution.

form is deemed to impermissibly discriminate against interstate commerce.[114]

In dissent, Chief Justice Rehnquist considered this interpretation of the Commerce Clause to force an all or nothing approach to regulation of hazardous wastes and conversely to consider the commodity at stake a "safe and attractive environment."[115] Rehnquist acknowledged the alternatives mentioned by the majority, but warned that these were 'gymnastic' and that only more litigation would follow as states continued to rightfully protect themselves in creative ways against analogous situations created by hazardous, industrial waste.[116]

FORT GRATIOT SANITARY LANDFILL, INC. V. MICHIGAN DEP'T. OF NATURAL RESOURCES[117]

In the case first brought to federal District Court,[118] Bill Kettlewell Excavating, Inc. (doing business as Fort Gratiot Landfill) sought declaration that the Michigan Solid Waste Management Act ("SWMA"),[119] was unconstitutional and to enjoin Michigan from enforcement. In the alternative, Kettlewell asserted that St. Clair County (Michigan) government entities unconstitutionally applied the SWMA. The Michigan SWMA provides that each county must have a solid waste management plan, and that solid waste must only be disposed of in the county it is generated in, or the disposition must be explicitly authorized in both the receiving and exporting county's solid waste management plan.[120]

Recognizing that interference with the transport of waste addressed the 'dormant' aspects of the Commerce Clause, federal District Judge James Harvey attempted to ascertain whether these laws were basically

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Hunt v. Chemical Waste Management, 584 So.2d at 1390-1391 (Houston, J., concurring in the judgment).

114. *Chemical Waste Management*, 112 S. Ct. at 2017.

115. *Id.* at 2018.

116. *Id.* at 2019.

117. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't. of Natural Resources, 112 S. Ct. 2019 (1992).

118. Bill Kettlewell Excavating, Inc., d/b/a Fort Gratiot Sanitary Landfill v. Michigan Dep't. of Natural Resources, 732 F.Supp. 761 (E.D. Mich. 1990).

119. Mich. Comp. Laws Ann. §§ 299.413a and 299.430(2) (West 1992).

120. *Bill Kettlewell Excavating, Inc.*, 732 F.Supp. at 762.

> A person shall not accept for disposal solid waste that is not generated in the county in which the disposal area is located unless the acceptance of solid waste that is not generated in the county is explicitly authorized in the approved county solid waste management plan. . . . In order for a disposal area to serve the disposal needs of another county, state, or country, the service must be explicitly authorized in the approved solid waste management plan of the receiving county. With regard to intercounty service within Michigan, the service must also be explicitly authorized in the exporting county's solid waste management plan.

Id.

protectionist in nature or "can fairly be viewed as. . . law[s] directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."[121] However, the Court noted that since the policies applied equally to other Michigan counties as well as out-of-state entities, it was evenhanded,[122] and thus following *Pike v. Bruce Church*,[123] "the Court finds that the SWMA imposes only incidental effects upon interstate commerce, and may therefore be upheld unless the burden imposed "is clearly excessive in relation to the putative local benefits."[124] Judge Harvey concludes that a legitimate local goal is fulfilled by extending the useful lives of the County's landfills, and that this purpose outweighs the minimal burdens on interstate commerce, and thus, upholds the Michigan laws and County policies.[125]

Kettlewell declared that having set aside sufficient disposal sites for 20 years local waste production, their application was promptly denied by the St. Clair County Solid Waste Planning Committee.[126] Kettlewell appealed claiming Commerce Clause violations and also denial of Due Process.[127] Citing *Philadelphia v. New Jersey*,[128] the U.S. Court of Appeals for the Sixth Circuit, in reviewing the determination of the District Court, *de novo*, noted that the New Jersey statute's intent was to protect the environment through limiting the volume of waste imported.[129] The circuit court recalled *Maine v. Taylor*[130] stating: "[T]he Supreme Court held that once a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means."[131] The Circuit Court concluded by upholding both the logic

121. *Id.* at 763 (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).
122. *Id.* at 766. "Indisputably, St. Clair County's challenged policy treats most in-state waste in the same manner as out-of-state solid waste by prohibiting the importation of either into the county." *Id.*
123. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).
124. *Bill Kettlewell Excavating, Inc.*, 732 F. Supp. at 765 (following Pike v. Bruce Church, 397 U.S. at 142).
125. *Id.* at 766.
126. Bill Kettlewell Excavating, Inc. v. Michigan Dept. of Natural Resources, 931 F.2d 413, 414 (6th Cir. 1991).
127. *Id.* at 415.
128. 437 U.S. 617.
129. *Bill Kettlewell Excavating, Inc.*, 931 F.2d at 416.
130. 477 U.S. at 138.
131. *Bill Kettlewell Excavating, Inc.*, 931 F.2d at 417.

and conclusions of the District Court.[132]

On March 30, 1992, the final appeal was argued before the U.S. Supreme Court.[133] Justice Stevens, speaking for the majority, (and incidentally answering a question posed in *Chemical Waste Management*):[134] Chemical and solid waste falls squarely within the realm of interstate commerce.[135]

In reversing the Sixth Circuit Court of Appeals, the U.S. Supreme Court warned Michigan that no county, nor locality, nor state may isolate itself from the national economy.[136] Justice Stevens, as did Justice White in *Chemical Waste*, invalidated the SWMA by suggesting perhaps reasonable, less burdensome, alternatives:

> Michigan could attain that objective without discriminating between in- and out-of-state waste. Michigan could, for example, limit the amount of waste that landfill operators may accept each year. See Philadelphia v. New Jersey, 437 U.S., at 626 . . . . There is, however, no valid health and safety reason for limiting the amount of waste that a landfill operator may accept from outside the State, but not the amount that the operator may accept from inside the State.[137]

After distinguishing *Fort Gratiot* from *Maine v. Taylor*,[138] Justice Stevens concluded that Michigan laws and policies "unambiguously discriminate against interstate commerce and are appropriately characterized as protectionist measures that cannot withstand scrutiny under the Commerce Clause."[139]

In his dissent, Chief Justice Rehnquist, joined by Justice Blackmun,

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132. "We find no error in the conclusion of the district court. . . ." *Id.* at 417.

"[The statutes and policies] impose only incidental effects upon interstate commerce, and may therefore be upheld. . . . " *Id.*

"[W]e affirm the decision of the district court that no constitutional violation has occurred." *Id.* at 418.

133. *Fort Gratiot*, 112 S. Ct. 2019.

134. *See supra*, note 113. Judge Houston states that until the U.S. Supreme Court so declares, he does not consider waste to be an article of interstate commerce. *Chemical Waste Management*, 584 So. 2d at 1390 (Houston, J., concurring).

135. *Id.* at 2023.

> Whether the business arrangements between out-of-state generators of waste and the Michigan operator of a waste disposal site are viewed as "sales" of garbage or "purchases" of transportation and disposal services, the commercial transactions unquestionably have an interstate character. The Commerce Clause thus imposes some constraints on Michigan's ability to regulate these transactions.

Id.

> As we explained in Philadelphia v. New Jersey: 'All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset.'

Id. at n.3.

136. *Id.* at 2024.

137. *Id.* at 2027.

138. 477 U.S. 131 (1986).

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

noted the increased volumes of hazardous waste, the substantial risks inherent in waste sites, and the repugnancy states and communities have for the prospect of dumping.[140] Rehnquist commended Michigan for confronting the problems of hazardous waste as one part of a comprehensive plan that demands that each community deal with its own waste.[141] The Chief Justice continued that, analogously, states have been allowed to address major environmental threats caused by the uncontrolled transfer of water: here substitute the words "attractive and safe environment" for "water", and the present case is described.[142] Chief Justice Rehnquist warned that these twin decisions will encourage states to dump their hazardous waste in other states where land is cheapest, and land is less populated, rather than directly confronting problems that they themselves create.[143]

CONCLUSION

The U.S. Supreme Court has set guidelines that may be followed into the twenty-first century:

1. That whenever reasonable and adequate alternatives may be found to deal with local or state policies and practice, those local laws that burden interstate commerce will be struck down.[144]

2. The Supreme Court defines both hazardous waste, no matter how poisonous, and ordinary garbage as items of interstate commerce.

Thus, what is or isn't a burden to interstate commerce must ultimately be decided by Congress.[145] Congress has yet to enact a comprehensive national policy. There is a pressing need to face these

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140. *Id.*

141. *Id.* at 2029.

142. *Id.* at 2030. (citing Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982). (Rehnquist, C.J., dissenting.))

143. *Id.* at 2031-2032.

144. Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951). In *Dean Milk*, the Court struck down a Madison ordinance requiring that all milk sold in Madison be bottled within 5 miles of Madison, ostensibly to aid in health inspections. The Court stated:

> It appears that reasonable and adequate alternatives are available . . . .

Id. at 354.

> To permit Madison to adopt a regulation not essential for the protection of local health interests and placing a discriminatory burden on interstate commerce would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.

Id. at 356.

145. In Pennsylvania v. Wheeling & Belmont Bridge Company, 54 U.S. (13 How.) 518 (1851) (I), the Taney court decided that a bridge over a river was equally as much a part of the navigation as was the river itself, and thus the court could regulate its height and thus force it to be elevated. Then in Pennsylvania v. Wheeling & Belmont Bridge Company, 59 U.S. (18 How.) 421 (1855) (II), the court decided that Congress having passed a statute allowing the height of the bridge, that its height should stand and that it did not obstruct navigation.

unpleasant problems.[146]

Chemical Waste Management and *Fort Gratiot* both align themselves with Commerce Clause cases from Chief Justice Marshall to the present. A free and unburdened interstate commerce is and has been considered to be of paramount importance to a unified nation. *City of Philadelphia v. New Jersey* is paradigmatic of the judicial analysis of the needs of interstate commerce vis a vis dormant Commerce Clause interpretation. Only Maine, presented with a threat of irreversible harm to its pristine shores, and yet with a vacuum of alternate scientific or legal solutions, has prevailed in enforcing laws that burden interstate commerce.[147]

In *Chemical Waste Management*, the State of Alabama attempting to burden out-of-state hazardous waste, was forced by the U.S. Supreme Court to become one of the nation's repositories for toxic substances. Michigan, on the other hand, sensibly required that each county plan for its own waste needs. In *Fort Gratiot* the U.S. Supreme Court struck down these measures so as to unburden interstate commerce.

Corporate entrepreneurs benefit most from these judgments: they continue to do business, while state and local laws banning or restricting interstate transport of hazardous substances and waste are overturned. Chief Justice Rehnquist noting the current insolvability of modern waste problems, sides with the notion of each state fending for itself. States naturally wish to buttress themselves against foreign pollution, albeit imported legally in commerce. Michigan attempted to organize local waste solutions, Alabama attempted to enjoin Chemical Waste Management. In both states, local legislatures felt justified in protecting the health, well-being, aesthetics and citizenry from potential harm. Chief Justice Rehnquist agrees.[148]

States may take actions legitimately directed at the preservation of the

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146. *See, e.g.*, Ann R. Mesnikoff, Note, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home,* 76 MINN. L. REV. 1219 (1992).

> "[T]he First Law of Garbage is: 'Everybody wants to pick it up, and nobody wants us to put it down.' "

Id. (quoting OFFICE OF SOLID WASTE, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, THE SOLID WASTE DILEMMA: AN AGENDA FOR ACTION 6 (1989)).

147. *See Maine v. Taylor,* 477 U.S. at 152:

> "There is something fishy about this case. Maine is the only State in the Union that blatantly discriminates against out-of-state baitfish by flatly prohibiting their importation .... This kind of stark discrimination against out-of-state articles of commerce requires rigorous justification by the discriminating State. 'When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.' Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353 (1977)."

Id. (Stevens, J., dissenting).

148. "The substantial environmental, aesthetic, health, and safety problems flowing from this country's waste piles were already apparent at the time we decided *Philadel-*

> State's natural resources, even if those actions incidentally work to disadvantage some out-of-state waste generators. See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources. . . .[149]

Thus States are now hamstrung between Congress's lack of a comprehensive national policy and the Supreme Court's strict admonitions against local protectionism.

As ecological concerns about the biosphere move steadily to the forefront, as trade barriers with foreign nations continue to fall, and as volumes of waste both hazardous or simply offensive continue to exponentially grow, Chief Justice Rehnquist's position - that State's must be allowed to manage their own waste, hazardous or not—will continue to challenge federal unity in potential legal conflict.

States and localities are facing the destruction of their own resources through the proliferation of garbage and the dangers of dumping and transporting hazardous waste. The Supreme Court, acting consistently with a tradition of broadly and actively enforcing the Commerce Clause of the U.S. Constitution, has disallowed states from taking the initiative to ban import of out-of-state garbage and waste or to burden that import in a discriminatory fashion. The twin pronouncements of the Supreme Court on June 1, 1992, *Fort Gratiot* and *Chemical Waste Management*, can be interpreted to challenge and demand that Congress and industry develop effective, scientific means of dealing with a national problem. Inherent in this is the requirement for a comprehensive national policy. If Congress fails in this, then there is a likelihood that our states will once again wage legal war with each other. At the time of the American Revolution, states vied with each other for business, and the Supreme Court acted to create and preserve national unity. Now we are faced with a crisis in garbage and hazardous waste. States now compete to exclude each other's toxic refuse. The twin dissents of Chief Justice Rehnquist may be interpreted as a warning to Congress to face environmental adversity or weaken national economic unity.

> *phia*. . . . The result, of course, is that while many are willing to generate waste . . . few are willing to help dispose of it.
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> . . . .
>
> [T]he Michigan legislature also appears to have concluded that . . . counties should reap as they have sown . . . .

Fort Gratiot, 112 S. Ct. at 2028 (Rehnquist, C.J., joined by Blackmun, J., dissenting).

149. *Chemical Waste Management*, 112 S. Ct. at 2017 (Rehnquist, C.J., dissenting) (citation omitted).