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# THE MARKET PARTICIPANT DOCTRINE: AMMUNITION FOR THE WAR ON TRASH

JOHN L. BROWNLEE\*

## I. INTRODUCTION

The problem of garbage disposal in America has reached a critical stage. Americans throw away 179.6 million tons of garbage per year.<sup>1</sup> People in this country generate more garbage per capita than in any other nation.<sup>2</sup> The amount of garbage generated annually in the United States has risen eighty percent since 1960,<sup>3</sup> and the current projection is that Americans will produce 216 million tons of garbage in the year 2000.<sup>4</sup>

During the last two decades, state and local governments have tried to find places to dispose of their share of the nearly 180 million tons of garbage produced annually in the United States. Faced with landfill closings, local opposition to siting new landfills, and environmental restrictions, states have searched beyond their geographic boundaries for disposal sites. More than fifteen million tons of garbage cross state lines each year.<sup>5</sup> In response, state and local jurisdictions with adequate

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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 lawn and shrubs - the varied human refuse of our modern industrial society." THE OFFICE OF SOLID WASTE, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, THE SOLID WASTE DILEMMA: AN AGENDA FOR ACTION 6 (1989) [hereinafter AGENDA FOR ACTION]. Garbage constitutes merely a part of what is referred to technically 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(27) (1988).

2. AGENDA FOR ACTION, *supra* note 1, at 8.

3. Casey Bukro, *East's Garbage Filling Heartland*, CHI. TRIBUNE, Nov. 5, 1989, at 1.

4. Don Phillips, *Containers Mask Cargo as Trains Roll Past D.C.*, WASH. POST, Dec. 22, 1991, at A1 (reporting EPA estimate).

5. See *Shipping Out the Trash*, 18 ENVTL. FORUM, No. 5, at 28 (1991) (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. OFFICE OF TECHNOLOGY ASSESSMENT, CONGRESS OF THE UNITED STATES, FACING AMERICA'S TRASH: WHAT

disposal capacity have banned waste generated outside their jurisdictions. States, struggling to plan for and accommodate their own solid waste, have attempted to use their regulatory powers to stop or slow the flow of waste imported to their landfills.<sup>6</sup>

Landfills, where approximately eighty percent of the nation's garbage is deposited, are the most widely used method for disposal of municipal solid waste.<sup>7</sup> Because of this heavy reliance on landfills, the amount of available landfill space in the nation has decreased dramatically in recent years. Estimates show that one-third of the existing landfills will be closed in two years and that eighty percent will be full within twenty years.<sup>8</sup> The failure to make long-term plans has left some states with inadequate existing landfill space,<sup>9</sup> and other states, which currently have sufficient landfill capacity, with an intensifying desire to protect their limited landfill resources.<sup>10</sup>

This Article argues that the better solution to the garbage disposal crisis is to allow courts to use the market participant doctrine to determine the constitutionality of state waste import restrictions. The market participant exception to the dormant Commerce Clause would permit states that operate and control solid waste landfills to reject the importation of out-of-state waste. The implementation of the market participant exception

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NEXT FOR MUNICIPAL SOLID WASTE? 1 (1989) at 274-75 [hereinafter FACING AMERICA'S TRASH].

6. States must take circuitous routes to avoid violating the Commerce Clause if they wish to 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).

7. AGENDA FOR ACTION, *supra* note 1, at 15. By comparison, only ten percent of the nation's garbage is recycled and ten percent incinerated. *Id.* More recent statistics indicate that this ratio may be improving slightly. Mariette DiChristina, *How We Can Win the War Against Garbage*, POPULAR SCI., Oct. 1990, at 57 (seventy-three percent of America's trash is disposed in landfills; thirteen percent is recycled and fourteen percent is incinerated).

8. FACING AMERICA'S TRASH, *supra* note 5, at 1; DiChristina, *supra* note 7, at 57.

9. The northeastern states, particularly New Jersey, New York, and Pennsylvania, suffer from severe shortages of landfill space. Jonathan Phillip Byers, *Now Entering the Age of NIMBY*, 21 WASTE AGE 36, 37 (1990) (NIMBY is the acronym for "not in my backyard").

10. See *Landfill Growth, Interstate Trash Movement Generate Clashes at County Official's Meetings*, 19 ENV'T REP. (BNA) 2365 (Mar. 10, 1989) (midwestern county officials, at the annual legislative conference of the National Association of Counties, voiced concern over eastern states' increasing reliance on privately owned landfills in the Midwest).

would allow states with adequate landfill capacity to plan properly for the disposal of their municipal solid waste, and force those states which rely heavily on the exportation of their garbage to develop alternative mechanisms to manage their own waste disposal problems.

Part I of this Article examines the history of the Commerce Clause and analyzes how the Commerce Clause and the dormant Commerce Clause have affected certain solid waste legislation. Part II examines the market participant doctrine and reviews how the United States Supreme Court has implemented and interpreted the doctrine. In Part III, the Article discusses three cases in which the courts have used the market participant doctrine to allow states to restrict the importation of out-of-state waste.

## II. THE COMMERCE CLAUSE AND RESTRICTIONS ON STATES' REGULATORY POWERS

The Constitution specifically grants to Congress the power to regulate commerce.<sup>11</sup> The primary purpose of the Commerce Clause is to ensure cooperation among the states in the area of interstate trade.<sup>12</sup> The Framers designed the Commerce Clause to keep commerce moving freely among the states, and thereby guard against the economic Balkanization that plagued the Colonies and the United States under the Articles of Confederation.<sup>13</sup> Although the Constitution does not define commerce, the United States Supreme Court has read the term broadly, and today commerce includes virtually all commercial transactions.<sup>14</sup>

The Constitution's grant of power to Congress over commerce,

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11. "The Congress shall have the power to . . . regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

12. See *H.P. Hood & Sons, Inc. v. DuMond* 336 U.S. 525, 539 (1949).

13. Under the Articles of Confederation, the states retained the power to regulate interstate commerce, resulting in the individual states discriminating against their neighbors in order to benefit their own citizens. THE FEDERALIST NO. 15 (Alexander Hamilton), NO. 47 (James Madison); David Pomper, Comment, *Recycling City of Philadelphia v. New Jersey: The Dormant Commerce Clause, Postindustrial Natural Resources, and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309, 1313 (1989). The Commerce Clause "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

14. Commerce is the "exchange of goods, productions, or property of any kind; the buying, selling, and exchanging of articles." *Anderson v. Humble Oil and Refining Co.*, 74 S.E.2d 415, 417 (Ga. 1970).

unlike the power to levy customs duties<sup>15</sup> and the power to raise armies,<sup>16</sup> is unaccompanied by correlative restrictions on state power.<sup>17</sup> This distinction does not, however, of itself, signify that the states are expected to participate in the power granted Congress, subject only to the operation of the Supremacy Clause. As Alexander Hamilton noted, "while some of the powers which are vested in the national government admit of their 'concurrent' exercise by the States, others are of their very nature 'exclusive,' and hence render the notion of a like power in the States 'contradictory and repugnant.'"<sup>18</sup> The power of Congress to promote interstate commerce includes the power to regulate the local movement of goods traveling in both the state of origin and the state of destination.<sup>19</sup> The language of the Commerce Clause explicitly grants power to Congress, and the Supreme Court has recognized that this grant of power implicitly limits the authority of the states in the area of interstate commerce.<sup>20</sup> The limitation placed on the states is the dormant Commerce Clause."

The text of the Commerce Clause provides no overt restraint of state impingement on interstate commerce, and Congress has been silent on the issue. Consequently, the Supreme Court has had to interpret the extent to which self-executing limitations on the scope of permissible state regulation are inherent in the Constitution's affirmative grant of power.<sup>21</sup> Absent a dormant Commerce Clause, if Congress had not legislated on a particular matter, states would be free to enact legislation favoring local commerce and limiting the rights of other states in commercial transactions.<sup>22</sup> More specifically, the dormant Commerce

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15. See U.S. CONST. art. I, § 9, cl. 2.

16. See U.S. CONST. art. I, § 9, cl. 3.

17. See *supra* note 11.

18. THE FEDERALIST NO. 32 (Alexander Hamilton).

19. See *generally* *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).

20. See *C.T.S. Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980); *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 534-38 (1949); *Cooley v. Board of Wardens*, 53 U.S. 299 (1852).

21. See *supra* note 20.

22. See, e.g., Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563 (1983); Martin H. Redish & Shane V. Nugent, *THE DORMANT COMMERCE CLAUSE AND THE CONSTITUTIONAL BALANCE OF FEDERALISM*, 1987 DUKE L.J. 569 (1987).

Clause operates to ensure that states acting as independent and self-interested economic actors will not jeopardize our nation's economic system and freedom in interstate trade.<sup>23</sup>

A. *Gibbons v. Ogden*<sup>24</sup>: *The Supreme Court Interprets Congressional Silence*

The New York legislature enacted a statute granting Robert Fulton and Robert Livingston the exclusive right to operate steamboats in New York waters.<sup>25</sup> The statute was designed to encourage investment in the development of steamboat technology.<sup>26</sup> Fulton and Livingston licensed Ogden to operate a ferry between New York City and Elizabethtown Point in New Jersey.<sup>27</sup> Gibbons began operating a competing ferry system that, because it necessarily entered New York waters, violated the grant to Fulton and Livingston, and the license to Ogden.<sup>28</sup> Gibbons' ferries were licensed as "vessels [in] the coasting trade" under a statute enacted by Congress in 1793.<sup>29</sup> Ogden obtained an injunction against Gibbons from the New York courts.<sup>30</sup>

Chief Justice John Marshall found the New York monopoly invalid because it conflicted with the federal commerce power.<sup>31</sup> Gibbons argued that the federal commerce power was exclusive; that is, that the states had no right to take any action which affected interstate commerce.<sup>32</sup> The Chief Justice conceded that the argument had "great force," and that he was "not satisfied that the argument had been refuted"<sup>33</sup> but avoided an explicit ruling on the argument. The Court assumed, without deciding, that the states could regulate commerce in a particular way if no actual conflict existed between the state regulation and an act of Congress.<sup>34</sup> The Court then found that an actual conflict

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23. *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 12 (1986).

24. 22 U.S. (Wheat.) 1 (1824).

25. *Id.* at 6.

26. *Id.* at 4.

27. *Id.* at 7.

28. *Id.* at 8.

29. *Id.* at 8.

30. *Id.*

31. *Id.* at 221.

32. *Id.* at 198.

33. *Id.* at 209.

34. *Gibbons v. Ogden*, 22 U.S. (Wheat) 1, 210 (1824).

between New York's action and a law of Congress was present.<sup>35</sup> The federal licensing law conflicted with the New York monopoly, and the New York monopoly had to fall under the Supremacy Clause.<sup>36</sup>

A few years after *Gibbons*, Chief Justice Marshall appeared to concede that a state sometimes could affect interstate commerce as an incidental consequence of the exercise of its police powers. In *Willson v. Black Bird Creek March Company*,<sup>37</sup> the state of Delaware had authorized the construction of a dam on a creek which flowed into the Delaware River.<sup>38</sup> Because the dam blocked navigation of the creek, the owners of a federally licensed ship broke the dam in order to pass through the creek, and were sued by the dam's owners.<sup>39</sup> The Court ruled in favor of the dam's owner.<sup>40</sup> The Chief Justice retreated from his position in *Gibbons* that congressional licensing of a vessel constituted congressional action which was specifically in conflict with a state's attempt to regulate the use of its waterways.<sup>41</sup> Marshall concluded in *Willson* that no actual conflict arose between Delaware's permitting the dam and any act of Congress, and further, that Delaware's action was not "repugnant to the power to regulate commerce in its dormant state."<sup>42</sup> The Court reasoned that Delaware intended to protect the health of nearby inhabitants rather than regulate interstate commerce.<sup>43</sup> This holding seemed to imply that the Court would not normally construe a state's attempt to regulate health concerns as interfering with the dormant federal commerce power.<sup>44</sup>

#### B. *City of Philadelphia v. New Jersey*<sup>45</sup>: *Environmental Concerns and the Dormant Commerce Clause*

In response to the use of New Jersey landfills for disposal of waste from cities in Pennsylvania and New York, the New Jersey legislature, in 1974, enacted a statute prohibiting the importation of

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35. *Id.* at 221.

36. *Id.* at 210.

37. 27 U.S. (2 Pet.) 245 (1829).

38. *Id.* at 245.

39. *Id.* at 246.

40. *Id.* at 252.

41. See *Gibbons v. Ogden*, 22 U.S. (Wheat) 1, 221 (1824).

42. *Willson*, 27 U.S. (2 Pet.) at 252.

43. *Id.* at 251.

44. *Id.*

45. 437 U.S. 617 (1978).

nonhazardous solid or liquid waste into the state.<sup>46</sup> Several New Jersey operators and out-of-state users of the landfill sites challenged the statute on the ground that it discriminated against interstate commerce.<sup>47</sup>

The Supreme Court struck down the statute as violative of the Commerce Clause.<sup>48</sup> The majority concluded that the law was "basically a protectionist measure," rather than a way of resolving legitimate local concerns.<sup>49</sup> The State's chosen means, not its asserted purposes, controlled the Court's decision.<sup>50</sup> The Court declined to decide whether the main purpose of the statute was to protect the state's environment and its inhabitants' health and safety or to stabilize the costs of waste disposal for New Jersey residents at the expense of out-of-state interests.<sup>51</sup> It was unnecessary to decide this issue because "the evil of protectionism can reside in legislative means as well as legislative ends."<sup>52</sup> Because New Jersey had chosen discriminatory methods to further its objectives, the statute represented a protectionist measure.<sup>53</sup> The Court held that the New Jersey statute "impose[d] on out-of-state commercial interests the full burden of conserving the State's remaining landfill space . . . [and constituted an] attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade."<sup>54</sup>

Justice Rehnquist, in dissent, argued that the state legislature had articulated valid concerns regarding the threats to the health and safety of citizens caused by landfills.<sup>55</sup> The Supreme Court and lower federal courts wrongly had permitted the states' despite the resulting incidental burden on interstate commerce.<sup>56</sup> Justice Rehnquist argued that "quarantine laws have not been considered forbidden protectionist measures, *even though they were directed against out-of-state*

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46. *Id.* at 618, 625.

47. *Id.* at 619.

48. *Id.* at 629.

49. *Id.* at 624.

50. *Id.* at 626.

51. *Id.*

52. *Id.*

53. *Id.* at 626-27.

54. *Id.* at 628.

55. *Id.* at 632.

56. *Id.* at 631.

commerce."<sup>57</sup> By invalidating the statute, the Court placed New Jersey in a precarious position. Justice Rehnquist commented on the unenviable position of the New Jersey legislature.

New Jersey must either prohibit all landfill operations, leaving itself to cast about for a presently nonexistent solution to the serious problem of disposing of the waste generated within its own borders, or it must accept waste from every portion of the United States, thereby multiplying the health and safety problems which would result if it dealt only with such wastes generated within the State.<sup>58</sup>

The majority in *City of Philadelphia* stuck down the New Jersey law because it erected a "barrier against the movement of interstate trade" without any rational justification for treating out-of-state waste differently from in-state waste.<sup>59</sup> The Court supported its position by referring to cases holding that a "[s]tate is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State."<sup>60</sup> This basic principle, coupled with the disclaimer in footnote number six,<sup>61</sup> acknowledged the market participant exception and left open the possibility that states might in some instances be able to restrict access to state-owned resources.<sup>62</sup>

### C. *Municipal Solid Waste and Recent Supreme Court Decisions*

The general public, concerned by news of environmental disasters such as Love Canal and Times Beach, has become aggressive in its opposition to sitting solid waste landfills.<sup>63</sup> "Behind the public

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57. *Id.*

58. *Id.*

59. *Id.* at 628.

60. *Id.* at 627 (quoting *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928)).

61. "We express no opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state-owned resources." *Id.* at 627 n.6.

62. *Id.* at 627.

63. Robert H. Abrams, *Keeping Out Non-Local Garbage: An End Around the Dormant Commerce Clause?*, 10 *Envtl. L. Rep.* (Envtl. L. Inst.) 340 (1991-92).

outcry lie genuine environmental and public health concerns, traditionally areas of regulation lying near the heart of the states' police power.<sup>64</sup> In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*,<sup>65</sup> the United States Supreme Court found that a Michigan statute discriminated impermissibly against interstate commerce. Rather than creating a single statewide plan, the Michigan statutory provisions required each county to adopt a solid waste management plan.<sup>66</sup> The act prohibited landfill operators from accepting solid waste generated outside of the county in which they were located unless the county plan explicitly authorized such acceptance.<sup>67</sup> The Court held that the Michigan law illegally discriminated against intrastate counties as well as other states.<sup>68</sup>

In 1978 the Michigan legislature passed the Solid Waste Management Act (SWMA) which required every county in the state to gauge the amount of solid waste that it would generate in the next twenty years and to adopt a plan for disposal of the waste at facilities that complied with Michigan health standards.<sup>69</sup> After holding public hearings and obtaining the necessary approval from municipalities in St. Clair County and from the Director of the Michigan Department of Natural Resources (the Department), the County Board of Commissioners adopted a solid waste management plan.<sup>70</sup> In 1987 the Department issued a permit to the plaintiff, to operate a sanitary landfill as a solid waste disposal area.<sup>71</sup> On December 28, 1988, the Michigan legislature amended the SWMA by adding two provisions prohibiting the acceptance of solid waste that was not generated in the county in which the disposal area was located.<sup>72</sup> In February of 1989, the plaintiff submitted an application for authority to accept out-of-state waste at its landfill.<sup>73</sup> After the planning committee denied the application, the plaintiff commenced an action challenging the

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64. *Id.* at 341.

65. 112 S. Ct. 2019 (1992).

66. *Id.* at 2021.

67. *Id.* at 2022.

68. *Id.* at 2028.

69. *Id.* at 2021-22.

70. *Id.* at 2022.

71. *Id.* at 2022.

72. *Id.*

73. *Id.*

restrictions.<sup>74</sup>

The Supreme Court held that the Michigan statute violated the Commerce Clause.<sup>75</sup> Although the waste import restrictions, unlike the prohibitions in *City of Philadelphia*, did not discriminate against interstate commerce on their face or in effect because they treated waste from other Michigan counties no differently from waste from other states, the Court held that a "[s]tate (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself."<sup>76</sup> With this holding, the Court eliminated another mechanism by which a state could attempt to limit the amount of municipal solid waste that entered its borders. As it did in *City of Philadelphia*, however, the Court in *Fort Gratiot Landfill* suggested that import restrictions may be permissible for publicly owned landfills.<sup>77</sup> Thus, public control of solid waste landfills, coupled with the enactment of the market participant exception, may be a state's best hope to protect the health, safety, and economic concerns of its citizens.

### III. THE MARKET PARTICIPANT DOCTRINE

The Supreme Court has held that when a state enters the market as a purchaser or seller of interstate commerce, nothing in the dormant Commerce Clause forbids it from restricting its own purchases or limiting its sales to its own citizens.<sup>78</sup> The Court has determined that a state or local government is not subject to the restrictions of the Commerce Clause when it acts as a market participant as opposed to a market regulator.<sup>79</sup> In the absence of congressional action, nothing in

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74. *Id.*

75. *Id.* at 2028.

76. *Id.* at 2109.

77. *Id.* at 2027 n.7.

78. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (5 to 4 decision holding that state bounty for scrap automobiles can favor scrap processors with an in-state plant).

79. *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204, 208 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976). The Court in *Reeves* referred to market-participant action as "state proprietary activity." *Reeves*, 447 U.S. at 439. Recent legislative proposals by states have applied the market participant exception under the guise of state planning. If a state or its subdivision acts as a market participant rather than a market regulator the Commerce Clause does not "require independent justification" for

the Commerce Clause prohibits a state from participating in the market and thereby favoring its own citizens over others.<sup>80</sup> Policy considerations of state sovereignty,<sup>81</sup> the role of each state "as guardian and trustee" for its people,<sup>82</sup> fairness,<sup>83</sup> and the fact that a state, like a private business, should not be governed by the Commerce Clause when it enters the private market encourage judicial restraint in this area.<sup>84</sup> The market participant doctrine represents an exception to the dormant Commerce Clause and swallows the rule developed in *City of Philadelphia* that prohibits solid waste restrictive statutes.

### A. *Origins of the Doctrine*

The public/private distinction became important in Commerce Clause jurisprudence just two years before the Supreme Court decided *City of Philadelphia*. In *Hughes v. Alexandria Scrap Corp.*,<sup>85</sup> the Court sustained a scheme whereby the State of Maryland purchased crushed automobile hulks above the market price, in order to help rid the state of abandoned cars.<sup>86</sup> This scheme operated in such a way that, as a practical matter, Maryland refused to buy hulks from out-of-state scrap processors.<sup>87</sup> Virginia processors claimed that this plan violated the Commerce Clause.<sup>88</sup> The Court disagreed and held that Commerce Clause analysis was inapplicable.<sup>89</sup> Maryland was not regulating the flow of hulks, but rather had "entered into the market itself" in order to raise the price of hulks.<sup>90</sup> The Court discerned nothing in the Commerce Clause that barred a state, "in the absence of congressional action, from participating in the market and exercising the

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any protectionist measure. *Hughes*, 426 U.S. at 809.

80. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. at 810.

81. *Reeves, Inc. v. Stake*, 447 U.S. at 438.

82. *Id.* (quoting *Atkins v. Kansas*, 191 U.S. 207, 222-23 (1903)).

83. *See, e.g., Reeves*, 447 U.S. at 446 (reversal would discourage similar state projects because of the fear that other states would reap the benefits of its foresight, risk, and industry).

84. *Id.* at 438-39 (quoting *U.S. v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

85. 426 U.S. 794 (1976).

86. *Id.* at 796.

87. *Id.*

88. *Id.* at 802.

89. *Id.* at 809.

90. *Id.* at 810.

right to favor its own citizens over others."<sup>91</sup> The *Hughes* decision immunized from dormant Commerce Clause scrutiny situations where a state acts solely as a market participant, rather than as a market regulator.

The theory that when governments act as market participants their actions are not subject to dormant Commerce Clause restrictions also appeared in *White v. Massachusetts Council of Construction Employers*.<sup>92</sup> The Court upheld an order by the mayor of Boston that all construction projects funded by city monies must be "performed by a work force consisting of at least half bona fide residents of Boston."<sup>93</sup> In the Court's view, where the government acts as market participant rather than regulator, the Commerce Clause simply does not apply; thus the impact on out-of-state residents is irrelevant, as is the fact that the governmental action may be broader than necessary to accomplish its objectives.<sup>94</sup>

#### *B. The Doctrine and the Natural Resources Exception*

Since *Hughes*, the Supreme Court has reaffirmed the market participant doctrine five times, solidifying the concept.<sup>95</sup> In *Reeves, Inc. v. Stake*,<sup>96</sup> the Court, in a 5-4 decision, upheld the right of a state owned cement plant to favor in-state customers in times of shortage. The majority dismissed the argument that such a ruling permitted the state to hoard its resources of cement.<sup>97</sup> The majority asserted that "[c]ement is not a natural resource, like coal, timber, wild game, or minerals...[but] is the end-product of a complex process whereby a costly physical plant and human labor act on raw materials."<sup>98</sup> The Court's rationale distinguished cement from raw materials and developed a natural resources exception to the market participant doctrine.<sup>99</sup> In the past, cases involving states' legislative attempts to

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91. *Id.*

92. 460 U.S. 204 (1983).

93. *Id.* at 206.

94. *Id.* at 210.

95. For lower court decisions applying the market participant exemption outside the waste import area, see *County Comm'rs v. Stevens*, 473 A.2d 12, 18 n.4 (Md. Ct. App. 1984).

96. 447 U.S. 429 (1980).

97. *Id.* at 443.

98. *Id.*

99. *Id.*

hoard natural resources have reached the Supreme Court, and in every instance the Court has struck down these efforts.<sup>100</sup>

The Supreme Court applied the natural resources exception in *South-Central Timber Development, Inc. v. Wunnicke*<sup>101</sup> when it reviewed an Alaska statute regulating the sale of timber owned by the state.<sup>102</sup> According to the statute, all proposed contracts for sale of the timber would require that the "primary manufacture" of the timber take place within the state.<sup>103</sup> One who successfully bid to purchase timber was required to process it within Alaska by converting the logs into slabs or cants before shipping it out of state.<sup>104</sup>

The Court concluded that the market participant doctrine did not apply, and held that the regulation violated the Commerce Clause.<sup>105</sup> The Court distinguished *South-Central Timber* from *Reeves*, noting two important differences. First, the timber was a natural resource, whereas the cement in *Reeves* was the end product of a long manufacturing process involving much labor and capital.<sup>106</sup> Second, the burdens on commerce in *South-Central Timber* affected more than those involved in the immediate transaction within the state, because the terms imposed by the state prevented the buyer from selling logs to an out-of-state buyer unless they had first been processed in-state.<sup>107</sup> The Court held that the market participant doctrine will apply only where the effects of the state's terms are limited to the particular market in which the state is participating.<sup>108</sup> In *South-Central Timber* the state was engaging in downstream regulation of the timber processing market<sup>109</sup> and, therefore, was not entitled to the market participant exception.

Significantly, by enacting restrictive statutes, Alaska was attempting to develop a local timber industry. The State could have utilized alternative methods such as requiring Alaska to sell its timber exclusively to companies that maintained active primary-processing

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100. See, e.g., *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (minnows); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (natural gas).

101. 467 U.S. 82 (1984).

102. *Id.* at 84 n.1.

103. *Id.*

104. *Id.* 85 n.2(a).

105. *Id.* at 91.

106. *Id.* at 94.

107. *Id.* at 95.

108. *Id.* at 97-98.

109. *Id.* at 95.

plants in Alaska, or having the State directly subsidize the primary processing industry within the state.<sup>110</sup> Justice Rehnquist, in his dissent, argued that because these alternatives were constitutional, the Court's ruling was "unduly formalistic."<sup>111</sup>

The Court in both *Reeves* and *South-Central Timber* suggested that natural resources may be an exception to the rule that a state may freely choose its customers. If the market participant doctrine provides for a natural resources exception, then courts will face the difficult task of determining what is or is not a natural resource.

The Court has implied that a state, consistent with the Commerce Clause, may restrict access to state owned resources,<sup>112</sup> thereby rejecting the application of the natural resources doctrine to public solid waste landfills. The Court in *City of Philadelphia* did state, however, that the New Jersey law "impose[d] on out-of-state commercial interests the full burden of conserving the State's remaining landfill space."<sup>113</sup> In this context the Supreme Court suggested that landfill sites were natural resources, and as support for this proposition, referred to earlier holdings that states may not prohibit nonresident access to privately owned resources found within the state.<sup>114</sup> Assuming that land suitable for landfills would be a natural resource which a state would not be permitted to amass, some courts have held that solid waste restrictive statutes did not allow the states to hoard land located within their territorial limits; instead, the statutes have attempted to "preserve for [the state's] residents the benefits from a service provided by a costly facility constructed and operated with tax revenues collected from [the state's] own citizens."<sup>115</sup> This service provided by local governments is "the end product of a complex process whereby a costly physical plant and human labor act on raw materials."<sup>116</sup>

### III. WASTE IMPORT BANS: VICTORY FOR THE MARKET PARTICIPANT DOCTRINE

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110. *Id.* at 103 (Rehnquist, J., dissenting).

111. *Id.* at 103.

112. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 n.6 (1978).

113. *Id.*

114. *Id.* at 627.

115. *County Comm'rs of Charles County, Maryland v. Stevens*, 473 A.2d 12, 20 (Md. 1984).

116. *Id.* (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 444 (1980)).

When the state itself acts as a merchant or customer, the Commerce Clause *pro tanto* does not apply.<sup>117</sup> Moreover, the exemption's applicability does not depend on whether the state or local government acts in a traditional governmental role, or instead enters a private market to operate a commercial venture. The majority in *City of Philadelphia* stated that a state or local government, consistent with the Commerce Clause, can restrict disposal of out-of-jurisdiction trash at landfills owned by the government.<sup>118</sup> This decision is important because eighty percent of the landfills receiving municipal solid waste in the United States are state or locally owned.<sup>119</sup> However, the Supreme Court has yet to address specifically how the market participant exemption applies to state and local measures discouraging the import of out-of-jurisdiction waste. That task has fallen to the lower courts.

*LaFrancois v. Rhode Island*<sup>120</sup>

The state of Rhode Island enacted several statutes that imposed criminal sanctions upon any individual found dumping out-of-state waste at the state-subsidized Central Landfill in Rhode Island.<sup>121</sup> The Central Landfill was the sole Rhode Island disposal site for all categories of nonhazardous solid waste.<sup>122</sup> The plaintiff, a commercial handler of solid waste, alleged that the statutory provisions violated the Commerce Clause.<sup>123</sup> The defendant, Rhode Island Solid Waste Management Corporation ("RISWMC"), was "a legislatively created public agency formed in 1974 in order to plan, construct, operate and maintain a statewide system of solid waste management facilities and services."<sup>124</sup> In 1980, RISWMC purchased the Central Landfill from

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117. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984).

118. 437 U.S. at 627 n.6.

119. Environmental Protection Agency [RCRA] Subtitle D Study: Phase I Report table 4-2 (1986). Of the approximately 9,000 landfills known to be receiving municipal waste, 77.9 percent are owned by local government, 1.4 percent by state government, and 3.9 percent by the federal government. Privately owned landfills make up the remaining 16.7 percent.

120. 669 F. Supp. 1204 (D.R.I. 1987).

121. *Id.* at 1206.

122. *Id.* at 1205.

123. *Id.*

124. *Id.* at 1206.

a private owner-operator.<sup>125</sup>

A public agency operated the Central Landfill and the State contributed to the landfill's funding. Consequently, the district court held that the public character of Central Landfill exempted the state's action from the restraints of the Commerce Clause pursuant to the reservation expressed in footnote six of *City of Philadelphia*.<sup>126</sup>

*County Commissioners of Charles County v. Stevens*<sup>127</sup>

The County Commissioners of Charles County owned and operated a sanitary landfill in Pisgah, Charles County, Maryland.<sup>128</sup> The purpose of the facility was to provide for the disposal of solid waste generated by Charles County residents.<sup>129</sup> The Pisgah facility was the only sanitary landfill in Charles County, and County tax revenue provided the primary funding for operation of the landfill.<sup>130</sup> Pursuant to their statutory authority, the County Commissioners adopted a regulation that prohibited disposal of waste generated outside of the County in the County landfill.<sup>131</sup> The regulation governed only public landfills and had no application to any privately owned facility.<sup>132</sup>

Stevens operated a solid waste hauling business within and beyond the territorial limits of Charles County.<sup>133</sup> Stevens' trucks dumped refuse collected outside of Charles County at the Pisgah site.<sup>134</sup> When the County suspended his permit for violating the statute,<sup>135</sup> Stevens filed suit complaining that the regulation contravened the Commerce Clause.<sup>136</sup>

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125. *Id.* at 1206.

126. *Id.* at 1208.

127. 473 A.2d 12 (Md. 1984).

128. *Id.* at 13.

129. *Id.*

130. *Id.*

131. Regulations Governing the Use of Charles County Public Trash Disposal Areas, Regulation 4(d): "No garbage, trash, or refuse collected outside the territorial limits of Charles County shall be disposed of in any Public Trash Disposal Area of Charles County." *County Comm'rs of Charles County v. Stevens*, 473 A.2d 12, 13-14 (Md. 1984).

132. *Id.* at 14.

133. *Id.* at 14.

134. *Id.*

135. *Id.* at 14.

136. *Id.*

The Court of Appeals of Maryland held that Charles County was acting as a market participant and that the Commerce Clause did not apply to its activities.<sup>137</sup> The court reasoned that the County neither bought nor sold refuse deposited in the landfill, but that it provided a service to private waste haulers.<sup>138</sup> Because Charles County constructed the landfill to accommodate the waste generated in the County, the restrictions merely limited the benefits of the service to the County taxpayers who paid for the landfill.<sup>139</sup> The Maryland appellate court regarded its decision as "good sense and sound policy,"<sup>140</sup> and affirmed the proposition that a state may limit "benefits generated by a state program to those who fund the state treasury and whom the State was created to serve."<sup>141</sup>

The court acknowledged the "common market" purpose of the Commerce Clause, yet emphasized that the United States is a "federal union of sovereign states in which local governments are given primary responsibility for providing many of the services that the public relies upon . . . ."<sup>142</sup> "The power of local governments to serve their citizens need not yield in every instance to the desire for national uniformity."<sup>143</sup>

*Shayne Brothers, Inc. v. District of Columbia*<sup>144</sup>

*Shayne Brothers* involved a corporation engaged in the business of trash removal in and around the District of Columbia.<sup>145</sup> Shayne Brothers held a solid waste collector's license from the District, and a significant portion of its trucks were licensed to operate in the District of Columbia.<sup>146</sup> The defendant, operated three solid waste landfills.<sup>147</sup> No private landfills existed in the city.<sup>148</sup> The District had enacted legislation that prohibited delivering solid wastes generated

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137. *Id.* at 19-20.

138. *Id.* at 20.

139. *Id.* at 21.

140. *Id.* at 21.

141. *Id.* (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 442 (1980)).

142. *Id.* at 22.

143. *Id.*

144. 592 F. Supp. 1128 (D.D.C. 1984).

145. *Id.* at 1130.

146. *Id.*

147. *Id.*

148. *Id.*

outside of the city to any of the disposal facilities unless prior arrangements had been made with the Commissioner.<sup>149</sup>

The controversy arose when the District barred one of Shayne Brothers' trucks from using the city's landfills as a penalty for importing waste from Maryland.<sup>150</sup> Shayne Brothers filed suit asserting that the District's regulation imposed an unconstitutional burden upon interstate commerce.<sup>151</sup> The United States District Court for the District of Columbia held that the statute did not violate the Commerce Clause.<sup>152</sup> "[T]he fact that the District has accomplished by an ordinance what it might have done by contract (or, for that matter, by simply exercising its landowner's prerogative to bar entry) does not alter the essence of its act."<sup>153</sup> Because the District expended a public resource, similar to providing the services of police or teachers, the regulation did nothing more than limit the benefits of the waste disposal service to the County taxpayers who paid for it.<sup>154</sup> This result is in harmony with the holding in *Charles County*.

#### IV. CONCLUSION

Millions of tons of garbage cross state lines each year,<sup>155</sup> and states have attempted to use their regulatory powers to stop the flow of waste imported into their landfills in order to accommodate their own solid waste. This Article has demonstrated that publicly owned and operated landfills have provided the necessary means by which state legislatures have enacted and enforced out-of-state waste import restrictions.

The threat of a Commerce Clause challenge to regulatory efforts has created a significant deterrent to aggressive state solid waste management. Although constitutional considerations have restricted legislation significantly, the Commerce Clause has not presented an insurmountable hurdle for waste management planning. The market participant doctrine provides the courts with a compromise that permits states to implement waste import restrictions without violating the

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149. *Id.* at 1130.

150. *Id.*

151. *Id.*

152. *Id.* at 1134.

153. *Id.* at 1133-34.

154. *Id.* at 1134.

155. *Shipping Out the Trash*, *supra* note 5, at 28.

**Commerce Clause.**

The market participant exception allows states to restrict the importation of out-of-state garbage while avoiding scrutiny under the dormant Commerce Clause. By avoiding such scrutiny, market participants restrict out-of-state waste without fear that other states will use Commerce Clause freedom to export waste for disposal into their landfills. The case law demonstrates that a state or local government can become a market participant by purchasing or building waste disposal facilities that provide a waste processing service for its citizens.

Many are willing to generate waste, yet few are willing to help dispose of it. Locales that provide disposal capacity to handle foreign waste effectively reduce safety risks to the states that will not take charge of their own waste. In this way, the market participant exception for waste import restrictions embraces the common sense notion that those responsible for a problem should be responsible for its solution.