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CASE NOTE

COMMERCE CLAUSE LIMITATIONS ON A STATE'S REGULATION OF WASTE DISPOSAL

CONSTITUTIONAL LAW—THE NEW JERSEY WASTE CONTROL ACT—In holding that a state may not isolate itself from a national problem by closing its landfills to waste from outside the state, the Supreme Court may have been looking ahead to more serious conflicts over nuclear disposal. *City of Philadelphia v. New Jersey*, 98 S.Ct. 2531 (1978).

The New Jersey Waste Control Act¹ was designed to prohibit the disposal in New Jersey landfills of waste originating outside that state. After having been twice sustained by the New Jersey Supreme Court against constitutional attacks, it was recently struck down by the Supreme Court of the United States as an impermissible regulation of interstate commerce.

In the early 1970's the State of New Jersey found itself running out of land to use for the disposal of waste. In 1973, the state legislature found a threat to the quality of the environment and declared "that the public, health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited."² The Waste Control Act was enacted to achieve that end.

Operators of private landfills in New Jersey, along with several cities in other states that had agreements with the operators for waste disposal suffered an immediate adverse effect. Two actions were brought against New Jersey and its Department of Environmental Protection in state court.³ The trial courts declared that the law was unconstitutional because it discriminated against interstate commerce. On appeal⁴ the New Jersey Supreme Court consolidated these cases and considered the constitutionality of the Waste Control Act.

The New Jersey Court took pains to point out the dire nature of

1. N.J. Stat. Ann. § §13:11-1 et seq. (Supp. 1978).

2. *Id.* §13:11-9.

3. *Hackensack Meadowlands Dev. Comm. v. Municipal Sanitary Landfill Auth.*, 127 N.J. Super. 160, 316 A.2d 711 (ch. div. 1974); In the other case judgment was rendered on an oral opinion. See *Hackensack Meadowlands Dev. Comm. v. Municipal Sanitary Landfill Auth.*, 68 N.J. 451, 348 A.2d 506, 507 (1975).

4. *Hackensack Meadowlands Dev. Comm. v. Municipal Sanitary Landfill Auth.*, 68 N.J. 451, 348 A.2d 506 (1975).

the problem faced by the state. Several studies had been made and all predicted that the state would run out of sites for landfill disposal operations in the near future. In the court's opinion, the problem had reached "crisis proportions."⁵ Viewing the problem in this light, the court proceeded to examine the constitutional issues raised by the Waste Control Act and its accompanying regulations.

As a preliminary step the court addressed New Jersey's argument that the Act presented no issues under the commerce clause of the constitution. This argument was based on the theory that the waste involved was valueless and therefore its movement was not commerce within the meaning of the constitution. The United States Supreme Court has long recognized the theory that interstate movement of objects harmful to the general public falls outside of the scope of the Commerce Clause.⁶ But the New Jersey court found that theory, and the state's argument slightly beside the point, because some of the regulations designed to enforce the Waste Control Act were broad enough to prohibit importation of waste that could have some economic value—for instance, recyclable waste. In any event, the court assumed for purposes of its decision that the mere transportation and disposal of valueless waste between states is interstate commerce for constitutional purposes.⁷

This brought the court to the issue of preemption—whether or not the United States Congress had the exclusive right to legislate. Congress had taken action in the form of the Solid Waste Disposal Act of 1965,⁸ but the court found a clear intention not to pre-empt state action. In fact, the court found that Congress had intended to encourage state action.

The next question was whether the Waste Control Act was a constitutionally impermissible regulation of interstate commerce. The court expressed the opinion that there are two ways of defining commerce for the purposes of applying the commerce clause. Accordingly, when the clause is used to support some exertion of federal control or regulation—an affirmative application—the clause has been given a sweeping interpretation by the U.S. Supreme Court. On the other hand, when the clause is used to strike down or restrict state legislation this is a negative application, and the reach of the clause is much more confined. The current attempt, then, to use the

5. *Id.* 348 A.2d at 509.

6. *Id.* 348 A.2d at 512.

7. *Id.* 348 A.2d at 514.

8. Solid Waste Disposal Act of 1965, 42 U.S.C. §§ 3251 et seq. (1970) (current version at 42 U.S.C.A. § 6901 et seq. (West 1977)).

commerce clause to invalidate New Jersey's Waste Control Act would be a negative application.

Relying on a 40 year-old Supreme Court opinion⁹ and a more recent treatise,¹⁰ the court arrived at criteria to use in testing a state law under the "negative implications" of the commerce clause. The court's test contained four questions. 1) Did the state legislature act within its province? 2) Were the means of regulation reasonably adapted to the end sought? 3) Does the legislation discriminate against interstate commerce? 4) Is the burden on interstate commerce outweighed by the benefit to the state?¹¹

The court found that the legislature had properly acted: there being no federal pre-emption, the state was free to act. And the legislation was a proper exercise of the state's police power because the preservation of the environment and protection of ecological values for the purpose of protecting the public health are primary objectives of that power.¹² Due to the serious nature of the problem, the court had no trouble finding that the means were reasonably adapted to these objectives. In the court's words, "Less than total exclusion of solid waste generated outside New Jersey would have been to no avail."¹³

The court was less than critical in its analysis of the discrimination question. It concluded that because the legislature had had no intent to impose economic barriers or create commercial restrictions, there was in fact no economic discrimination against interstate commerce. The court also observed that the ban on bringing garbage into the state applied equally to refuse collectors both from New Jersey and from out of state, and that out of state residents remained free to collect and dump within the state. Therefore, concluded the court, the Waste Control Act was not discriminatory.

Finally, the court found that the burden on interstate commerce imposed by the Waste Control Act was "slight indeed" compared with the benefit to the state of averting danger to the public health and environment.¹⁴ Alternative methods and places of disposal were found by the court to be available to neighboring states at little cost. The court concluded that "where the effect upon trade and commerce is relatively slight, as is here the case, and where at the same time the values sought to be protected by the state legislation are as

9. *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938).

10. Engdahl, *Constitutional Power: Federal and State* §11.03, at 272 (1974).

11. *Hackensack Meadowslands Dev. Comm.*, 348 A.2d at 517.

12. *Id.* 348 A.2d at 516.

13. *Id.* 348 A.2d at 517.

14. *Id.* 348 A.2d at 518.

crucial to the welfare of its citizens as is here true, we have no hesitancy in sustaining the state action."¹⁵

This decision was appealed to the United States Supreme Court. Probable jurisdiction was noted April 5, 1976.¹⁶ Shortly before the case was argued the Resource Conservation and Recovery Act of 1976 (RCRA)¹⁷ was signed into law by President Ford. For this reason, the judgment of the New Jersey court was vacated and the case remanded. On remand the question for the N.J. court to decide was "whether or to what extent the Resource Conservation and Recovery Act of 1976 pre-empts the New Jersey [Waste Control Act]."¹⁸

In June 1977, the N.J. Supreme Court announced its decision.¹⁹ It expressed the belief that the United States Supreme Court had been "especially reluctant to find an intent to pre-empt where state legislation has been enacted to serve local environmental interests."²⁰ And it found that although the RCRA called for waste disposal guidelines to be established by the federal government, Congress intended to leave to each state the decision as to whether or not to accept recommendations set forth in the guidelines.²¹ Thus the previous decision of the N.J. court was affirmed, and the case was appealed again to the United States Supreme Court.

On June 23, 1978 Justice Stewart delivered the opinion of the Court. The Court briefly agreed with the New Jersey court that the Waste Control Act had not been pre-empted. It then turned to the weightier constitutional question.

The Court criticized the N.J. court's belief that the definition of commerce varies according to the purpose to which the Commerce Clause is being put. The Supreme Court majority held that all objects of interstate trade, including garbage, merit Commerce Clause protection, with none being excluded by definition. A state cannot escape constitutional scrutiny when it bans out of state waste, merely by labeling the waste "valueless."²²

The Court then summarized its past decisions defining permissible and impermissible state regulation of interstate commerce. A virtually per se rule of invalidity has prevailed when the object of state

15. *Id.* 348 A.2d at 519.

16. Hackensack Meadowlands Dev. Comm., probable jurisdiction noted sub nom. *City of Philadelphia v. N.J.*, 425 U.S. 910 (1976).

17. Pub. L. No. 94580, 42 U.S.C.A. § §6901 et seq.

18. *City of Philadelphia v. N.J.*, 430 U.S. 141, 142 (1977).

19. *City of Philadelphia v. State*, 73 N.J. 562, 376 A.2d 888 (1977).

20. *Id.* 376 A.2d at 891.

21. *Id.* 376 A.2d at 893.

22. *City of Philadelphia v. N.J.*, 98 S. Ct. 2531, 2535 (1978).

regulation has been simple economic protectionism.²³ However, "incidental burdens" on interstate commerce have been allowed when they seemed to be an unavoidable result of state legislation designed to protect the health and safety of people in the state.²⁴ Legislation of this sort, which evenhandedly serves a legitimate local purpose and only incidentally affects interstate commerce, will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.²⁵ The Court found the crucial question to be whether the Waste Control Act was simply a protectionist measure or a law directed to legitimate local concerns with only incidental effect upon interstate commerce.²⁶

Contrary to the N.J. court, the Supreme Court found it not particularly helpful to make a determination of what it called the ultimate legislative purpose of the Waste Control Act. The "evil of protectionism" can lurk in the means of legislation as well as in the ends. Whether the legislature intended to reduce disposal costs to N.J. residents or to protect the environment, the Court assumed the state could have achieved either purpose by slowing the flow of all waste into the remaining landfill sites, even though interstate commerce would be incidentally affected. But discrimination against articles of commerce coming from outside the state, without some reason apart from the origin of the articles to treat them differently, is not a permissible way to achieve the state purpose, regardless of the purpose. The Court held "Both on its face and in its plain effect, the [Waste Control act] violates this principle of nondiscrimination."²⁷

In two cases decided early in this century,²⁸ the Supreme Court held that a state may not accord its own citizens a preferred right of access to natural resources within the state, to the disadvantage of out of state consumers. These cases both involved state imposed restrictions on transporting natural gas to other states. In the present case the natural resource—landfill space—sought to be preserved for the citizens of New Jersey at the expense of out of state citizens is not an article of commerce, as had been the situation in the previous natural resources cases. The Court found this difference inconsequential:

It does not matter that the State has shut the article of commerce

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 2537.

28. *Oklahoma v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

inside the State in one case and outside the State in the other. What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.²⁹

Even if the law was found to be discriminatory, New Jersey asked the Court to consider it to be a quarantine law. Such laws have been repeatedly upheld even though they appeared to single out interstate commerce for special treatment.³⁰ The Court has said that the states "have power to . . . prevent the introduction into the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death."³¹ The quarantine laws that have been upheld, however, did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin.³²

Accordingly, the Waste Control Act was found not to be a quarantine law. No claim has been made that waste from within New Jersey was any less harmful to the life expectancy of landfill sites than waste from outside the state. Because of this the Court found that New Jersey's attempt to ban out of state waste while leaving landfill sites open to in state waste was an obvious effort to saddle those outside with the entire burden of making the remaining sites last longer. The Court stated that "legislative effort is clearly impermissible under the Commerce Clause of the Constitution." A state may not isolate itself in the stream of interstate commerce from a problem shared by all.³³

In his dissent, Justice Rehnquist focused attention on the asserted health hazards presented by current state-of-the-art waste disposal. He characterized the majority decision as offering New Jersey a Hobson's choice of either prohibiting all landfill operations in the state or accepting waste from every portion of the United States. In his words: "The physical fact of life that New Jersey must somehow dispose of its own noxious items does not mean that it must serve as a depository for those of every other State . . . New Jersey should be free under our past precedents to prohibit the importation of solid waste because of the health and safety problems that such waste poses to its citizens."³⁴

29. *City of Philadelphia v. N.J.*, 98 S.Ct. at 2538.

30. *Id.*

31. *Bowman v. Chicago and N.W. Ry. Co.*, 125 U.S. 465, 489 (1888).

32. *City of Philadelphia v. N.J.*, 98 S. Ct. at 2538.

33. *Id.* at 4805.

34. *Id.*

CONCLUSION

It is probably significant that the court gave so little credence to New Jersey's claims of the health hazards posed by the extra volume of waste from out of the state. The court was much more impressed with the fact that waste disposal is a problem shared by all of the states, and it implicitly decided that all states must therefore share in the solution. Also of note is the fact that the court's decision means no state can prevent others from sharing its natural resource of waste disposal sites, even though it is a resource which does not move in interstate commerce.

Apparently, any state faced with a similar problem in the future—the disposal of nuclear waste, for instance—will have to choose either to ban all disposal or allow disposal of wastes from other states. Although the Court implies that a claim that movement of a particular substance is hazardous might possibly lead to a different result,³⁵ this is little solace. That the Court would uphold a state's outright ban against nuclear disposal is unlikely for two reasons. First, if one state could impose such a ban, all could, and the problem would be aggravated rather than solved. Second, as technology makes it increasingly safe to transport nuclear waste, the significant problem remains the problem of permanent disposal. This is a national problem, and, as the court says, "What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade."³⁶

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35. *Id.* at 4804.

36. *Id.*