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# OUT-OF-STATE TRASH: SOLID WASTE AND THE DORMANT COMMERCE CLAUSE

*BRADFORD C. MANK\**

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## I. INTRODUCTION

America faces a garbage crisis. Many cities and states are rapidly depleting their landfill capacity for ordinary municipal solid waste.<sup>1</sup> The "Not In My Back Yard" (NIMBY) syndrome hinders regional and national solutions to the solid waste problem.<sup>2</sup> This Article examines to what extent local communities may exclude solid waste from out-of-state sources without violating the Commerce Clause.

In *Philadelphia v. New Jersey*,<sup>3</sup> the United States Supreme Court held that the dormant Commerce Clause prohibits a state or local government from refusing to import most or all solid waste originating outside that state. The New Jersey statute in question regulated both

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1. See, e.g., Beck, *Buried Alive*, NEWSWEEK, Nov. 27, 1989, at 67; Kovacs and Anderson, *States as Market Participants in Solid Waste Disposal Services - Fair Competition or the Destruction of the Private Sector*, 18 ENVTL. L. 779, 779-82 (1988); Comment, *Recycling Philadelphia v. New Jersey: The Dormant Commerce Clause, Postindustrial Natural Resources, and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309, 1309-11 (1989) (many communities are running out of space for solid waste).

2. See, e.g., Beck, *supra* note 1, at 67; Kovacs and Anderson, *supra* note 1, at 781 (NIMBY frustrates efforts to build new landfills). *But see* Comment, *supra* note 1, at 1334 (local political participation prevents domination of landfill decisions by large waste producers and handlers).

3. 437 U.S. 617 (1978).

private and public landfills.<sup>4</sup> The Supreme Court left open the issue of whether a state may “restrict to state residents access to state-owned resources . . . or . . . spend state funds solely on behalf of state residents and businesses.”<sup>5</sup> In other words, the Supreme Court did not address to what extent state, county or municipal landfills may prohibit or discriminate against out-of-state solid waste. Because states and local governments own or operate approximately eighty-one percent of the nation’s landfills, *Philadelphia v. New Jersey* settled very little as a practical matter.<sup>6</sup>

Since the Supreme Court’s decision in *Philadelphia v. New Jersey*, five federal and state decisions have held that state, county or municipal landfills may discriminate against or even prohibit out-of-state solid waste without violating the dormant Commerce Clause.<sup>7</sup> These cases have all relied upon the principle that a state or local government may discriminate against interstate commerce if the government is acting as a “market participant” rather than as a “market regulator.”<sup>8</sup>

These five decisions have sparked criticism. In the Third Circuit case of *Swin Resources Systems, Inc. v. Lycoming County, Pennsylvania*, Chief Judge Gibbons, dissenting, argued that the distinction between a state’s role as market participant and as a market regulator was no longer valid, and contended that the dormant Commerce Clause bars states or local governments from discriminating against the importation of out-of-state solid waste.<sup>9</sup> In addition, two authorities, Kovacs and Anderson, claim that states attempt to evade the Commerce Clause by using their regulatory powers to drive out private landfill operators, who may not discriminate against out-of-state solid waste, ensuring governmental monopoly control of landfills in order to block the importation of out-of-state solid waste.<sup>10</sup>

This Article argues that the dormant Commerce Clause prohibits

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4. *Id.* at 618-19.

5. *Id.* at 627 n.6.

6. Comment, *supra* note 1, at 1311 and n.18 (81% of landfills are owned by local and state governments) (citing 53 Fed. Reg. 33,318 (1988)).

7. *Swin Resource Sys. v. Lycoming County*, 883 F.2d 245 (3d Cir. 1989); *Lefrancois v. Rhode Island*, 669 F. Supp. 1204 (D.R.I. 1987); *Evergreen Waste Sys. v. Metropolitan Serv. Dist.*, 643 F. Supp. 127 (D.Or. 1986), *aff’d on other grounds*, 820 F.2d 1482 (9th Cir. 1987); *Shayne Bros., Inc. v. Dist. of Columbia*, 592 F. Supp. 1128 (D.D.C. 1984); *County Comm’rs v. Stevens*, 299 Md. 203, 473 A.2d 12 (1984).

8. See cases cited *supra* note 7.

9. 883 F.2d 245, 257-62 (3d Cir. 1989).

10. Kovacs and Anderson, *supra* note 1, at 810.

state or local government landfills from discriminating against out-of-state solid waste, but provides a different analysis than Judge Gibbons or Kovacs and Anderson. Although Judge Gibbons and Kovacs and Anderson make a number of valid points, the Supreme Court is unlikely to adopt the arguments of either.

Courts have created a "natural resources" exception to the market participant doctrine to prevent states from using their ownership of scarce natural resources to burden interstate commerce.<sup>11</sup> The five courts that have allowed state or local landfills to discriminate against out-of-state solid waste viewed landfills as service industries rather than natural resources.<sup>12</sup> This Article contends that landfills are a hybrid or a mixture of natural resources, primarily land, and services. Consequently, courts should weigh the national importance to interstate commerce of a "mixed" natural resource/service in determining whether to apply the market participant doctrine.

In addition, courts that have permitted landfills to discriminate against out-of-state solid waste often emphasize local storage of landfill space.<sup>13</sup> This Article argues that courts should not consider these "artificial" shortages created by NIMBY politics. By vigorously enforcing the dormant Commerce Clause, courts can encourage regional or national solutions to the solid waste crisis.

## II. THE COMMERCE CLAUSE

It will be useful to explore the general principles underlying the dormant Commerce Clause before examining the specific issues relating to solid waste. In particular, one needs to understand the "market participant" doctrine and its "natural resources" exception.

### A. *The Dormant Commerce Clause*

The Commerce Clause of the United States Constitution serves a dual function. By its express terms, it provides: "The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States. . . ."<sup>14</sup> The Supreme Court has interpreted the Commerce Clause "not only as an authorization for congressional action, but also, even in the absence of a conflicting federal statute, as a

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11. *See infra* notes 100-17 and accompanying text.

12. *See infra* notes 118-25 and accompanying text.

13. *See infra* notes 124-25 and accompanying text.

14. U.S. CONST. art. I, § 8, cl. 3.

restriction on permissible state regulation.”<sup>15</sup> Courts refer to this latter role of negative restrictions as the “dormant” Commerce Clause.<sup>16</sup> Dormant Commerce Clause limitations apply with equal force to all laws and regulations that affect interstate commerce, whether at the state, county or municipal level.<sup>17</sup>

The Supreme Court has construed the dormant Commerce Clause as a check on state and local authority that prevents the “rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.”<sup>18</sup> The dormant Commerce Clause is designed to promote the “material success that has come to inhabitants of the states which make up this federal free trade unit.”<sup>19</sup> The Supreme Court has declared:

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by custom duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation from any. Such was the vision of the Founders. . . .<sup>20</sup>

The Supreme Court has developed a two-part dormant Commerce Clause analysis. Non-discriminatory laws and regulations that burden the flow of interstate commerce must satisfy a balancing test: “Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>21</sup>

By contrast, the Court has held *per se* unconstitutional those state statutes and regulations that foster economic isolation of the state by

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15. *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979) (footnote omitted).

16. *Swin Resource Sys. v. Lycoming County*, 883 F.2d at 248; *Lefrancois v. Rhode Island*, 669 F. Supp. at 1207; Comment, *supra* note 1, at 1313-17 (discussing the basic nature of the “dormant” or “negative” Commerce Clause).

17. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *County Comm’rs v. Stevens*, 299 Md. at 208, 473 A.2d at 14 (courts applied Commerce Clause analysis to county resolutions and municipal ordinances).

18. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935).

19. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538 (1949).

20. *Id.* at 539.

21. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

discriminating against interstate commerce in favor of local interests.<sup>22</sup> In *Philadelphia v. New Jersey*, the Supreme Court applied the *per se* unconstitutional standard applied to a New Jersey statute that prohibited the dumping of solid waste originating outside New Jersey in any public or private landfill within the state.<sup>23</sup> The Supreme Court ruled that the New Jersey statute failed to provide any rationale for discriminating against out-of-state solid waste while permitting unrestricted disposal of in-state refuse.<sup>24</sup> However, as noted in the introduction of this Article, the Supreme Court reserved judgment on the question of whether a state might constitutionally exclude out-of-state waste from publicly owned landfill sites.<sup>25</sup>

### B. *The Market Participant Doctrine*

The Supreme Court has established a complete exemption from dormant Commerce Clause restrictions for governments acting as market participants rather than as market regulators. The scope of the market participant doctrine is unclear. Each Supreme Court decision applying the doctrine is based heavily on the particular facts in that case.

In a decision applying the market participant doctrine to a county landfill, the Third Circuit in *Swin Resources Systems, Inc. v. Lycoming County, Pennsylvania* observed that the contours of the market participant doctrine were far from clear:

Application of the distinction between “market participant” and “market regulator” has, however, occasioned considerable dispute in the Supreme Court’s jurisprudence. The author of each of the three opinions that applied the doctrine — *Hughes v. Alexandria Scrap Corp.*, (Powell, J.); *Reeves, Inc. v. Stake*, (Blackmun, J.); *White*, (Rehnquist, J.) — authored a dissent in the next, the pattern being maintained by Justice Rehnquist’s dissent in *South-Central Timber Development, Inc. v. Wunnicke*, the principal case in which application of the doctrine resulted in a conclusion that the state was not a market participant.<sup>26</sup>

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22. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

23. *Id.* at 628.

24. *Id.* at 626-27. *Cf.* *Bill Kettlewell Excavating, Inc. v. Michigan Dept. of Nat. Resources*, 58 U.S.L.W. 2547 (March 2, 1990) (county may ban the importation of trash into a private landfill when there is no distinction between out-of-state trash and the in-state trash of other counties).

25. *Id.* at 627 n.6.

26. *Swin Resources Sys. v. Lycoming County*, 883 F.2d 245, 249 (3d Cir. 1989) (citations omitted).

The Supreme Court first established the market participant exception in *Hughes v. Alexandria Scrap Corp.*<sup>27</sup> The Court upheld a Maryland statute that encouraged licensed scrap processors to rid the state of abandoned automobiles by paying a bounty for crushed car hulks.<sup>28</sup> Virginia scrap processors challenged the statute on the grounds that it impermissibly burdened commerce by imposing more stringent documentation requirements on out-of-state processors than on Maryland businesses.<sup>29</sup> The Court concluded that the statute did not unduly burden interstate commerce because Maryland was acting as a market participant rather than as a market regulator. "Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead it has entered into the market itself to bid up their price."<sup>30</sup> The Court concluded that Maryland "as a purchaser, in effect, of a potential article of interstate commerce" had merely "restricted its trade to its own citizens or businesses within the State."<sup>31</sup> The Court held, "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."<sup>32</sup>

In *Reeves, Inc. v. Stake*,<sup>33</sup> the Supreme Court reaffirmed the market participant doctrine while simultaneously establishing a natural resources exception to that rule. The Court held that a state could give preference to state residents in the sale of cement manufactured at a state-owned cement plant without violating the Commerce Clause.<sup>34</sup> In 1919, South Dakota built a cement plant to address a regional cement shortage.<sup>35</sup> For many years, the plant produced more cement than state residents needed and sold the surplus to out-of-state customers including Reeves, Inc., a Wyoming concrete distributor.<sup>36</sup> In 1978, however, the plant found itself unable to meet the increasing regional

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27. 426 U.S. 794 (1976).

28. *Id.*

29. *Id.* at 796-802.

30. *Id.* at 806.

31. *Id.* at 805.

32. *Id.* at 810.

33. 447 U.S. 429 (1980).

34. *Id.*

35. *Id.* at 430, 431 n.1.

36. *Id.* at 432-33.

and national demand.<sup>37</sup> Accordingly, the plant began enforcing a long standing policy of giving preference to South Dakota residents.<sup>38</sup> The policy forced Reeves, which obtained ninety-five percent of its supply from the South Dakota plant, to cut production by seventy-six percent, and Reeves brought suit challenging the plant's preferential policy.<sup>39</sup>

The *Reeves* Court found that South Dakota acted as a market participant rather than as a market regulator and, therefore, concluded that the state's policy of preferring its residents was not subject to dormant Commerce Clause restrictions.<sup>40</sup> The Court reaffirmed the market participant doctrine:

The basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law. As that case explains, the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. . . . There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.<sup>41</sup>

In addition, the Court rejected the contention that the preference policy violated the *per se* standard used in *Philadelphia v. New Jersey*:

We find the label "protectionism" of little help in this context. The States's refusal to sell to buyers other than South Dakotans is "protectionist" only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve. Petitioner's argument apparently also would characterize as "protectionist" rules restricting to state residents the enjoyment of state educational institutions, energy generated by a state-run plant, police and fire protection, and agricultural improvement and business development programs. Such policies, while perhaps "protectionist" in a loose sense, reflect the essential and patently unobjectionable purpose of the state government — to serve the citizens of the State.<sup>42</sup>

The *Reeves* Court, however, stated that the market participant doctrine might not be applied in circumstances involving natural resources. The district court in *Reeves* held that the policy of favoring South Dakota customers violated the Commerce Clause in part be-

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37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 400.

41. *Id.* at 436-37 (citations omitted).

42. *Id.* at 442.

cause cement was a natural resource that a state could not hoard.<sup>43</sup> The Supreme Court rejected the district court's finding that cement was a natural resource, but noted that natural resources may be excluded in some cases from the scope of the market participant doctrine:

This argument, although rooted in the core purpose of the Commerce Clause, does not fit the present facts. Cement is not a natural resource, like coal, timber, wild game, or minerals. *Cf. Hughes v. Oklahoma*, 441 U.S. 322, (1979) (minnows); *Philadelphia v. New Jersey*, *supra* (landfill sites); *Pennsylvania v. West Virginia*, 262 U.S. 553, (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229, (1911) (same); Note, 32 Rutgers L. Rev. 741 (1979). It is the end product of a complex process whereby a costly physical plant and human labor act on raw materials. South Dakota has not sought to limit access to the State's limestone used to make cement. Nor has it restricted the ability of private firms of sister States to set up plants within its borders. Tr. of Oral Arg. 4. Moreover, petitioner has not suggested that South Dakota possesses unique access to the materials needed to produce cement. Whatever limits might exist on a State's ability to invoke the *Alexandria Scrap* exemption to hoard resources which by happenstance are found there, those limits do not apply here.<sup>44</sup>

Most significantly for this Article, the *Reeves* Court cited *Philadelphia v. New Jersey*, which involves landfill sites, as an example of a natural resources case; the significance of this citation will be discussed in depth later in this Article.<sup>45</sup>

In *White v. Massachusetts Council of Construction Employers*, the Supreme Court upheld the constitutionality of an executive order of the Mayor of Boston requiring all construction projects funded in whole or in part either by city funds or city-administered federal funds to be performed by a work force at least half of which is composed of Boston residents.<sup>46</sup> The Court concluded that Boston acted as a market participant and, therefore, was not subject to the restraints of the Commerce Clause.<sup>47</sup>

In *South-Central Timber Development, Inc. v. Wunnicke*,<sup>48</sup> a Supreme Court plurality held that an Alaskan regulation that required

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43. *Id.* at 443-44.

44. *Id.*

45. *Id.* at 443, and see *infra* notes 66, 115-57 and accompanying text.

46. 460 U.S. 204 (1983).

47. *Id.*

48. 467 U.S. 82 (1984).

purchasers of state-owned timber to process the timber in Alaska prior to export violated the dormant Commerce Clause. The Court ruled that the Alaska regulation constituted market regulation rather than market participation because of the conditions it attached to state timber sales resulted in “downstream regulation of the timber-processing market in which it [the state] is not a participant.”<sup>49</sup> The Court rejected Alaska’s contention that *Reeves* controlled its decision:

Although the Court in *Reeves* did strongly endorse the right of a State to deal with whomever it chooses when it participates in the market, it did not — and did not purport to — sanction the imposition of any terms that the State might desire. For example, the Court expressly noted in *Reeves* that “Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged,” 447 U.S., at 438, n.9, that a natural resource “like coal, timber, wild game, or minerals,” was not involved, but instead the cement was “the end product of a complex process whereby a costly physical plant and human labor act on raw materials,” *id.* at 443-444, and that South Dakota did not bar resale of South Dakota cement to out-of-state purchasers, *id.* at 444, n.17. In this case, all three of the elements that were not present in *Reeves* - foreign commerce, a natural resource, and restrictions on resale - are present.<sup>50</sup>

It is noteworthy for the purposes of this Article that the *Wunnicke* court drew a distinction between the cement at issue in *Reeves* and the natural resource, timber, involved in the subsequent case.

Since the *Wunnicke* decision in 1984, the Supreme Court has favorably mentioned the market participant doctrine in two cases, without applying the rule in either case.<sup>51</sup> In *Wisconsin Department of Industry, Labor and Human Relations v. Gould*,<sup>52</sup> the Supreme Court held that the National Labor Relations Act (NLRA) preempted a Wisconsin statute that debarred certain repeat violators of the NLRA from doing business with the state. The Court rejected Wisconsin’s argument that it acted as a market participant. “We agree with the Court of Appeals, however, that by flatly prohibiting state purchases from repeat labor law violators Wisconsin ‘simply is not functioning as a private purchaser of services’; for all practical purposes, Wisconsin’s

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49. *Id.* at 99.

50. *Id.* at 95-96.

51. See *infra* notes 52-56 and accompanying text.

52. 475 U.S. 282 (1986).

debarment scheme is tantamount to regulation.”<sup>53</sup> The Court stated that the market participant doctrine had no application where Congress had acted and preempted state law. “In any event, the ‘market participant’ doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted.”<sup>54</sup>

In *New Energy Co. v. Limbach*,<sup>55</sup> the Supreme Court held that an Ohio statute that awarded tax credit for each gallon of ethanol sold as a component of gasohol by fuel dealers discriminates against interstate commerce in violation of the Commerce Clause, but only if the ethanol is produced in Ohio or in a state that grants similar tax advantages to ethanol produced in Ohio. The Supreme Court rejected Ohio’s contention that it acted as a market participant:

The market participant doctrine has no application here. The Ohio action ultimately at issue is neither its purchase nor its sale of ethanol, but its assessment and computation of taxes — a primeval governmental activity. To be sure, the tax credit scheme has the purpose and effect of subsidizing a particular industry, as do many dispositions of the tax laws. That does not transform it into a form of state participation in the free market.<sup>56</sup>

### III. LANDFILLS AND THE MARKET PARTICIPANT DOCTRINE

Five federal and state decisions have applied the market participant doctrine in holding that state, county or municipal landfills may discriminate against or prohibit out-of-state solid waste without violating the dormant Commerce Clause.<sup>57</sup> These cases have concluded that landfills are not scarce natural resources but are participants in the market for disposal services.<sup>58</sup> In addition, some of these cases have emphasized local shortages in landfill capacity as a basis for excluding out-of-state waste.<sup>59</sup>

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53. *Id.* at 289 (citations omitted) (quoting the appellate court opinion, 750 F.2d 608 (1984)).

54. *Id.*

55. 108 S. Ct. 1803 (1988).

56. *Id.* at 1809.

57. *See cases cited supra* note 7.

58. *See supra* notes 7-8 and accompanying text.

59. *See, e.g., Swin Resource Sys. Inc. v. Lycoming County*, 883 F.2d 245, 253-54 (3d Cir. 1989); *Lefrancois v. Rhode Island*, 669 F. Supp. 1204, 1217-18 (D.R.I. 1987); *Evergreen Waste Sys., Inc., v. Metropolitan Serv. Dist.*, 643 F. Supp. 127, 130 (D. Or. 1986), *aff’d on other grounds*, 820 F.2d 1482 (9th Cir. 1987) (citing local shortages of

The most recent case, *Swin Resource Systems, Inc. v. Lycoming County*,<sup>60</sup> will probably be the most influential because it involved the Third Circuit Court of Appeals. Federal district courts decided three of the previous decisions, one of which was affirmed in a rather cursory opinion by the Ninth Circuit, and the Maryland Court of Appeals decided the fifth case.<sup>61</sup> In *Swin*, the operator of a solid waste processing facility brought an action against Lycoming County, which operated a landfill.<sup>62</sup> The County charged a lower rate for the reception and disposal of waste from Lycoming and nearby counties than for waste originating from outside that area.<sup>63</sup> Swin's waste processing facility received solid waste from Eastern Pennsylvania and New Jersey.

In a two to one decision, the *Swin* Court held that the County was a market participant in operating its landfill and, therefore, exempt from the dormant Commerce Clause:

We see Lycoming as a market participating in the market for disposal services: the discrimination to which Swin objects is embodied only in rules concerning the price and volume conditions under which persons may use the disposal service that Lycoming itself offers. In setting these price and volume conditions, Lycoming has not crossed the line that Alaska crossed when that state attempted to regulate the timber-processing market by conditioning its timber sales on guarantees that the purchasers would act in a certain way in a downstream market. The price and volume conditions to which Swin objects do not pertain to the operation of private landfills and do not apply beyond the immediate market in which Lycoming transacts business.

If Maryland may decree that only those with Maryland auto hulks will receive state bounties, it would seem that Lycoming can similarly decree that only local trash will be disposed of in its landfill on favorable terms. If South Dakota may give preference to local concrete buyers when a severe shortage makes that resource scarce, it would seem that Lycoming may similarly give preference to local garbage (and hence local garbage-producing residents) when a shortage of disposal sites makes landfills scarce. And if Boston may limit jobs to local residents, we see no reason why Lycoming may not limit preferential use of its landfill to local

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landfill space as a factor in upholding a government landfill's restrictions on the acceptance of out-of-state solid waste).

60. 883 F.2d 245 (3d Cir. 1989).

61. See cases cited *supra* note 7.

62. 883 F.2d at 246-48.

63. *Id.*

garbage (and hence local garbage-producing residents).<sup>64</sup>

Thus, the *Swin* Court used the market participant doctrine and the local shortages of landfill space to uphold the County's discriminatory pricing policies against a dormant Commerce Clause challenge.

In *Lefrancois v. Rhode Island*,<sup>65</sup> a federal district court held that Rhode Island could completely ban the dumping of all out-of-state solid waste despite the fact that the landfill was the state's only generic-waste landfill and the largest sanitary landfill in New England. The court rejected the plaintiff's contention that the landfill constituted a natural resource outside the market participant doctrine's scope:

The plaintiff correctly notes that in distinguishing a cement plant from natural resources such as timber, minerals, and wild game, for which the Commerce Clause requires an unfettered national market, the Court in *Reeves* cited *City of Philadelphia v. New Jersey*, and parenthetically, landfill sites, in support. And plaintiff's position would be strong, indeed, if this Court were to accept plaintiff's underlying premise that Rhode Island is participating in the landfill site market. However, I believe that in operating the Central Landfill, Rhode Island has entered the market for landfill services and is therefore not a participant in a natural-resource market. In defining the relevant market as landfill services, I am persuaded by the reasoning of the Court of Appeals of Maryland, which addressed this question in the context of a private refuse hauler's challenge of out-of-county refuse at a county-owned landfill. The Court wrote:

The market in which the County participates in the operation of the Disgah landfill is not waste. The County neither buys nor sells refuse deposited in its landfill. Rather, it provides a service to [the plaintiff] and the other private waste haulers, *i.e.*, for a fee, the County accepts the waste they have collected, compacts it and covers it with a soil so that its final disposal complies with all applicable environmental and health laws. Therefore, for purposes of the market participant analysis in this case, the market is landfill services.

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The distinction between a market in landfill services and landfill sites is not illusory; the difference is easily discerned by examining what has been closed to the plaintiff since the amendment of section 23-19-13.1. This statutory amendment has deprived the plaintiff and other out-of-state refuse haulers of their ability to de-

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64. *Id.* at 250.

65. 669 F. Supp. 1204 (D.R.I. 1987).

posit waste to be processed in the state-operated Central Landfill. The amendment has not, however, precluded any party, in-state or foreign, from purchasing property upon which to construct a sanitary landfill open to all waste regardless of origin. Indeed, as the parties have stipulated, four such license applications are currently pending before the state authorities. In operating the Central Landfill, Rhode Island has done nothing more than purchase a natural resource, *i.e.*, the landfill site, and offer to its customers the service of waste processing.<sup>66</sup>

The *Swin* court presented additional arguments for not applying the natural resources exception to landfills.<sup>67</sup> This Article will examine those arguments in the course of presenting its analysis of the natural resources exception to the market participant doctrine.

#### IV. CRITICISM OF THE MARKET PARTICIPANT DOCTRINE AS APPLIED TO LANDFILLS.

Judge Gibbons, in his dissenting opinion in *Swin*, argued that the distinction between a state's role as a market participant versus as a market regulator was no longer valid, and contended that the dormant Commerce Clause barred states or local governments from discriminating against the importation of out-of-state solid waste.<sup>68</sup> In addition, Kovacs and Anderson claim that some states attempt to evade the Commerce Clause by using their regulatory powers to drive out private landfill operators who may discriminate against out-of-state solid waste, gaining governmental monopoly control of landfills in order to block the importation of out-of-state solid waste.<sup>69</sup> Although Judge Gibbons and Kovacs and Anderson make a number of valid points the Supreme Court is unlikely to adopt the arguments of either.

##### A. Judge Gibbons

Judge Gibbons argued that the market participant doctrine was no longer good law in light of the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transportation Authority*,<sup>70</sup> which overruled *National League of Cities v. Usery*.<sup>71</sup> Judge Gibbons first pointed out

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66. *Id.* at 1211 (citations omitted).

67. *See infra* notes 139-40 and accompanying text.

68. *Swin*, 883 F.2d at 257-62.

69. Kovacs and Anderson, *supra* note 1, at 810.

70. 469 U.S. 528 (1984).

71. 426 U.S. 883 (1976).

that the market participant doctrine was closely linked to the reasoning in *National League of Cities*:

Thirteen years ago in a peculiar eruption of Dixieism, the Supreme Court announced that the dormant Commerce Clause (unexercised by Congress) did not reach local government's "non-governmental" participation in the market. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S. Ct. 2488, 49 L.Ed.2d 220 (1976). On the same day the Supreme Court, manifesting the same disease, also declared that the Commerce Clause granted Congress no power to regulate local governments' "governmental" functions. *National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L.Ed.2d 245 (1976). *Garcia* has since expressly dispensed with the doctrine of *National League of Cities*, 469 U.S. 531, 105 S. Ct. at 1007. In so doing, it also effectively eliminated the Dixiecrat basis for *Alexandria Scrap*, its progeny, and the market participant exception.<sup>72</sup>

Judge Gibbons stated that the *National League of Cities* distinction between "integral" or "traditional governmental" functions versus "non-integral" activities followed the same rationale as the distinction between market participation and market regulation, and, therefore, that *Garcia* effectively overruled the market participant doctrine:

Rejection of the market participant theory necessarily follows from *Garcia* on each of that case's main premises. First, the regulatory/government distinction is nothing more than the integral/non-integral distinction in another guise. To be sure, the distinction played divergent roles depending upon whether Congress had acted. Under *National League of Cities*, the label of "integral" or "governmental" protected a state activity from the Commerce Clause; under *Alexandria Scrap*, the label "regulatory" or "governmental" left a state activity open to (dormant) Commerce Clause attack. The different uses of the categories, however, changes neither their similarity nor their invalidity. *Garcia* noted at length the inherent unworkability of such labeling. Indeed, in other contexts, courts have concluded exactly what the cases cited by the majority deny, that the operation of a landfill is an integral, traditional governmental activity. See *Hybud Equipment Corp.*, 654 F.2d at 1196 (deeming landfill operation a traditional governmental activity); *Hancock*, 619 F. Supp. 322, 328 (E.D.Pa.) (stating, without deciding, that counties "simply regulat[e]" landfills), 811 F.2d 225, 231-32 (3d Cir. 1987) (holding county operation of landfill "state action" for antitrust

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72. *Swin*, 883 F.2d at 257 (Gibbons, J., dissenting).

purposes).<sup>73</sup>

The *Swin* majority rejected Judge Gibbons' argument that *Garcia* had effectively overruled the market participant doctrine, and noted the distinction between Congress' positive power to regulate interstate commerce, at issue in *Garcia*, and the dormant Commerce Clause's market participant doctrine:

That Congress has a (virtually) absolute authority to enact legislation affecting the operation of state governments, as *Garcia* held, does not, however, imply that the federal courts should hold unconstitutional as falling within the market participant doctrine. *Garcia* permits Congress to require state-operated landfills to accept out-of-state garbage or to overturn the market participant doctrine in its entirety. *Garcia* does not require the Courts of Appeals to do so absent Congressional action.<sup>74</sup>

The *Swin* majority went on to state that even if they agreed with Judge Gibbons "that *Garcia* undermined the logical basis for the market participant doctrine cases, we lack the authority to overrule them."<sup>75</sup>

Since *Garcia*, only two Supreme Court cases, *New Energy* and *Gould*, have discussed the market participant doctrine to any degree, but neither applied it.<sup>76</sup> As previously noted,<sup>77</sup> the *Gould* court held that the NLRA preempted a Wisconsin statute and, therefore, that the market participant doctrine did not apply where Congress had acted and preempted state law. In *New Energy*,<sup>78</sup> the Supreme court held that the market participant doctrine did not apply to an Ohio tax credit scheme designed to promote ethanol use that discriminated against ethanol from states that did not have reciprocal tax advantages for Ohio ethanol; the Court concluded that Ohio's attempt to influence the ethanol market through tax credits was far different from the state participating in the market through sales or purchases.

Neither *New Energy* nor *Gould* provide much insight into whether the Supreme Court is likely to reconsider the market participant doctrine in light of the *Garcia* decision. Although the tax credit scheme in *New Energy* in some ways resembles the bounty for auto hulks in *Alexandria Scrap*, the two statutes create distinguishable situations. The

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73. *Id.* at 260-61.

74. *Swin*, 883 F.2d at 255.

75. *Id.*

76. *See supra* notes 51-56 and accompanying text.

77. *See supra* notes 52-54 and accompanying text.

78. *See supra* notes 55-56 and accompanying text.

Maryland statute from *Alexandria Scrap* made that state in effect the private purchaser of abandoned cars. In contrast, the Ohio tax credit program subsidized the ethanol industry, albeit in a manner in which Ohio acted more as a friendly regulator of energy industry than as a direct participant in the market.<sup>79</sup> In *Gould*, the issue of NLRA preemption clouded the question of whether Wisconsin's refusal to purchase from repeat NLRA violators placed the state within the scope of the market participant doctrine.<sup>80</sup> The facts in *New Energy* and *Gould* were different enough from *Alexandria Scrap*, *Reeves* or *White* to make it difficult to say whether the Supreme Court is intent on overruling or narrowing the market participant doctrine. It is worth noting, however, that six current Justices have joined at least one majority opinion upholding the doctrine.<sup>81</sup>

Judge Gibbons makes a valid point when he argues that the distinction between the state as market participant and as market regulator is artificial in much the same way as the integral/non-integral government function distinction overturned by *Garcia*.<sup>82</sup> The *Swin* majority, however, correctly observed that *Garcia* involved the positive power of Congress to regulate state governments, and, accordingly, did not necessarily overrule Supreme Court cases involving the market participant exception to the dormant Commerce Clause.<sup>83</sup> A major question is how far the Supreme court is likely to extend its analysis in *Garcia* in the context of the dormant Commerce Clause. *Garcia* was a five to four decision, and President Bush will probably replace one or more of the Justices who voted with the majority with a more conservative Justice. Therefore, it would be unwise to bet that the Supreme Court will expand *Garcia* to overturn the market participant doctrine in the near future. Moreover, it is quite possible that a new Bush Supreme Court

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79. Compare *New Energy Co. v. Limbach*, 108 S. Ct. 1803 (1988) with *Hughes v. Alexandria Scrap*, 447 U.S. 429 (1980).

80. See *supra* notes 52-54 and accompanying text.

81. Comment, *supra* note 1, at 1320 and n.60. Justices Brennan, Marshall, O'Connor, Stevens and Chief Justice Rehnquist joined in *White*; see *supra* notes 46-47 and accompanying text. Justice Blackmun supported the doctrine in *Reeves*; see *supra* notes 40-45 and accompanying text. Justice Scalia recognized the validity of the doctrine in *New Energy*, see *supra* notes 55-56 and accompanying text. Justice Kennedy has never addressed the market participant issue. Justice White has continuously dissented from applications of the doctrine.

82. *Swin Resource Sys. v. Lycoming County*, 883 F.2d 245, 257-62 (3d Cir. 1989) (Gibbons, J., dissenting).

83. *Id.*

might overrule *Garcia*.<sup>84</sup>

### B. *Market Participants or Market Destroyers?*

In their article, Kovacs and Anderson argue that at least some states use their regulatory powers to drive out private landfills and insure governmental control of the landfill industry.<sup>85</sup> They suggest that states harass private landfills to prevent the importation of out-of-state solid waste, which private landfills cannot bar.<sup>86</sup> They contend that courts should not apply the market participant doctrine where states use their regulatory powers to drive out private market competitors.<sup>87</sup>

There is some evidence to support Kovacs and Anderson's arguments. State and local governments own or operate approximately eighty-one percent of the solid waste landfills in the country.<sup>88</sup> As a result of increasingly stringent regulations and rising costs, an estimated 14,000 solid waste landfills closed between 1978 and 1988.<sup>89</sup> Although 5,500 solid waste landfills operated in 1988, processing about 187 million tons annually, one study predicts that in 2013 only 1,003 of these landfills will be operating, with a total processing capacity of nineteen million tons.<sup>90</sup>

On the other hand, private interests own and operate nineteen percent of the nation's landfills.<sup>91</sup> That figure is low, but it indicates that in some states private operators can survive despite heavy government regulation. In *Lefrancois v. Rhode Island*,<sup>92</sup> where the state operated the only general purpose landfill in Rhode Island and the largest in New England, the federal district court rejected the plaintiff's contention that the state occupied a monopoly position because four license applications for private landfills were pending.<sup>93</sup>

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84. Current Chief Justice Rehnquist pointedly predicted in his *Garcia* dissent that in the future a majority of the Court would overrule that case. *Garcia v. San Antonio Metropolitan Transp. Auth.*, 469 U.S. at 528, 580 (1984) (Rehnquist, J. dissenting).

85. Kovacs and Anderson, *supra* note 1, at 779-816.

86. *Id.*

87. *Id.*

88. *See supra* note 6 and accompanying text.

89. Kovacs and Anderson, *supra* note 1, at 781; *see generally* Beck, *supra* note 1, at 67-76 (discussing the growing shortage of landfill space).

90. Kovacs and Anderson, *supra* note 1, at 781-82.

91. *See supra* note 6 (if 81% of landfills are government owned then 19% must be privately owned).

92. 669 F. Supp. at 1206, 1211-12.

93. *Id.* at 1212.

It may be difficult in some cases to distinguish between government regulations designed to protect the environment and those intended to drive out private landfills. For example, Kovacs and Anderson contend that "North Carolina has established water discharge limits so stringent that a planned facility could not operate economically."<sup>94</sup> Assuming that Kovacs and Anderson are correct that a private operator could not run a landfill in North Carolina, the issue becomes whether courts should refuse to apply the market participant exception where an apparently neutral environmental regulation or statute has the practical effect of excluding all but government-subsidized landfills. The fact that a government business occupies a monopoly position in a particular market does not exempt it from the market participant doctrine.

In *Reeves*, South Dakota built the cement plant at issue because no cement plant was then operating in the state. The Supreme Court applied the market participant doctrine despite the fact that the plaintiff, Reeves, was unable to find another supplier.<sup>95</sup> Thus, it is unlikely that courts will refuse to apply the market participant doctrine merely because strict government regulations make it difficult or impossible for private competitors to enter a market, unless the regulations are discriminatory. States and local governments clearly have a strong interest in protecting the environment and in public safety. Few courts would hold that legislators designed the North Carolina water discharge limits or similar neutral environmental regulations to drive out private landfill operators and to guarantee government control of landfills.<sup>96</sup>

Kovacs and Anderson have a point when they argue that environmental regulations may drive out private landfills and leave government subsidized landfills in a monopoly position.<sup>97</sup> *Reeves* casts doubts, however, on the proposition that a monopoly position is enough to deprive that business of the protection of the market partici-

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94. Kovacs and Anderson, *supra* note 1, at 810.

95. *See supra* notes 33-45 and accompanying text.

96. *See infra* notes 128-59 and accompanying text.

97. Kovacs and Anderson, *supra* note 1, at 815-16. *See generally supra* notes 85-96 and accompanying text for evidence that the decline in the number of landfills in the United States is the result of increasingly strict environmental regulations that drive up costs for private landfill operators. Of course, a good argument is that strict environmental controls are necessary to protect the public health, and that the landfill crisis should be addressed through more recycling and changes in the American lifestyle. *See generally* Beck, *supra* note 1, at 67-76.

pant doctrine.<sup>98</sup> Nor would the mere existence of neutral environmental regulations that have the incidental effect of limiting private landfills lead courts exclude landfills from the market participant doctrine.<sup>99</sup> Kovacs and Anderson have identified a serious problem: the difficulties faced by private landfills in competing with government landfills. However, they do not provide legal arguments which will convince the Supreme Court.

## V. THE NATURAL RESOURCES EXCEPTION

An exception to the market participant doctrine exists in the case of natural resources.<sup>100</sup> The courts that have applied the market participant doctrine to landfills have argued that landfills are services rather than natural resources.<sup>101</sup> On the other hand, Kovacs and Anderson contend that landfills are clearly within the natural resources exception.<sup>102</sup> This Article contends that landfills are a hybrid or mixture of natural resources, primarily land, and services. Courts should weigh the national importance of a "mixed" natural resource/service in determining whether to apply the market participant doctrine.

In particular, the national importance of a "mixed" natural resource/service should be a factor when courts balance the local need for landfills against the national or regional agenda. Courts that have permitted landfills to discriminate against out-of-state solid waste often emphasize local shortages of landfill space.<sup>103</sup> Courts should not weigh "artificial" shortages created by NIMBY politics in assessing local needs versus national interstate commerce concerns.

### A. *Natural Resources and the Commerce Clause*

The Supreme Court has distinguished between goods produced by nature with little or no investment by society, and goods requiring a significant human investment either in their production or consumption.<sup>104</sup> Before 1900, the Supreme Court followed the common law

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98. See *supra* notes 95-96 and accompanying text.

99. *Id.*

100. See *supra* notes 43-45, 50, 66-67 and accompanying text, and *infra* notes 101-59 and accompanying text.

101. See cases cited *supra* note 7; see also *supra* notes 66-67 and accompanying text; *infra* notes 139-40 and accompanying text.

102. Kovacs and Anderson, *supra* note 1, at 810-11.

103. See *supra* note 59 and accompanying text.

104. Comment, *supra* note 1, at 1330-31 (arguing that courts have been more will-

doctrine that raw natural resources such as wild game belonged to the state as the trustee for present and future inhabitants.<sup>105</sup> Beginning in the early 1900's, however, the Court in a series of cases held that the Commerce Clause prohibits states from hoarding natural resources such as natural gas or coal.<sup>106</sup> In 1979, the Court in *Hughes v. Oklahoma*<sup>107</sup> swept away the last vestiges of the old common law rule that states own fish and game when it held that Oklahoma's attempt to restrict minnow exports violated the dormant Commerce Clause. Some commentators, however, have argued that the Supreme Court has and should take a different approach where a state expends significant funds to preserve natural resources.<sup>108</sup> In *Baldwin v. Fish & Game Commission*,<sup>109</sup> the Supreme Court upheld a Montana law that discriminated against nonresidents in granting permits to hunt elk after finding that the state had invested considerable effort to preserve the elk population. *Baldwin*, decided one year before *Hughes*, involved the privileges and immunities clause but it may have significant implications for Commerce Clause purposes. It is also noteworthy that the Court in *Baldwin* found that elk hunting "is not a means to the nonresident's livelihood" whereas the *Hughes* case involved a commercial minnow business.<sup>110</sup> Thus, two factors that may influence the Supreme

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ing to allow a state to favor its citizens where the state has invested resources to preserve the natural resource in question); *see also infra* notes 105-59 and accompanying text.

105. *See, e.g., Geer v. Connecticut*, 161 U.S. 519, 529 (1896) (noting that the "ownership of wild animals . . . is in the State . . . in its sovereign capacity as the representative and for the benefit of all its people in common" (quoting *State v. Rodman*, 58 Minn. 393, 400, 59 N.W. 1098, 1099 (1894))); *McCready v. Virginia*, 94 U.S. 391, 394 (1876) (stating that each state owns the tidewaters within its jurisdiction and the fish they contain); Comment, *supra* note 1, at 1329 and n.114.

106. *See, e.g., Pennsylvania v. West Virginia*, 262 U.S. 553, 595-600 (1923) (striking down a West Virginia statute giving preference to domestic consumers of natural gas over out-of-state users); *Oklahoma v. Kansas Natural Gas Co.*, 221 U.S. 229, 255-62 (1911) (finding unconstitutional an Oklahoma statute prohibiting foreign corporations from transporting natural gas out of the state; the Court noted that if it upheld the statute then "Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals"); Comment, *supra* note 1, at 1329 and nn.115-16.

107. 441 U.S. 322 (1979).

108. *See, e.g., Hellerstein, Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources*, 1979 SUP. CT. REV. 51, 89; Comment, *supra* note 1, at 1330-31 (arguing that if a state expends monies to preserve natural resources then it should be able to give preference to its citizens in using that resource).

109. 436 U.S. 371 (1978). *See* Comment, *supra* note 1, at 1330 and nn.118-19 (discussing *Baldwin*).

110. *Compare Baldwin*, 436 U.S. 371 (1978) with *Hughes*, 441 U.S. 322 (1979).

Court's approach to Commerce Clause cases are: first, whether the state has invested significant funds to preserve a natural resource, and, second, the degree to which a state regulation interferes with interstate commerce.<sup>111</sup>

As discussed in Part II. B. of this Article, the Court in *Reeves* created a natural resources exception to the market participant doctrine.<sup>112</sup> The Court held that cement was not a natural resource because it "is the end product of a complex process whereby a costly physical plant and human labor act on raw materials."<sup>113</sup> In essence, the *Reeves* Court distinguished between natural resources and services or manufactured products based on whether the goods remained fundamentally the same as it existed in nature or was the product of complex human intervention.<sup>114</sup> Most significantly for the purposes of this Article, the *Reeves* Court listed landfill sites in *Philadelphia v. New Jersey*<sup>115</sup> and other cases as examples of natural resources.<sup>116</sup> The *Reeves* Court did not explain why it listed landfill site cases among the natural resources cases, and its reasoning has engendered considerable controversy.<sup>117</sup>

### B. *Landfills Are Not Natural Resources*

The five cases that have applied the market participant exception to landfills have concluded that such sites are basically service industries rather than natural resources.<sup>118</sup> These cases emphasized that more than land is involved in the sanitary disposal of solid waste; a site may compact waste, bury it and employ various methods to preserve the environment from the escape of the waste.<sup>119</sup> It is clear that a state or county must expend resources to operate a landfill.<sup>120</sup>

The five courts distinguished the *Reeves* Court's reference to *Phila-*

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111. See *supra* notes 104-10 and accompanying text; *infra* notes 112-59 and accompanying text.

112. See *supra* notes 33-45 and accompanying text.

113. *Reeves*, 447 U.S. 429, 444 (1980).

114. *Id.*

115. See *supra* note 22.

116. *Reeves*, 447 U.S. at 443; *supra* note 44 and accompanying text.

117. See *supra* note 66 and accompanying text; *infra* notes 118-59 and accompanying text.

118. See *supra* notes 64, 66 and accompanying text; cases cited *supra* note 7.

119. See *supra* note 118 and accompanying text.

120. See *supra* notes 118-19 and accompanying text.

*delphia* and landfill sites. They emphasized that *Philadelphia* involved a statute that severely limited the access of out-of-state waste haulers to both private and public landfills.<sup>121</sup> Thus, the New Jersey statute restricted the ability of out-of-state waste haulers to purchase land within the state for landfill resources, and, accordingly, affected the interstate market in the natural resource of land.<sup>122</sup> The refusal of a government landfill to accept out-of-state waste, however, does not prevent an out-of-state waste hauler from purchasing land to build a private landfill.<sup>123</sup>

In addition, these courts argued that landfills operating at public expense may refuse out-of-state waste, especially when there are shortages of land to handle local waste.<sup>124</sup> The *Swin* majority argued that courts should be able to consider local opposition to landfills in addressing whether a local shortage of landfill space justifies restrictions on the importation of out-of-state waste:

We also take cognizance of the difficulties often attendant in efforts by municipalities to build waste disposal sites in light of their unpopularity with local residents. Neither the sacrifice of local residents in allowing a landfill to be built nearby nor the political character of much of the shortage of land available for landfill construction should be ignored.<sup>125</sup>

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121. See *supra* note 66 and accompanying text; *Evergreen Waste Sys., Inc. v. Metropolitan Serv. Auth.*, 643 F. Supp. 127, 131-32 (D.R.I. 1987); *County Comm'rs v. Stevens*, 299 Md. 203, 219-21, 473 A.2d 20-21 (1984); *Shayne Bros., Inc. v. Dist. of Columbia*, 592 F. Supp. 1125, 1132-34 (D.D.C. 1984) (distinguishing *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), which invalidated a New Jersey statute barring out-of-state solid waste from both private and public landfills from instances in which a public landfill prohibits out-of-state waste).

122. See *supra* note 121 and accompanying text for cases arguing that a total ban on the importation of out-of-state waste by both public and private landfills is impermissible under *Philadelphia* and the dormant Commerce Clause. The ban is unconstitutional because such a limitation prevents out-of-state haulers from purchasing land, a natural resource, while restrictions on the importation of waste from out-of-state sources by a government landfill does not prevent an out-of-state waste hauler from purchasing land to develop private landfills. See *infra* note 123 and accompanying text.

123. Theoretically, out-of-state waste haulers can purchase land for a private landfill; however, Kovacs and Anderson, *supra* note 1, at 810, argue that states through various regulatory devices can effectively ban private landfills. See *supra* notes 85-99 and accompanying text for a discussion of the extent private interests may operate a landfill.

124. *Swin v. Resource Sys. v. Lycoming County*, 883 F.2d 245, 251-55 (3d Cir. 1989) (arguing that government landfills should be able to favor their citizens because local citizens provide funding, and especially if there are local landfill shortages); *supra* notes 59, 103 and accompanying text.

125. *Swin*, 883 F.2d at 254.

This Article proposes that considering local opposition to the importation of out-of-state waste conflicts with the purpose of the Commerce Clause.

### C. *Landfills Are Natural Resources*

Both Judges Gibbons and Kovacs and Anderson argue that landfills essentially sell land, a natural resource, rather than provide services. Kovacs and Anderson emphasize that there is limited land available and suitable for landfill use in an era of intense government regulation of the environment.<sup>126</sup> Judge Gibbons argued, "Lycoming County does not participate in a market 'for disposal services.' Rather, like any other landfill, it sells space to concerns that have earlier transacted to purchase and process solid waste."<sup>127</sup> The arguments, however, do not satisfactorily address the issue that state or local governments do provide at least some money to operate landfills.

## VI. "MIXED" LANDFILLS

Landfills involve a mixture of natural resources, land, and services designed to safely dispose of the solid waste.<sup>128</sup> In a mixed natural resources/service case, courts should balance the nation's interest in the free exchange of natural resources against the extent to which local governments have expended monies to preserve that natural resource. Under some circumstances, a state or local landfill may justifiably favor local waste over out-of-state waste if a genuine shortage of landfill space exists. A court, however, should not consider local shortages that are the result of deliberate attempts to exclude interstate waste.

The Supreme Court is likely to address "mixed" natural resources/government investment cases as it did in *Sporhase v. Nebraska*.<sup>129</sup> In *Sporhase*, a Colorado resident challenged a Nebraska statute that restricted the withdrawal of groundwater from Nebraska wells for use in another state unless that state had a reciprocity agreement with Nebraska.<sup>130</sup> The Court first concluded that groundwater is

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126. Kovacs and Anderson, *supra* note 1, at 810-12.

127. *Swin*, 883 F.2d at 259 (Gibbons, J., dissenting).

128. *See infra* notes 129-59 and accompanying text; *supra* notes 117-27 and accompanying text for various arguments that landfills are *either* natural resources *or* service industries; if good arguments can be made on either side of that argument then it is reasonable to suggest that landfills are *both* natural resources and service industries.

129. 458 U.S. 941 (1982).

130. *Id.* at 943-44.

an article of commerce and, therefore, subject to the Commerce Clause.<sup>131</sup> The Court agreed with Nebraska that the state had a strong interest in conserving groundwater in times of "severe shortage."<sup>132</sup> The Court emphasized that Nebraska had greater authority to regulate water use than other economic goods because water carries health implications:

First, a State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens — and not simply the health of its economy — is at the core of its police power. For Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other.<sup>133</sup>

Furthermore, the Court recognized that a state might favor its citizens in the time of shortage where the state had expended funds to conserve a natural resource: "Finally, given appellee's conservation efforts, the continuing availability of ground water in Nebraska is simply happenstance; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage."<sup>134</sup> The Court cited *Reeves, Philadelphia v. New Jersey*, and *Baldwin* for this quotation, although the first case was given the "See" signal, and the last two cases merely warranted a "Cf."<sup>135</sup>

While the *Sporhase* Court indicated that a state might be able to favor its citizens in times of shortage where the state had actively encouraged conservation measures, the Court concluded that the reciprocity provisions in the Nebraska statute did not sufficiently promote conservation, and, therefore, violated the Commerce Clause: "The reciprocity requirement fails to clear this initial hurdle. For there is no evidence that this restriction is narrowly tailored to the conservation and preservation rationale."<sup>136</sup>

The Supreme Court's decision in *Sporhase* offers several clues as to how the Court should deal with efforts by government landfills to exclude out-of-state waste. If a county or state can show that health or environmental concerns impose significant limits on landfill space, then a government landfill should be able to favor its own citizens. Kovacs

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131. *Id.* at 945-54.

132. *Id.* at 956.

133. *Id.*

134. *Id.* at 957.

135. *Id.*

136. *Id.* at 957-58.

and Anderson fail to distinguish between government regulations limiting landfill space that serve a genuine health or environmental purpose and those that simply reflect mere parochialism.<sup>137</sup> For instance, if a county can demonstrate that the presence of a large aquifer requires severe limitations on landfill use in that area then a court is likely to allow discrimination against waste from beyond that county.<sup>138</sup>

On the other hand, a blanket restriction on disposal of out-of-state waste that is unrelated to health or environmental concerns, like the reciprocity requirement in *Sporhase*, fails to meet the dictates of the dormant Commerce Clause. This Article strongly disagrees with the *Swin* Court that shortages caused by local opposition to landfills is the type of genuine shortage that warrants restrictions on interstate commerce.

The *Swin* Court argued that landfills do not constitute natural resources because the shortage of land for such purposes is often related to political factors rather than the "happenstance" of whether one state is endowed by nature with more suitable land than another site:

Shortages of land available for landfill construction may be created by vigorous local opposition to using geologically suitable land to build landfills or by a state's hesitation, in light of the financial cost, to build landfills on geologically suitable land that it has already permitted to be dedicated to residential, commercial, industrial, or recreational use. To the extent that a shortage of landfill-available land is caused by such political factors, characterizing landfill-available land as being in short supply (and hence distinguishable from land available for cement plants) would seem inconsistent with a "happenstance" rationale for the natural resources exception to the market participant doctrine, as past and present political choices are not the product of geological happenstance.<sup>139</sup>

The *Swin* court contended that courts should consider that landfills are usually built despite local opposition.<sup>140</sup>

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137. See generally Kovacs and Anderson, *supra* note 1, at 779-816 (complaining that environmental regulations raise costs for private landfill operators, but failing to address the issue of whether the benefits of those regulations in promoting public health outweigh the costs to private landfills).

138. *Sporhase v. Nebraska*, 458 U.S. at 956-57 (the Supreme Court is more likely to uphold statutes or regulations favoring a particular group of citizens if such a law promotes public health rather than simply advances economic protectionism).

139. *Swin Resource Sys. v. Lycoming County*, 883 F.2d 245, 253-54 (3d Cir. 1989).

140. *Id.* at 254. See *supra* note 125 and accompanying text.

The *Swin* court cited the *Sporhase* decision several times, but failed to note that the *Sporhase* case involved conservation efforts intended to promote public health, a valid exercise of the state's police power.<sup>141</sup> The *Swin* Court argued that government landfills may discriminate against out-of-state waste because local political forces oppose using suitable land for landfill purposes. This argument is flawed because parochialism is not a valid reason for a state exercising its police powers to favor local waste. The *Sporhase* Court emphasized that the Supreme Court is less likely to invalidate a statute designed to promote public health than one that simply is economically beneficial to local residents.<sup>142</sup>

In *Geo-Tech Reclamation Industries v. Hamrick*,<sup>143</sup> the Fourth Circuit recently struck down a West Virginia statute that allowed a state agency to deny a solid waste facility permit on the basis of adverse public sentiment. The *Geo-Tech* court held that the statute provided no meaningful standards for permit approval, and that there was no rational relationship between the statute's goals and its means.<sup>144</sup> The court concluded that the clause authorizing the director of the West Virginia Department of Natural Resources to reject permits that were "significantly adverse to the public interest" bore no substantial or rational relationship to the state's interest in promoting the general public welfare and, therefore, was outside the scope of the police power.<sup>145</sup>

Accordingly, pursuant to the analysis in *Sporhase*, courts should not defer to a government landfill's restrictions on out-of-state waste if the landfill shortage is the result of parochialism, a goal outside the scope of the police power. The fact that local citizens oppose waste from out-of-state sources does not constitute a valid health or environmental concern that might allow a state or its subdivision to favor its citizens in a time of shortage.<sup>146</sup>

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141. Compare *Swin*, 883 F.2d at 254-54 (discussing *Sporhase*, but failing to mention that the Nebraska statute at issue promoted public health) with *Sporhase*, 458 U.S. at 956-57 (distinguishing between statutes promoting public health versus those advancing economic protectionism for purposes of the Commerce Clause).

142. *Sporhase*, 458 U.S. at 956. See *supra* note 133 and accompanying text.

143. 886 F.2d 662 (4th Cir. 1989).

144. *Id.* at 665-67.

145. *Id.* at 666. West Virginia recognized "that many who speak out against a landfill will do so because of self-interest, bias or ignorance. These are but a few of the less-than-noble motivations commonly referred to as the 'Not-in-My-Backyard' syndrome." *Id.*

146. The Supreme Court in *Sporhase* distinguished between laws promoting public

The *Swin* Court's argument that courts should consider local opposition to landfills conflicts with the purpose and history of the Commerce Clause, which is designed to promote national economic unity and to prevent local protectionism.<sup>147</sup> A government landfill surely may charge an out-of-state waste hauler a fee reflecting the full cost of disposing of the waste and subsidize the cost for local citizens.<sup>148</sup> The dormant Commerce Clause demands, however, that government landfills provide equal access to both local and out-of-state waste unless there is a genuine shortage of landfill space caused by health or environmental concerns that falls within the legitimate scope of the police power.<sup>149</sup>

## VII. CONCLUSION

The issue of whether government landfills fit within the market participant exception to the dormant Commerce Clause or the natural re-

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health and those based on economic protectionism. *See Sporhase*, 458 U.S. at 956-57; *supra* note 138 and accompanying text.

147. *See supra* notes 14-22 and accompanying text; Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335 (1934) (dormant Commerce Clause designed to prevent local protectionism and promote national economic unity); *see also* Comment, *supra* note 1, at 1313-17 (discussing purpose of dormant Commerce Clause).

148. A state owned enterprise can certainly charge a fee reflecting market cost; for example, the cement plant in *Reeves* sold its cement like any private cement plant would. *Reeves Inc. v. Stake*, 447 U.S. 429, 430-33 (1980). The question of whether a state may subsidize the cost for local citizens is more complex. In *Alexandria Scrap*, the Supreme Court upheld a scheme that only those with Maryland auto hulks would receive that state's bounties. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 796-810 (1976). The *Swin* Court argued that *Alexandria Scrap* supported the Third Circuit's holding that a government landfill may exclude out-of-state waste. *Swin Resource Sys. v. Lycoming County*, 883 F.2d 245, 250 (3d Cir. 1989). A basic difference between *Alexandria Scrap* and *Swin*, however, is that landfills involve land, a natural resource. Thus, a state might be able to favor its citizens where a natural resource is not involved, but may be precluded from exercising a similar preference in regard to scarce natural resources. In the case of landfills it is perhaps less important that a government landfill charges a below market rate for local waste than whether it excludes out-of-state waste or charges above market rates designed to keep out such waste. During genuine local shortages of solid waste landfill space it may be appropriate for a landfill owned by a government entity to favor its citizens by charging a lower price as long as the price for out-of-state waste bears a reasonable relationship to the extent of that shortage. *See supra* notes 100-47 and accompanying text, and *infra* notes 149-59 and accompanying text.

149. *See supra* notes 100-48 and accompanying text, and *infra* notes 150-59 and accompanying text.

sources doctrine is a difficult one because landfills involve important natural resources, suitable land, and public expenditures for the services necessary to run an environmentally safe operation. The Supreme Court's decision in *Sporhase* suggests that a government may favor its citizens where the polity makes expenditures to conserve a scarce resource in a time of genuine shortage.<sup>150</sup> Neither the courts that have applied the market participant exception to landfills nor Judge Gibbons or Kovacs and Anderson have distinguished between genuine and artificial shortages.<sup>151</sup> *Sporhase* implies that a government's efforts to conserve a natural resource during a genuine shortage may override the national interest in free trade. Conversely, one may infer from *Sporhase* that government goals outside the proper scope of the police power are insufficient to trump the Commerce Clause's national economic policy.<sup>152</sup> Thus, *Sporhase* in effect applied a balancing test that weighed the national economic goal of encouraging free trade in natural resources against the value of promoting local conservation of genuinely scarce natural resources.<sup>153</sup>

Courts applying the dormant Commerce Clause to cases involving government landfills, must balance the value of encouraging local communities to set aside land and resources for landfills by permitting local authorities to favor their citizens with the need to promote regional and national solutions to the solid waste crisis. Some communities or

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150. See *supra* notes 129-49 and accompanying text.

151. Courts that applied the market participant doctrine to landfills invoke local shortages of landfill space as an additional ground for excluding out-of-state waste, but fail to address whether the local shortage is the result of local prejudices or a genuine shortage of environmentally suitable land. See *supra* notes 59, 139-40 and accompanying text. The Third Circuit in *Swin* argued that courts ought to consider local pressures against the siting of landfills, and in effect that such politically created shortages are genuine shortages. See *supra* notes 139-40 and accompanying text. Courts should distinguish between "artificial" and "genuine" shortages. See *supra* notes 129-50 and accompanying text, and *infra* notes 152-59 and accompanying text. Kovacs and Anderson note that some areas have less land suitable for landfills than other regions but do not address whether a genuine shortage of land would justify favoring local citizens. Kovacs and Anderson, *supra* note 1, at 810-12. Judge Gibbons in his *Swin* dissent condemns the discriminatory price structure in that case, but fails to examine whether a price differential might be justified as a result of a shortage. *Swin Resources Sys. v. Lycoming County*, 883 F.2d at 261-62 (Gibbons, J., dissenting); see *supra* note 148 and accompanying text.

152. See *supra* notes 129-46 and accompanying text.

153. *Sporhase v. Nebraska*, 458 U.S. 941, 956-57 (1982) (applying a different test under the Commerce Clause depending on whether the public health or economic protectionism is at issue).

states have a great deal of land environmentally suitable for landfill use while other states do not.<sup>154</sup> A community blessed with a considerable amount of landfill resources should not be able to arbitrarily exclude all out-of-state waste; on the other hand, some incentives must exist to encourage that community to spend money to operate a government landfill.<sup>155</sup> Accordingly, a government landfill should not be able to exclude out-of-state waste unless there is a genuine shortage of land, but should be able to subsidize local waste costs as long as the landfill charges a fair market price for waste from outside areas.<sup>156</sup> It is true that such a policy would favor local interests over national ones to some extent. In the long run, however, as the *Sporhase* Court recognized in the context of groundwater, allowing local governments to promote a scarce natural resource, in this case landfill space, can work in the national interest.<sup>157</sup>

Congress needs to enact legislation that comprehensively addresses the national problem of solid waste disposal.<sup>158</sup> Americans need to

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154. Kovacs and Anderson, *supra* note 1, at 810-12.

155. The *Swin* Court correctly pointed out that local opposition often creates barriers to landfills; *Swin*, 883 F.2d at 253-54; however, while it may be practical to allow some government subsidies for local waste to encourage the operation of local governmental landfills, the Commerce Clause does not permit restrictions on the importation of out-of-state waste unless there is a genuine shortage of land for that purpose. *See supra* notes 129-54 and accompanying text.

156. States should limit subsidies for local waste in order to prevent exclusion of out-of-state waste unless a genuine shortage of land suitable for landfills in a particular community exists. *See supra* notes 129-55 and accompanying text.

157. Subsidies for local waste should necessarily encourage local communities to operate community landfills for both local and out-of-state solid waste. It is better to have subsidies for local waste than to have communities refuse to operate landfills at all. Therefore, in the context of a mixed natural resource/service, courts should exercise some flexibility and balance local and national interests. On the other hand, any cost differential between local and out-of-state waste should not be so large that it results in an effective ban on out-of-state waste. Some accommodation should be made to local communities that bear the costs of operating a landfill, especially if there is genuine shortage of landfill space. The Commerce Clause's primary goal of promoting national free trade must remain paramount, however. *See supra* notes 100-56 and accompanying text.

158. Congress addressed the problem of hazardous waste through the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-87 (1982 & Supp. IV 1986). *Philadelphia v. New Jersey* held that RCRA did not preempt state regulation of solid waste, including import restrictions, as a secondary holding. *Philadelphia v. New Jersey*, 437 U.S. 617, 620 n.4 (1978); *see also* Comment, *supra* note 1, at 1346 n.214. A student comment has argued that courts should defer to restrictions placed on out-of-state waste by government landfills until Congress enacts positive legislation, and that courts in general should employ the dormant Commerce Clause to strike down only

produce less waste and to recycle more of it.<sup>159</sup> Until Congress acts or the solid waste crisis disappears, federal courts must imaginatively apply the dormant Commerce Clause to achieve the twin goals of encouraging local communities to fund landfills and to promote interstate commerce in solid waste.

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state laws that threaten the health of the national political process. *See* Comment, *supra* note 1, at 1309-49. Although the student comment makes a number of clever arguments, a long line of Supreme Court decisions have used the dormant Commerce Clause to strike down laws that interfere with the goal of a national free trade market. *See supra* notes 14-21 and accompanying text; *see, e.g.,* *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1852) (an early Supreme Court decision applying the dormant Commerce Clause in its present form). This Article seeks to predict what the Supreme Court may hold when confronted with the landfill issue. Nonetheless, only Congress, not the courts, can fashion a comprehensive solution to the solid waste crisis afflicting this nation. *See supra* notes 1-2 and accompanying text. The United States Environmental Protection Agency has proposed some preliminary regulations for solid waste facilities, but these do not address the crucial issue of restrictions on out-of-state waste. *See* FPA Solid Waste Disposal Facility Criteria, 53 Fed. Reg. 33,314 (1988) (to be codified, at 40 C.F.R. §§ 257, 258) (proposed Aug. 30, 1988); Comment, *supra* note 1, at 1347-48.

159. *See supra* notes 1-2 and accompanying text.