STATE POWERS AND RESPONSIBILITIES CONCERNING THE FLOW OF WASTE

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ABSTRACT

The primary source of federal jurisdiction over the transportation and management of waste is derived from the Commerce Clause of the U.S. Constitution. That authority is of two main types - active, which empowers federal supervision over matters affecting commerce, and passive, which restrains state activity regarding commerce-related issues. The passive, or dormant, powers prevent a state from undertaking economic protectionist actions, but they do not prevent legitimate regulation for public health and safety where there is not a less intrusive alternative.

The Commerce Clause does not prohibit states from making market-based decisions as proprietors, and discriminatory activities may be undertaken in that capacity. A federally approved compact empowers states or groups of states to act in ways that would otherwise be precluded by the Commerce Clause.

The public policy issues at work in the above situations are discussed. Several proposals to revise the Low-Level Radioactive Waste Policy Amendments Act to conform with these principles are described.

INTRODUCTION

This paper presents the legal aspects of state control over the importation and exportation of radioactive waste. There are a number of major legal principles that have a direct bearing on this subject. Probably the most important and most frequently discussed issues concern the Commerce Clause of the United States Constitution.

The Commerce Clause is found in Section 8 of Article I of the Constitution. In typically sparse fashion, it declares: "The Congress shall have Power ... to regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes."

There are two broad categories of jurisdiction that may be involved when any particular transaction is subject to the Commerce Clause. The first category is referred to as "active" jurisdiction. This indicates that the clause empowers the federal government to take affirmative action over a subject matter. An example of action taken under the active powers of the clause would be passing a piece of environmental legislation by Congress and delegating power to an administrative agency such as the Environmental Protection Agency or the Nuclear Regulatory Commission to enforce it. The second category, which has been inferred from the intent of the clause, is referred to as the "dormant" powers of the clause. In this case, a state may be precluded from taking action on a certain matter because to do so would impermissibly or unreasonably interfere with interstate commerce.

STATES AS REGULATORS

An example of action precluded under the dormant powers of the Commerce Clause is an outright prohibition on the importation of waste for disposal. Such was the issue in City of Philadelphia v. New Jersey (1). The State of New Jersey had enacted a ban on the importation of solid waste for disposal. The State had characterized the ban as an effort to conserve landfill space and to protect its citizens' environmental health and well-being. The Supreme Court struck the ban down, holding that the Act was an example of economic protectionism. The Court noted as significant the fact that the State was attempting to treat out-of-state waste differently from in-state waste for no reason apart from its origin.

Under certain circumstances, the dormant powers of the Commerce Clause do not prevent a state from exercising its police powers in protecting the health and safety of its citizens and environment, even where the state's action may be discriminatory in its effect. To be upheld, the state's efforts must not have an unreasonable effect on interstate commerce in relation to the benefits gained, and there must be no less burdensome, non-discriminatory alternative available to the state in protecting a legitimate interest. (Economic protectionism is not a legitimate local interest.)

States have been given considerable latitude in the environmental protection sphere. In Maine v. Taylor (2), the State had erected a ban on the importation of certain bait fish. Despite the ban's discriminatory nature, the Court upheld it because a majority felt that the State had met its burden of showing a reasonable purpose (prevention of the spread of fish diseases) and that a less restrictive alternative was not available.

Some states have become quite creative in straddling the line between protectionism and use of the police powers to further their citizens' welfare. In Michigan a state statute which empowers counties to ban out-of-county waste as part of a comprehensive planning process has been upheld (3). The Supreme Court recently agreed to review this case.

A problem reverse to the above situation has begun to emerge. Several entities have banned the export of waste or have required that waste flow through certain facilities. While often couched in other terms, the main purpose of these flow control laws is to protect the economics of various municipal programs. If out-of-state transportation of waste is significantly affected, the same Commerce Clause principles should apply, and it is likely that many of these bans will be struck down.

STATES AS PROPRIETORS

A state has a great deal of discretion in deciding which services it will offer to its citizens to provide for the general welfare. The Supreme Court has endorsed this philosophy very strongly. Of course, there is political opposition and a general reluctance on the part of states to enter fields which would compete with viable private enterprise. It may seem obvious, but it is worth noting that governments may limit their services to their own constituents.

When a state enterprise is established, that enterprise is protected in ways that are similar to a private business. That is, the state enterprise is allowed to make market-based decisions dependent on the interests of its owner, the state, much like a private business would. (Of course, a state's decisions may not violate individual constitutional rights, such as the right to equal protection under the law.)

This principle, known as the market-participant doctrine, was affirmed by the Supreme Court in Reeves, Inc. v. Stake (4). In that case, the State of South Dakota operated a cement plant which gave preference to in-state customers in times of shortage. The Court upheld the state's actions, finding that the state was participating in the market rather than regulating it. By comparison, in South-Central Timber Development, Inc. v. Wunnicke (5), a State of Alaska requirement that timber from state lands be processed in-state prior to export was struck down. In that case the Court held that the market-participant doctrine allows burdens on the particular market at issue; however, the state is not at liberty to impose conditions that have a substantial regulatory effect outside of that particular market.

The market-participant doctrine has been confirmed in waste disposal cases. In Rhode Island a state agency operating the largest landfill in the state excluded waste generated out of state. In that case, LeFrancois v. Rhode Island (6), an out-of-state hauler unsuccessfully challenged the practice under the Commerce Clause. In another important case, a county in Pennsylvania gave preference to county residents and imposed much larger fees on non-locally generated waste. The practice was upheld under the market- participant doctrine. Swin Resource Systems, Inc. v. Lycoming County (7).

It has been questioned whether the market-participant doctrine would apply in situations involving a government participating with a private party to develop waste management facilities. There is neither an apparent theoretical basis nor legal reason for asserting that the doctrine should be weakened under these circumstances. There is no conceptual difficulty with the government's conditioning its involvement with a private business upon an agreement to exercise its "market-participant" prerogative.

STATES AS MEMBERS OF A COMPACT

A compact is a binding agreement between two or more states which affects the rights of any other non-compact states. States are prohibited from entering a compact without the approval of Congress (8). Once a compact is approved by Congress, the compact has the effect of federal law. The Supreme Court will not assume the role of arbiter in modifying or altering a compact's terms (9).

Congressional consent to the formation of compacts often has significant constitutional implications. Since Congress has authority over interstate commerce and compact formation, it may authorize a compact to interfere with commerce in ways that, without such authorization, would be prohibited under the dormant powers of the Commerce Clause.

An example of this situation is found in Congress' ratification of LLRW compact legislation which permits the compact to control and prevent the exportation of commercial LLRW generated within the compact region. In the absence of Congressional approval, such restrictions would be unconstitutional. However, in the case of an LLRW compact, since the authority is found in Congressionally approved legislation, the exportation restriction is immune from Commerce Clause attack.

All of the radioactive waste compacts confer authority that would otherwise be precluded under the dormant Commerce Clause powers. Most, if not all, of the compacts confer the power to prevent in-compact generators from shipping waste to other than compact-operated facilities. The obvious purpose is to ensure the financial viability of compact facilities by attempting to guarantee a certain minimum waste stream. A few of the compacts also appear to have authority to prevent the establishment of other private waste management facilities within the entire compact region, including within those in-compact states which are not hosting compact disposal facilities.

THE LLRW POLICY ACT

The LLRW Policy Act was enacted in 1981. The Act called upon states to provide for the disposal of commercial LLRW generated within their borders. The main impetus for the Act was the prospect that the three sited states, Washington, Nevada, and South Carolina, would attempt to deny out-of-state generators access to the existing facilities within those states.

One attempt to block access occurred by means of a statewide referendum in Washington in 1980. The law prohibited the transportation and storage of out-of-state LLRW. This prohibition was struck down as being contrary to the Commerce Clause (10). (The law also violated the Supremacy Clause. The site was owned by the federal government, which leased it to the state, which in turn leased it to a commercial operator. The federal government, a co-plaintiff in this case, had not surrendered to the state the right to so limit disposal operations.) Further attempts to deny access to existing sites were deemed likely, and this provided an incentive for passing the Act.

Passage of the Act was also motivated by the expectation that waste volumes would increase dramatically through time, forcing existing disposal sites to reach capacity quickly. This never happened; indeed, in the last decade there has been a drastic reduction in the volumes of LLRW shipped for disposal. Nationwide, rather than increasing dramatically, LLRW volumes have declined by about fifty percent from 1980 through 1989. It is anticipated that waste volumes could decline by another half again by 1993 (11). (Decreased volumes of waste will result in extremely high disposal fees, possibly jeopardizing the economic viability of the many currently planned disposal facilities.)

In January 1986, dissatisfied with the progress which had occurred to that time, Congress significantly modified the Act. The revisions direct explicit commands to the states in terms of deadlines for various milestones related to facility establishment. Moreover, a punishment was created for states that

failed to comply. The 1985 LLRW Policy Amendments Act (LLRWPAA) creates the ultimate sanction in that it requires noncomplying states to assume liability for damages arising from their failure to take possession of LLRW by January 1, 1996.

A federal Act forcing a state to assume some private liability for failure to follow the Act's dictates would have been unthinkable for more than 200 years of our nation's history. However, that changed in 1985 with Garcia v. San Antonio Metropolitan Transit Authority (12). In Garcia, the issue was whether the wage and hour limitations of federal law would also apply to the state-operated mass transit system. A 5-4 majority of the Court answered affirmatively, stating that henceforth the political process would be the primary mechanism for preserving states' rights under the Constitution.

Supporters of the LLRWPAA have argued that the Act represents a paradigm of proper functioning of the political process. They point to the National Governors' Association's (NGA's) support for the bill as well as statements by Senator Daniel P. Moynihan (D-NY). (Supporters have blatantly misrepresented the facts; their efforts to associate NGA support with the "take title" provision of the bill are misleading, since the NGA had opposed this concept.) However, the issue to be decided is not who supported the law and when. The issue is whether the Supreme Court or some other body such as the general electorate or the NGA will be the final arbiter of the balance of power between the federal and state governments.

We submit that, under the Constitution, it is the Supreme Court that must be that final arbiter. If every member of Congress and every governor were to agree to give away basic states' rights, it would be to no avail. It must be the function of the Court to preserve the framework of our federal system.

The high Court's concern for states' rights was recently highlighted in Gregory v. Ashcroft (13). This case held that federal age discrimination legislation did not preempt a state law that established a maximum retirement age for state judges. While the decision was couched in terms of statutory interpretation, it raises issues concerning the indestructibility of states' rights and constitutional limitations on federal powers.

In our opinion, the LLRWPAA represents the greatest intrusion upon states' rights that has ever been imposed by the federal government. Upholding the right of the federal government to issue affirmative commands to the states would drastically alter the balance of power under the Constitution.

POLICY ISSUES FOR THE FUTURE

There is a strong theoretical basis for treating waste transportation and disposal like any other transaction under the Commerce Clause. To allow the creation of artificial barriers might temporarily benefit one state; however, as the Court pointed out in City of Philadelphia v. New Jersey, it might only be a matter of time before such barriers would harm that same state. The Court rightly takes great care in preserving the concept of our nation as one economic unit. In its own words, considering the United States as one economic entity "has advanced the solidarity and prosperity of the Nation" and helped it to become "the most impressive in the history of commerce." Since the physical qualities (climate, geology, etc.) of certain geographic regions make them more technically suitable, and hence more economically conducive, for waste management, the Court will continue to protect the option to export and import waste.

This interest need not and should not interfere with a state's responsibility to protect the health and welfare of its citizens. The state has a strong, legitimate interest in protecting its citizens' welfare. Moreover, it has a responsibility to do so. The authority afforded the state to protect its citizens should be commensurate with that responsibility. Thus, states should be permitted to regulate more stringently than the federal government. Health and welfare issues are most appropriately resolved through state licensing processes. In addition, the effectiveness of these processes may be further enhanced by already existing mechanisms.

The waste generators are the principal participants in the waste disposal marketplace, and primary responsibility for disposal should be placed on them. Generators should bear the burden of demonstrating that the waste can be safely managed. It is they who should be responsible for waste management and for negotiating compensation. If they fail in that marketplace, they should not be generating the waste.

If a state voluntarily assumes the task of providing a waste disposal service, that should be its prerogative. However, no state should be forced into the waste disposal business. Experience teaches that governments are poor regulators of themselves. Our nation's experience with municipal construction and operation of wastewater treatment plants is a good example. Enforcement and oversight is usually greater over a private enterprise, which is often held to a higher standard. On the other hand, states are sometimes better suited to assume the risks and costs of a new enterprise, and they may provide a valuable learning experience that might not otherwise be forthcoming. Ultimately, however, the decision of whether to participate in a particular market (and to what degree) must be the state's.

Where a state has decided to participate in the waste disposal marketplace, its ability to act as proprietor to exclude out-of-state wastes seems clear. Yet, this matter is often portrayed as uncertain, especially by opponents of siting efforts. Unquestionably, a state's ability to exclude out-of-state waste in these circumstances is a matter of high public importance; without it, states would not directly undertake a wide variety of public benefit projects. Such endeavors are important to the nation as well as to the particular state. The "market-participant" right should be reaffirmed and ratified in law to remove any perceived doubt.

With regard to LLRW disposal, states are being forced to enter a particular market. The LLRWPAA does not afford the protections to "go-it-alone" states that it provides to states that enter compacts.

In the LLRW disposal scheme, compacts serve a useful purpose. In particular, they allow the compact states to be reasonably sure of recovering the costs of facility development. This is done by Congress' authorizing the compact to require that all compact-generated waste be disposed of in the compact facility. Compacts have relied on this measure to attempt to ensure economic viability of the proposed facilities; it is thus reasonable and preferable that compacts be permitted to restrict the flow of waste in this manner. This is a benefit, however, which "go-it-alone" states like New York do not possess. In general, Congress should be very hesitant to grant export control powers to state or local governments. In the

case of LLRW, such legislation is warranted, however. Without it, "go-it-alone" states face a potentially enormous gamble.

In contrast, it is very difficult to reconcile any flat prohibition on management facilities in an entire compact area with the principles and benefits of a free market. Such prohibitions are the ultimate expression of NIMBY-ism, and they have been sanctioned by Congress. Given this oppressive conflict, they should be removed.

In January 1990, the Supreme Court granted a writ of certiorari, agreeing to hear the appeal of New York State's, Cortland County's, and Allegany County's constitutionality challenge of the LLRWPAA. Even in the event that the Act survives Supreme Court review unscathed, it should be amended. The LLRWPAA is based on several erroneous assumptions - - that waste volumes would increase greatly; that storage is not a viable management option; that all areas of the country are suitable for waste disposal; and that technical problems in disposal facility design and construction will be easily overcome. [The U.S. Geological Survey indicates, however, that not all states are likely to be suitable for radioactive waste disposal and that the technical problems are quite significant (14, 15).] Moreover, the Act abandons free market principles which have served as the foundation for this nation's economy and its success.

To briefly summarize, the LLRW Policy Act should be amended as follows:

1. The oppressive and punitive "take title" provision should be removed.
2. States should be permitted to oversee storage as a management alternative.
3. "Go-it alone" states which build their own facilities should be authorized to require that all waste generated in the state be sent to the state disposal facility.
4. Compacts should retain the ability to guarantee their waste streams by precluding the exportation of waste produced by in-compact generators.
5. The federal authority of a compact to prevent any commercial disposal ventures in the entire compact region should be withdrawn.
6. The existing right of a state as proprietor to exclude out-of-state waste from its own facility should be reaffirmed in the law.
7. The right of a state to impose environmental standards that are stricter than the federal government's should be established.

The strident efforts being undertaken to see the LLRWPAA upheld raise numerous concerns. We question what will be gained if the Supreme Court upholds the Act. The stage has already been set for mass civil disobedience - and *unfortunately* much worse. Heightened conflict will prompt greater public awareness and resolve against forceful siting attempts. There will undoubtedly be many more legal battles before the reality of "take title" has been settled. Ironically, the flurry of activity that the Act has precipitated has accomplished little in terms of providing for effective management of commercial LLRW.

It appears that implementing the Act in its present form will be detrimental to the industry as well as to the public. If processes continue on their present courses, confrontations will intensify, enhancing negative perceptions of the industry. Additionally, the Act is prompting the construction of too many disposal sites, which will result in artificially inflated disposal fees; this will jeopardize the economic viability of facilities with respect to both operation and maintenance. Finally, facilities will be constructed in regions that are far less naturally suited than what otherwise might have been chosen, leading to failed containment and costly cleanup.

In its present form, the LLRWPAA seems to be creating more waste management problems than it is resolving. Indeed, it sends a clear message to the public that LLRW cannot be managed safely. By relying on the Act to remedy the waste management dilemma, the industry has bypassed one of the few readily available opportunities to bolster its credibility. Unfortunately for all concerned, it has instead promoted strategies that may prolong the present, ill-fated system. In our opinion, these actions cannot prevent a much needed revisiting of the LLRWPAA and the principles it embodies.

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