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Article

***29** WASTE & THE DORMANT COMMERCE CLAUSE

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THE CURRENT SUPREME COURT interpretation of the commerce clause is rich with internal contradictions. The most evident of these is the stark contrast between the intellectual precommitments to the affirmative use of the commerce power on the one hand and dormant, or negative, use of the commerce power on the other. Our affirmative commerce clause jurisprudence speaks to the power of Congress to structure economic markets as it pleases, free of judicial meddling. The Court leaves the choice between monopoly and competition in national or local markets to Congress alone. When Congress has not acted, the states have a similar degree of freedom of choice between monopoly and competition in their internal markets. So long as a single sovereign covers the relevant territory, the Court affords it free rein over the choice of market structure. Those who disagree with the industrial policy of either Congress or the states are free to mount a political attack against their respective decisions in the appropriate legislative fora. But they receive no encouragement and less comfort from the United States Supreme Court.

I have already spoken my piece against the received wisdom of the Court's affirmative commerce clause jurisprudence, and need to say very little about it here. [FN1] The operative provision extends to Congress the power 'to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.' [FN2] As both a textual and a structural matter, it is quite impossible to read that clause as though it conferred a grant on Congress to do whatever it pleases whenever it chooses. No lofty rhetoric of translation or changed circumstances can justify its current scope, even after the tiny (but important) concessions ***30** accepted in United States v. Lopez. [FN3] As a matter of first principle, Congress surely has the unquestioned power to keep the lines of commerce among the states open to all comers, but it does not have the power to regulate any productive activities within the state, even if goods and services produced are destined for shipment across state lines. The network of communication creates an intrinsic structural monopoly, and it lies within the power of Congress to keep all its links open.

I offer this capsule summary of Congress's affirmative power to set the stage for a more detailed discussion of the dormant, or negative, commerce clause. As an interpretive matter, the case for the dormant commerce clause seems weak. The text of the commerce clause is short, and it unambiguously grants Congress the power to regulate commerce among the several states. But it does not confer exclusive power of regulation on the federal government. Nor does it contain any explicit limitation on the power of the states to regulate. It contains no provisions parallel to those found in Article I, section 10, which does impose such implicit limitations: 'No state shall enter into any Treaty, Alliance, or Confederation,' etc.; 'No state shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports,' etc.; 'No state shall, without the Consent of Congress, lay any Duty of Tonnage,' etc. [FN4]

Nowhere does the Constitution contain any provision that limits the power of the states to regulate commerce among the several states when Congress fails to act. The evident plan (unwise as it appears in retrospect) was to allow Congress to act under its affirmative powers to keep the arteries of commerce open. This toleration of the exercise of state power squares well

with the view that jealous states yielded as little of their sovereign power to the federal government as was necessary to form and preserve the Union. Judged by the interpretive standards that I have invoked to condemn the expansive reading of the affirmative commerce clause, the case for the dormant commerce clause flunks. Some of the work it does in restricting state power is also covered by the privileges and immunities clause of Article IV, section 2, which prohibits discrimination by one state against residents of other states, [FN5] but not against out-of-state corporations. [FN6] But insofar as the dormant commerce clause occupies a distinctive niche, it is difficult to defend it as an interpretive matter--especially when it lies within the power of Congress to abolish (or introduce) the doctrine either by general legislation or by specific interventions in given cases. It survives, indeed flourishes, today under the maxim of error communis facit legem--the error of the community makes law.

For these purposes, however, I set aside all doubts about the constitutional pedigree of the dormant commerce clause in order to explore its internal logic in the treatment of goods and bads. Ever since Gibbons v. Ogden [FN7] marked its initial backhanded introduction, the doctrine has strikingly altered the balance between the national government and the states by reversing what seems to have been the original constitutional default provision: after Gibbons, when Congress is silent, the states are still subject to sharp restrictions on what they can do. Congress can, of course, lift these fetters against state action when it sees fit, and I shall comment presently on several ***31** such efforts. This default provision, however, is difficult to override. Unlike a contract of sale whose default provisions are determined by the Uniform Commercial Code, it takes more than the agreement of two traders to reverse the initial presumption. Many states have strong attachments to the initial presumption, so political gridlock can easily frustrate contrary Congressional action. The first judicial word of the Supreme Court often becomes the last political word on any particular issue.

Competitive Equilibrium Under the Dormant Commerce Clause

Even though the textual authority for the dormant commerce power is scant, the Court has aggressively invoked the doctrine to limit the exercise of state power. In this context, we no longer detect any of the agnosticism between rival forms of industrial organization that dominates the interpretation of the affirmative commerce clause. Rather, the Court's rhetoric shows an unmistakable preference for open competition across state lines, unhampered by dubious state regulations designed to exclude foreign (which for these purposes means from another state) commerce that might compete with local goods. [FN8] The grand thematic element of the Supreme Court's vision is that the commerce clause, by its own force, precludes states from preferring their own businesses over outside rivals that operate in direct competition with local firms. Perhaps the strongest articulation of this dual vision of the affirmative and dormant commerce powers was put forward by Justice Jackson in H.P. Hood & Sons v. DuMond:

This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in Baldwin v. Seelig, 294 U.S. 511, 527 [1935], 'what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.' In so speaking it but followed the principle that the state may not use its admitted power to protect the health and safety of its people as a basis for suppressing competition. . . . This Court has not only recognized this disability of the state to isolate its own economy as a basis for striking down parochial legislative policies designed to do so, but it has recognized the incapacity of the state to protect its own inhabitants from competition as a reason for sustaining particular exercises of the commerce power of Congress to reach matters in which the states were so disabled.

The material success that has come to inhabitants of the states which make up this federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions. [FN9]

The evident dualities of Jackson's short passage leave much to ponder. Initially, he reaffirms the power of Congress to regulate commerce, either to advance or suppress it. Oddly, he finds some 'vital power' to erect custom barriers to foreign competition, even though the logic of free trade in goods and ***32** services is as powerful in the international arena as it is in the domestic one. The broader the market is, the greater the number of players, and hence the more effective the operation of competitive forces. Yet, nowhere does Jackson explain why an economic principle good for the dormant commerce power turns sour when used to limit Congress's affirmative power. Congress's admitted power to form cartels should not be treated as vital when it is, at best, regrettable. Yet Jackson is doing more than explicating a critical provision. He is also acting as its judicial booster.

With that bow to Congressional power, Jackson then takes a more positive tone toward competition by vowing to protect it against the perils of state regulation. Here he is not so foolish as to indicate that all economic regulation is prohibited simply because competition is good. He does not work in a stripped-down libertarian state devoid of external harms and public goods. His task is not to ban regulation and taxation. It is to domesticate their use in interstate transactions. Jackson then adopts multiple techniques to achieve his stated end. First, he recognizes that competition across state lines can only be preserved if sharp limitations are imposed on the ubiquitous police power. In Hood, the concrete embodiment of that principle was the flat dismissal of New York's argument that its Commissioner of Agriculture and Markets could reject the application of an out-of-state milk dealer for permission to establish an additional purchasing facility in New York because the Commissioner was not satisfied that 'issuance of the license will not tend to a destructive competition in a market already adequately served and that the issuance of the license is in the public interest.' [FN10] The clear implication of this point is that competition to an existing local firm also boosts the larger collection of interests that operates both within and beyond any given state. Unless this were the case, why should anyone tolerate local losses for which there were no offsetting gains?

Hood was the decisive response to the use of unbridled discretion to withhold or issue permits. In the context of interstate rivalries, the Court has been alert to other dangers to competition as well. One common threat stems from regulation that is neutral on its face but whose known disparate impact favors domestic over foreign firms; somehow in practice we never have to worry about the reverse situation. In Hood, for example, Justice Jackson looked to Baldwin v. Seelig, where the Court struck down a provision of the New York Milk Control Act which forbade the resale of milk purchased outside New York for prices below the New York minimum. For Justice Cardozo, it did not matter that this minimum price figure applied with equal force to local and foreign commerce. The legislation operated like a tax on foreign milk equal to the difference in price between New York and (as it was) Vermont milk. New York's position could have been upheld on the ground that the equal prices for all milk satisfied some requirement of formal equality between local and foreign business. But the uniform pricing rule undercut the competitive advantage of out-of-state suppliers. The case therefore was rightly distinguished shortly thereafter in Henneford v. Silas Mason Co., [FN11] when Cardozo upheld a 2 percent 'compensating use tax' equal in amount to the sales tax imposed on local produce. The economic difference is clear: the compensating use tax in Henneford did not negate the price advantage of out-of-state suppliers, as did the price-fixing scheme struck down in Baldwin.

It would be nice to report that the Court's ***33** dormant commerce clause jurisprudence always undertook search and destroy operations against parochial state interests. Yet once we move beyond import taxes and similar restrictions, the question of what counts as a protectionist piece of legislation is often more difficult to detect. Unfortunately, the Court's jurisprudence also contains discordant elements, such as Exxon v. Governor of Maryland, [FN12] which upheld a Maryland statute that forbade in neutral terms any producer or refiner of petroleum products from operating a retail service station within the state. The statute exerted a skewed impact against certain retailers, but escaped invalidation, perhaps because it did not involve the shipment of goods in interstate commerce.

For these purposes, however, I shall ignore this and similar anomalies, and assume that the dormant commerce clause has the

expansive free trade purposes assigned to it in Hood. Once that is established, the next question is whether the state can offer some valid police power reason for local regulation--one that serves the interest in safety, health, or morals. In Baldwin, New York sought to defend its cartelization program as a health measure which stabilized prices within the state. No way, came Cardozo's sharp retort, for if economic regulation counts as a health measure, then the presumption in favor of competition is swallowed by its exception.

Sometimes the health issue is closer, but not close enough. In Dean Milk Co. v. Madison, [FN13] a Madison ordinance required that all pasteurized milk sold within the city be bottled in plants located within five miles of the central square of Madison. The plan was designed to facilitate local inspection of milk, and discriminated not only against milk shipped in from Illinois, but also against in-state Wisconsin suppliers. No matter. In a quick footnote Justice Clark cut through the complications presented by Madison's dual bad motive to hone in on the discrimination against foreign commerce. [FN14] Better that the federal protection cut too broadly than too narrowly. That done, the tough reading of the police power required the regulation to be struck down because 'reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available. ' [FN15] Distant bottlers might be asked to foot the bill for sending Madison inspectors to their regions, or the City could insist that the milk bottled elsewhere conform to the standards set for locally bottled milk. Health inspection is not handled effortlessly by the market, and so unregulated competition need not be treated as an achievable first-best alternative. Setting a course that has gained power over time, the nondiscrimination approach with teeth allows the state to achieve its regulatory end only when it does so without tilting the scales in favor of the local interests. Only strong justifications, verging on strict scrutiny, will save regulations that hit only out-of-state parties, as in Maine v. Taylor, [FN16] where the Court upheld the restriction against the importation of out-of-state baitfish that carried deadly parasites not found in the native varieties.

Waste & the Commerce Clause

It is now time to switch gears, and results. Let us now assume that the pedigree of the dormant commerce clause is impeccable, and ***34** that the protection of free trade across state boundaries is its raison d'être. The more specific question that we have to face is whether the rule that applies to the shipment of goods in interstate commerce should apply with full rigor to bads, that is to the shipment of waste. The key modern case that extends the standard analysis of the dormant commerce clause to waste is City of Philadelphia v. New Jersey. [FN17] Philadelphia invalidated a New Jersey law that prohibited any importation of 'solid or liquid waste which originated or was collected outside the territorial limits of this State.' The case represents the first of many that in recent years have dealt with the movement of bads across state lines. [FN18]

The analytical approach in all these cases is the same: The rigorous dormant commerce clause test for deciding whether the state may prohibit, tax or regulate the shipment and sale of goods across state lines carries over to the shipment and storage of bads across state lines. The steps by which that conclusion was reached in Philadelphia are easy to trace. The initial point was that the term 'commerce' covers 'valueless' wastes every bit as much as it covers goods. That said, Justice Stewart repeated the powerful language from cases like Hood and Seelig to the effect that states had to supply an even-handed treatment between domestic and foreign bads, as well as domestic and foreign goods. He found no reason to doubt that New Jersey could impose appropriate regulations to protect the environment against the evils of waste, but in so doing could not treat wastes originated or collected outside the state any differently from those generated or collected inside the state.

The standard theory of international trade applauds this kind of result. The implicit assumption in this argument is that wastes differ from other items shifted in interstate commerce only in limited respects. Buyers pay for goods, but owners have to pay others to accept waste. The cash in waste transactions runs with the bads, not in the opposite direction. But the key assumption of the orthodox model is that the reversal of the cash flow has only one effect: to convert the sale of goods into the purchase of services--here to dispose of the waste correctly. This surely does not require one to leap to the proposition that waste

is 'not an article of commerce,' which falls outside the scope of the dormant commerce power. More substantive considerations will have to control.

Another assumption in this analysis is that state regulation is able to meet any harm that the transportation and storage of waste inside the state will impose on local interests. Consistent with this view, the Supreme Court does not require a state to receive waste free and clear of all restrictions on its use. Rather, it allows foreign waste to be subject to the same restrictions that are imposed on domestic waste, leaving it for the state to decide what level of restriction is optimal. This, it is posited, will allow for competition in the waste service industries that will operate across state borders in the same fashion as the market for goods. For any fixed amount of waste, the optimal set of local environmental regulations should not vary with the origin of the waste in question. The nondiscrimination rule also prevents local creators of waste from having exclusive rights to local facilities in ways that could lead to the misallocation of resources, if foreign wastes could be better stored in local facilities. If these assumptions of the standard model fail, then Congress may, for good ***35** reasons or ill, decide to regulate the transmission of waste across state lines in ways that do not conform to this competitive model. But the Court at least will not sully its hands in this process of political accommodation, which is likely to produce results that no one--certainly not I--would care to defend.

There is a great deal to commend this standard orthodoxy. The theory is simple and it avoids the need to make any marginal determinations as to what counts as a good or a bad. But a moment's reflection should indicate that the model depends critically on a state's treatment of the negative externalities generated by waste. If those externalities are fully and adequately controlled by local legislation, then this model goes through without much of a hitch: transactions in waste are service transactions whose only externalities are the pecuniary externalities of financial markets. But that assumption is optimistic, to say the least. The hard practical question is what, if anything, should be done to alter the basic theory when the direct regulation of externalities is insufficient to prevent harms to strangers. That situation is easy to envision. All it takes is a recognition of the smog that hovers over Los Angeles and other major cities and the stench that can be created by waste dumps that are located near population centers. In these circumstances, is the nondiscrimination principle sufficient to deal with the problem at hand?

In most cases, it is correct to insist that the courts are mistaken for following mushy balancing tests when clear results will hold. But here my argument cuts in the opposite direction. The correct treatment of waste in interstate commerce is uncertain, and that unclarity may undermine the conventional treatment of waste under the dormant commerce clause. It is quite one thing for a state to say that it will remain open for goods that come in across state lines. The very use of the term 'goods' suggests that the things imported will in general benefit the place to which they are imported. But waste, even if it is an article of commerce, is not a good. Rather, Justice Stewart's characterization of 'wastes' as 'valueless' makes it appear as though bads were only goods with zero value: would that this happy conclusion were so, for then no one would want to ship waste across state lines in the first place, or object to its shipment by others.

Unfortunately, however, waste has negative value, which makes it far more heroic for a state to remain open to bads that come hurtling across state lines, at least when internal state laws are insufficient to counteract their negative externalities. Most people do not welcome the imposition of liabilities; the common law rules that govern the voluntary assignment of rights are different from those which involve the forced assumption of liabilities. We allow the creation of contracts that benefit third parties; but we do not allow contracts that impose additional liabilities on strangers. Waste creates losses; it is far from clear why states should be required to receive them with the same open arms that they receive foreign goods. A new source of goods increases the likelihood that the citizens of any state will receive the benefits of greater competition. To be sure, competition has negative external effects on individual traders, but its systematic effects are positive, which is why it forms the ideal that drives the dormant commerce clause jurisprudence in the first place. The injection of new bads into the

economy hardly moves the state smartly to some competitive equilibrium; instead it strains local facilities to handle the negative outputs from other states. Given these differences between goods and bads, it seems less than self-evident that the dormant commerce clause requires every state to accept liabilities in the same fashion that it accepts assets.

Gaining approval for the operation of waste sites is no easy task, given the obvious risks of leakage and pollution--not only in the storage ***36** of waste on site, but in the shipment of waste to the site. [FN19] A local economy could remain in balance if the local waste facilities were sufficient to receive all the waste materials generated from local production. It is one thing to extend the hours of a department store to handle an influx of foreign goods; it is quite another thing to enlarge a dumpsite to handle the influx of waste from other jurisdictions. The supply of landfill does not expand without running a gauntlet of regulation from every level of government. To be sure, the local operators of waste facilities benefit from the increased rates that follow from increased demand. But by the same token, either the displaced local wastes have to be shipped somewhere else, thereby creating an additional risk of transportation spillage, or local production of waste has to be curtailed if alternative waste sites are not found. In this environment, the free movement of waste from one locale to another need not represent the unambiguous outcome of a pure competitive system, even within a single state. By the same token, the free movement of waste across state boundaries need not have the same desirable overall consequences as the free shipments of goods.

Another way to see the difference is to ask what a state will do to maximize its local economy first in goods, and then in bads, when its use of the police powers is subject only to a general nondiscrimination constraint. With goods, the answer seems clear. The local dairy farmers in Baldwin v. Seelig will hardly consent to blocking their local sales to exclude foreign sales. Total exclusion results in zero profits, which has to be less than what they could achieve if allowed to go toe-to-toe with foreign suppliers. Local consumers, without question, would not stand for any rule that simply prohibited on a neutral basis (without disparate impact) the sale of all dairy goods within the state. If the only choice is whether everyone comes in or everyone stays out, then the nondiscrimination provision will lead to the former, and more desirable, result. The calculations are likely to prove more complex when the nondiscrimination principle applies to any uniform tax imposed on foreign and domestic goods. There might conceivably be some high uniform tax that leaves local producers better off than a low uniform tax. But that uniform tax will not alter the relative prices of goods between sellers, so it is hard to imagine what that tax level would be. Of course a fixed excise tax would work against low-cost foreign producers, which is why the nondiscrimination principle should be couched in percentage terms.

The situation with waste looks quite different. First off, an immediate consumer revolt seems improbable if a state simply decided that no one could dispose of waste within the territory. Not-in-my-back-yard is a war cry heard in many communities. A state-wide version of NIMBY could easily attract a coalition to either eliminate or reduce the number of waste sites. After all, it is one thing for local communities to accept waste sites that relocate local waste from relatively dangerous to relatively safe conditions. One externality is removed from the local community even as another, smaller, externality is added. On net pollution that once caused 1000 units of local damage now causes only 100 of local damage. The state thus gets the benefit as well as the downside from waste relocation. It is quite another thing for communities to accept foreign waste that makes it harder to move local waste to local sites. Now someone else gets the benefit of 1000 units of waste reduction while citizens in the local state receive the 100 units of uncompensated harm. Given this imbalance, one cautious prediction is that the nondiscrimination***37** rule in the market for bads will constrain the supply of suitable sites within any given state. If that political cycle is repeated multiple times in different states, the conventional dormant commerce clause theory should lead to system-wide national shortages of waste disposal sites, as fewer sites are opened when wastes move freely across state lines than when wastes remain within states. The default position for the market for bads looks quite different from the vibrant competitive equilibrium (even with uniform sales taxes) in the markets for goods.

In raising these concerns, it is critical to recognize two key caveats. First, the arguments above give no comfort to local gov-

ernments that require private firms to use their local waste processing facilities. Here, if others are willing to receive the waste, no local legislation should be allowed to keep it at home. [FN20] Nor does this argument allow any state to ban the shipment of foreign waste through its territory to ultimate sites in third states willing to accept it. Here the dormant commerce clause applies not to the static resting position at issue in Philadelphia v. New Jersey, but to the power of the state to disrupt the network connections between different states. If Virginia is prepared (for a fat fee) to bury wastes generated in New York, New Jersey should not be allowed to block the direct shipment of wastes through its territory. In this context, the familiar nondiscrimination rule helps by preventing New Jersey from forcing the use of roundabout shipment routes for waste. But even that rule might not suffice against determined local imposition that requires, for example, costly inspection of waste transportation at state lines. Any restrictions on shipment should be examined in light of the usual test in matters of this sort, that stated in Pike v. Bruce Church, Inc.: 'Where the statute regulated evenhandedly to effectuate a legitimate local interest, and its effects on interstate commence are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.' [FN21] A transporter might well be able to carry its burden under this standard, depending on the extent of the restrictions.

Flipping the Default Rule

The steadfast refusal of the Supreme Court to distinguish between goods and bads has created an uneasy nondiscrimination default rule for the disposal (as opposed to the interstate shipment) of bads. But Congress can reverse that position, either for goods or for bads. The next question is whether this flawed nondiscrimination provision outperforms a second flawed rule--allowing each state to exclude foreign waste from its own storage and disposal facilities, and by implication to discriminate in the charges imposed for allowing its storage. It is also possible to conceive of default rules that ban exclusion but allow discrimination. Congress might, for example, choose a default provision that lets each state charge double for the storage of out-of-state waste. Or perhaps it could reverse the rule in Dean Milk so as to allow states to impose on foreign waste the same differential tax that its localities impose on wastes that come from other sites located outside the community but within the state.

In the abstract, it is very hard to be sure which of these default rules make sense. In part, the problem is finding out the function of the default rules. If it is to posit an ideal set of institutional arrangements, then the nondiscrimination rule might have some advantages, notwithstanding the objections I raised to it above. But if it is to anticipate the ***38** likely result of the political process, then the rule of exclusion may offer a slightly better fit. As noted earlier, it is never easy for Congress to legislate a reversal of the initial default rule in any complex social setting. Unlike a simple bilateral contract, too many interest groups may block any shift from the status quo. It is that rigidity that helps protect free competition from Congressional mischief in most but not all cases.

With foreign waste, however, we have some strong evidence of the limitations of Philadelphia v. New Jersey. In at least some negative contexts the default rule on waste set out in Philadelphia has been overridden politically, as described in the more recent case of New York v. United States. [FN22] Doctrinally, New York is usually treated as stating the limitations that state sovereignty imposes on the reach of the affirmative commerce clause. [FN23] New York arose out of a dispute over the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985. [FN24] The statute was passed by Congress in response to an anticipated shortage in 31 states of disposal sites for low-level radioactive wastes--a shortage that presumably should not have developed if the nondiscrimination provision had operated in the sensible fashion postulated by its defenders.

In order to overcome this perceived shortage, Congress passed a complex system of carrots and sticks to encourage the development of waste disposal sites. The keys to the structure are prohibitions and discriminatory forms of taxation, which attract instant condemnation under the classical view of the negative commerce clause. For example, section 2021e(a)(3)(b)

provides: 'Any State in which a regional disposal facility . . . is located may, subject to the provisions of this compact, prohibit the disposal at such facility of low-level radioactive waste generated outside of the compact region' if certain capacity restraints are met. More concretely, one key provision in the statute authorizes states to impose a statutory surcharge on waste received from other states that are not part of any 'sited compact region.' [FN25] The applicable surcharges were set out in dollar terms: $10 per cubic foot of low-level radioactive waste for 1986 and 1987; $20 for 1988 and 1989; and $40 for 1990, 1991 and 1992. [FN26]

The statute then requires that 25 percent of the money so collected be paid into a trust account run by the Department of Energy, which funds are then paid out to those states that reach specified 'milestones' in developing sites for the storage of their own waste. [FN27] These milestones are meant to encourage laggard states to develop their own waste disposal areas or to enter into regional compacts that will help take care of this issue. The statute also contains a set of rules that authorize compliant states to slowly raise the ante against noncompliant states, starting with discriminatory taxes [FN28] and followed by a total exclusion of their ***39** waste materials. [FN29] The last provisions--those whose constitutionality was at issue-- sought to bring the states to heel by requiring states that do not develop procedures for the disposition of waste within their borders to 'take title' to that waste--a liability and not an asset. [FN30]

The legal regime is moderately complicated and the administrative structure is more so. My purpose here, however, is not to comment on the legal issue of federalism that occupied the Court--its conclusion that the 'take title' provision was an infringement on state sovereignty within the revitalized federal system. Nor is it to note with glee that the discriminatory portions of the Act escaped all constitutional challenge. Rather, the key point is that Congress has adopted discriminatory structures that confirm my central point: the market for waste (when externalities are imperfectly controlled) is not the same as the market for goods. It might be possible to construct some interest-group theory which explains why this statute has introduced a regime that is worse than the one it has displaced. But at first blush at least, the simpler explanation is that the nondiscrimination principle of Philadelphia did not adequately handle the situation. If, as appears, that is the case, then the facile extension of Dean Milk to Philadelphia counts as a methodological error even for those who accept, as I do, that the purpose of the dormant commerce clause is to overcome protectionism between jurisdictions. Once this point is established, the hard and delicate question becomes whether this means that Philadelphia counts as a mistake. In other words, which end point--total right of exclusion, or equal right of access--forms the appropriate baseline from which further deviations should take place? It is as though one has to decide whether with respect to waste the United States is, by default, a commons or a set of enclaves. In this case, Congress adopted a solution that called for progressive increases in tax rates, culminating with a virtual exclusion for noncompliant states. No court could approximate that fine-tuned solution by judicial decision. Nor is it necessarily the case that this carefully-crafted solution should be regarded as ideal. It could well be that a set of state compacts created in a world in which the federal government kept a hands-off posture could have done better, although my own sense is that, owing to the coordination problems at hand, on this occasion Congress served a useful role as the honest broker. Guessing the right baseline is hazardous business, but with waste, I think that the greater danger lies in using the nondiscrimination principle than in jettisoning it.

Analogies from Home & Abroad

I can point to two additional pieces of evidence that support the conclusion that the nondiscrimination principle is problematic, both of which involve the institutional response to heated debates over waste disposal. One burning political issue in New York City today arises out of the anticipated closing of the huge Fresh Kills landfill in Staten Island, which, once accomplished, will impose on New York City the unenviable task of finding ways to dispose of about 13,000 tons of household garbage each day. The political battles that have ensued within the City have pitted one borough against another. Thus, the opponents of the project 'seethe that poorer, minority areas dominated by Democrats appear to be sacrificial ***40** lambs for satisfying white Republican Staten Islanders.' [FN31] The pointed reply of Guy V. Molinari, Borough President of Staten Is-

land, to the quoted sentence did not deny that each borough was responsible for its own waste. Rather, he insisted on two propositions: Staten Island is diverse, and it should not have to take in garbage from Brooklyn. [FN32] The inevitable reply of Howard Golden, Brooklyn's Borough President, did not deny Molinari's conceptual framework. Instead, he noted that in the emergent order each borough should be required to process its own waste, and then injected a new complication: in any ultimate solution Brooklyn should be relieved of having to handle a disproportionate level of the commercial waste. [FN33] At no point did anyone claim that waste should be freely movable inside the City. Indeed, once the waste is allocated to the Borough of its origin, it is likely that the same principle will apply to districts within Boroughs. But it hardly seems that the problem of conflicting local sentiments can be sidestepped by the massive movement of waste to sites in different states. It will require the same kind of painful negotiation that ended in the regional compacts under congressional blessing. Here it seems that an appeal to the virtues of pure competition in economic markets will not carry the day.

This battle has now spilled over into the interstate arena, with some considerable complications. A recent New York Times story features a picture of a massive landfill in Sussex County, Virginia, with a plastic bag saying 'I heart NY' prominently featured in the lower left quadrant. [FN34] The story then goes on to describe how many Virginians bridled at New York Mayor Rudolph Giuliani's suggestion that Virginia should accept New York's trash in exchange for the city's cultural and financial contributions. Closer to the ground, the local communities that accept the waste and collect fees for it are ambivalent. The opposition centers in those parts of the state through which the trash runs, but which collect no revenues for the inconvenience suffered. In one sense, this debate is troubling because of the strong desire of some citizens to keep waste out of their state even if they do not live or work where it is stored. The case also shows that the political economy of the issue has added complexity, for someone has to decide how much of the fees go to the state and how much to the county or town in which the waste is stored. It may well be, therefore, that the best rule is one that allows local communities, but not states, to control the local use of waste. Ironically, regional pressures within states could lead to inferior rules even under the current nondiscrimination regime. But once again, there is no reason to think that the nondiscrimination rule provides the ideal default rule, let alone the final resting place.

The second piece of evidence that supports this conclusion comes not from local politics, but from the rules on waste disposal that have been adopted in the European Union. A full collection of the various treaties on the subject occupies a dense volume called European Waste Law [FN35] which contains 130 pages of Annexes to the Basic Directive promulgated in 1975. [FN36] The exact meaning of these provisions is for the ***41** expert to figure out, but it is evident that the Europeans, too, have experienced some obvious uneasiness in making the simple equation of the regulation of waste with the regulation of goods. Most emphatically, the shipment of waste across borders is not wholly banned, and is subject to conflicting pressures. The rules on transportation contain a general nondiscrimination provision similar to that which holds on transportation of goods. Any restrictions must relate to health and safety, and must be applied to purely local transit. [FN37] At the same time we are told that the transportation of waste is governed by the principles of 'self-sufficiency,' and 'proximity,' which appear to mean, respectively, that each member of the EU should be capable of disposing of its own waste, and that such disposal should take place as close to the site of generation as is possible.

Notwithstanding all these provisions, it is very hard to identify any clear answer to the question of whether one member of the EU is required to accept waste that is generated within another member's borders. From the guarded terms governing the shipment of waste, it appears that importation is not required. Perhaps this interpretation is wrong as a result of obscure text or unaccounted for local practice. No matter: these precise particulars are of immense importance for someone who has to deal with the distribution of the control over waste by the EU and its member states. For our purposes, however, the only point is that the guarded disputes within the EU offer a strange commentary on the federalism battles within the United States before 1937.

The EU is not the United States. The differences among the EU's member states in both language and culture are enormous. Their willingness therefore to accept an American-like solution that would give Brussels the power of Washington, D.C., is not in the cards. The whole question of curbing members is no longer the low-stakes game that takes place against a backdrop that Congress can trump whenever it chooses. Now the claims of EU member states involve their right to resist control from Brussels when the two conflict. In that world, we see clearly that the simple nondiscrimination principle does not necessarily trump a rule that treats EU members as autonomous entities with the right to exclude wastes from other sources. That uneasiness is exactly what we should expect given the abiding differences between goods and bads. We should therefore be suspicious of any jud-icial doctrine, including that so confidently announced in Philadelphia v. New Jersey, that presupposes equivalence between them.

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[FN1]. Richard A. Epstein, The Proper Scope of the Commerce Power, 73 VA. L. REV. 1387 (1987); Richard A. Epstein, Constitutional Faith and the Commerce Clause, 71 NOTRE DAME L. REV. 167 (1996); Richard A. Epstein, Fidelity Without Translation, 1 GREEN BAG 2D 21 (1997).

[FN2]. U.S. CONST., Art. 1, § 8, cl. 3.

[FN3]. 514 U.S. 549 (1995).

[FN4]. See David P. Currie, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS--1789--1888 at 173 (1985).

[FN5]. See United Building & Construction Trades Council v. Camden, 465 U.S. 208 (1984).

[FN6]. Paul v. Virginia, 75 U.S. 168 (1868).

[FN7]. 22 U.S. 1 (1824).

[FN8]. For explication of this antiprotectionist theme, see Don Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 MICH. L. REV. 1091, 1112 (1986): 'State protectionism is unacceptable because it is inconsistent with the very idea of a political union, even a limited federal union. Protectionist legislation is the economic equivalent of war.' As Regan notes, it also invites retaliation, which in fact helped drive Chief Justice Marshall to his decision in Gibbons v. Ogden, 22 U.S. 1 (1824).

[FN9]. 336 U.S. 525, 537-538 (1949).

[FN10]. Id. at 528.

[FN11]. 300 U.S. 577 (1937).

[FN12]. 437 U.S. 117 (1978).

[FN13]. 340 U.S. 349 (1951).

[FN14]. 'It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce. ' Id. at 354 n.4.

[FN15]. Id. at 354.

[FN16]. 477 U.S. 131 (1986).

[FN17]. 437 U.S. 617 (1978).

[FN18]. See, e.g., Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992), which imposed a differential tax on waste generated outside the state; Oregon Waste Systems, Inc. v. Department of Environmental Quality, 511 U.S. 93 (1994), also involving a differential surcharge on in-state and out-of-state waste.

[FN19]. The stories on the subject are legion. See, e.g., Eric Lipton, As Imported Garbage Piles Up, So Do Worries: 3 Million Tons of Trash Enter Virginia Each Year, WASH. POST, Nov. 12, 1998, at A1.

[FN20]. See C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383 (1994).

[FN21]. 397 U.S. 137, 142 (1970).

[FN22]. 505 U.S. 144 (1992).

[FN23]. See, e.g., Gerald Gunther & Kathleen Sullivan, CONSTITUTIONAL LAW 212 (13th ed 1997), where the case is located in a section entitled 'External Limits on the Commerce Power: The State Autonomy and Sovereignty Concerns Reflected in the Tenth and Eleventh Amendments'; Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein & Mark V. Tushnet, CONSTITUTIONAL LAW 270 (3d ed 1996), under the more concise title 'Implied Limits on Congress's Powers.'

[FN24]. 42 U.S.C. § 2021b - 2021j.

[FN25]. 42 U.S.C. § 2021e(d)(1).

[FN26]. Id.

[FN27]. Id. at § 2021e(d)(2)(B), dealing with 'Milestone incentives-- Payments.'

[FN28]. Id. at § 2021e(e)(2), setting out penalty surcharges that are either twice or fourfold those otherwise allowed under the Act.

[FN29]. Id. at § 2021e(e)(2)(C).

[FN30]. Id. at § 2021e(d)(2)(C)(i).

[FN31]. Douglas Martin, Boroughs Battle Over Trash As Last Landfill Nears Close, N.Y. TIMES, Nov. 16, 1998, at B1.

[FN32]. Letter of Nov. 20, 1998, N.Y. TIMES, at A32.

[FN33]. Letter of Nov. 26, 1998, N.Y. TIMES, at A38.

[FN34]. David W. Chen, Glow of New York Trash Flickers in Virginia, N.Y. TIMES, March 11, 1999, at A1.

[FN35]. Jean-Pierre Hannequart, EUROPEAN WASTE LAW (1998).

[FN36]. Council Directive 75/442/EEC of 15 July 1975 on waste (as amended by 91/156/EEC and adopted by 96/350/EC).

[FN37]. Hannequart, supra note 35, at 43-46.

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