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# Discussion Following the Remarks of Dr. Schaefer and Mr. De

Discussion

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## DISCUSSION FOLLOWING THE REMARKS OF DR. SCHAEFER AND MR. DE

COMMENT, MR. McLLROY: Thank you very much. I would like to open the floor up for questions. To make sure that we have an accurate transcript, please make sure you have a microphone and identify yourself. Does anybody have a question?

QUESTION, MS. DALLMEYER: This is a question for Matthew. I know that there are regional compacts among the states for low-level nuclear waste disposal,<sup>1</sup> but why do you think that compacts regarding solid waste disposal would not be subject to the same sort of 7-2 decision in the Supreme Court, under which individual state or county requirements have been struck down?

ANSWER, DR. SCHAEFER: For the states to do the compacts, they would need Federal government approval; and that is why I say the U.S. federal government ought to get together with the Canadian federal authorities and create very minimal, flexible, phased in requirements that would allow such compacts to go forward.

The other interesting thing is that in the low level nuclear waste area, the Feds actually used three techniques to encourage the states. First, they gave the states conditional funding, saying that, basically, we are going to give you money if you meet minimum guidelines. Second, they said, if you do not meet the guidelines, we were eventually going to allow the other states, by increasing their fees against you, to gradually shut you out. Third, they said, you are going to have to “take title” of the waste from the private operators in your state. The “take-title” provision was struck down by the Supreme Court,<sup>2</sup> but the other two incentives – conditional funding and gradual ratcheting up pressure through restrictions – are still possible.

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<sup>1</sup> See Audeen W. Fentiman et al., *Low-level Radioactive Waste Compacts*, at [http://www.ag.ohio-state.edu/~rer/rerhtml/rer\\_61.html](http://www.ag.ohio-state.edu/~rer/rerhtml/rer_61.html) (last visited July 9, 2002).

<sup>2</sup> See *New York v. U.S.*, 505 U.S. 144 (1992). Portions of the Low-Level Radioactive Waste Policy Act, requiring states to “take title” of low-level nuclear waste created by the nuclear power plants in the state, were declared unconstitutional by the U.S. Supreme Court:

Because the Act’s take title provision offers the States a “choice” between the two unconstitutionally coercive alternatives – either accepting ownership of waste or regulating according to Congress’ instructions – the provision lies outside Congress’ enumerated powers and is inconsistent with the Tenth Amendment. On the one hand, either forcing the transfer of waste from generators to the States or requiring the States to become liable for the generators’ damages would “commandeer” States into the service of federal regulatory purposes. On the other hand, requiring the States to regulate pursuant to Congress’ direction would present a simple unconstitutional

You might say that the dormant Commerce Clause jurisprudence placed all the leverage with the exporting states and none with importing states, but I also mentioned the fact that importing states continue to limit out-of-state waste through various techniques. The states have become very creative; and I will just mention a couple that have not been tested by the Court, but if they were, they might be rejected.

Michigan has a “bottle bill;” you have to pay a 10-cent deposit.<sup>3</sup> Therefore, Michigan solid waste does not contain plastic bottles. Toronto, on the other hand, does not have a bottle bill. Some of the waste coming into Michigan has plastic bottles in it. Michigan can then say, when it rejects waste from Toronto, we are not blocking out-of-state waste; we are just saying if you are going to deposit waste in Michigan landfills, it cannot have plastic bottles in it. That might be upheld; but, then again, it might not be. It might simply act as an incentive for Toronto to enact a bottle bill. Rather than these importing states being creative and extracting some leverage that way, we ought to think of flexible common minimum standards between the two governments.

ANSWER, MR. DE: Under Toronto’s 4R’s recycling initiatives, we use blue boxes to collect all of our plastic bottles, but there is probably quite a few situations where people throw their plastic bottles into the garbage, even though it should not be there. Even if we were to institute a bottle bill, there might still be occasional incidences of mixing of plastic bottles.

COMMENT, MR. McLLROY: That is interesting. I have to confess, I do put my plastic bottles in those blue boxes, but I will not do that anymore.

QUESTION, MR. CHARNOVITZ: This question is mainly for Matt. I can see the notion of “waste as a good” may be a sound market approach, but I am wondering whether your suggestion that our constitutional law provides for a market approach is the only way to look at it. Waste is a highly regulated field; there are no transactions between individuals that are not regulated by government. In fact, it is government trade. It seems to me if you look at the government as an economic actor, the market approach would be simply to let the governments work it out as buyers and sellers for whatever price they work out. South Carolina does not want trade from Colorado, so you would make the price high; the same would go for Philadelphia and New Jersey. The market approach would be *laissez-faire*. The Supreme Court is not glorifying or imposing a market approach, but rather, it is imposing an anti-discrimination law or regulatory approach that is quite different.

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command to implement legislation enacted by Congress. Thus, the States’ “choice” is no choice at all.

505 U.S. at 146.

<sup>3</sup> See MICH. COMP. LAWS ANN. §§ 445-571, 445-572, 445-573 (West 2002).

ANSWER, DR. SCHAEFER: That is a fair point. When I speak of the market model, it should be referred to as a non-discrimination model. Obviously, there are heavy regulations in this area, but what the court is saying is that there are to be no barriers to out-of-state of waste. It will likely come up on a trade agreement challenge as well. So, is garbage a good? The Supreme Court has said that the trade in garbage is commerce.<sup>4</sup> The difference between garbage transactions and other types of commerce is that the person delivering the product is paying money. Therefore, it really is a service transaction, and the Court noted, in more recent cases, that the delivery of services is commerce, and that when you erect a barrier, you are essentially blocking interstate service transactions from taking place.<sup>5</sup>

On your point – why not just treat the governments as the actors they are – there are some recent cases that show how states can get around the dormant Commerce Clause. There is something called the “market-participant” exception; that is, when a state is acting as a buyer or seller, they are typically exempt from dormant Commerce Clause transactions.<sup>6</sup> However, states have to be careful that its actions are not having a regulatory effect on private market actors. For example, in a recent case, a state became a market participant by using tax dollars to buy the waste disposal service for its constituents, and retained an open-bidding practice to allow both out-of-state and in-state companies to provide that service. Some lower courts have ruled that this is permissible. Hence, there may be some ways to use the “market-participant” exception to get around some of the commerce-clause jurisprudence.

QUESTION, MS. VERDUN: It seems to me that discrimination has an immediate appeal to the area’s residents, but if you are trying to get away from discrimination and still tackle the problem, there are three options: regulation of standards, incentives to reduce waste, and disincentives or charges. I was wondering if you have looked at other countries to see how different methods have been successful in tackling the problem. In European countries, where there is even less land for landfill, they must have had some success, unless there are barges of waste coming across the ocean of which I am not aware. I would be interested in your thoughts on how other countries have done this and which of those three methods is the most useful.

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<sup>4</sup> Garbage is an “[article] of commerce.” *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978).

<sup>5</sup> See *C & A Carbone v. Clarkstown*, 511 U.S. 383, 391 (1994) (“[T]he article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it.”).

<sup>6</sup> See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (“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.”).

ANSWER, DR. SCHAEFER: It is very complicated. This is going to be a generalization because I do not have full knowledge or an understanding of the European system; what I do know is they tend to side a little bit more towards the "proximity" model, allowing regions to shun out-of-jurisdiction waste. Again, it is one thing to consider how others handle it. But is that the way to go? We probably should look at other models and see if they work. I would re-emphasize the idea that you will eventually need some minimal standards that are as flexible as possible; otherwise, it is a question of who has the most leverage. If Michigan adopts rigorous waste reduction efforts and they continue to take garbage from people that do not, it is a political problem. People in Michigan will ask, why are we recycling? Why do we have a bottle bill when bottles are coming into our landfills anyway? Then the question becomes, who has the leverage to change the other side? Right now, because states cannot erect barriers, all the leverage is on the side of the garbage exporters. It seems to me that it will be necessary for the federal government to step in, at least to a minimal extent.

QUESTION, MR. KING: I was wondering, is there any role that the North American Commission on Environmental Quality can play in this situation?

ANSWER, DR. SCHAEFER: I think this is one of the things that the Commission could study and then make a few recommendations. Similar things are happening with Mexico; there are some U.S. states that are getting Mexican garbage, as hazardous waste in the *maquilladora* region is coming in to the U.S. for processing and disposal.

In just getting back to the Supreme Court's rationale in the dormant Commerce Clause case: we do not want balkanization; the U.S. economy must be integrated, and we should take the benefits of integration along with its burdens. In fact, Rudy Giuliani said this in a way that I am not certain is great for selling it politically, "Virginia, stop complaining about our waste. We provide the entertainment and financial services for the country, and you are going to provide the landfill space."<sup>7</sup> We are in this together. However, I think with the Canadian, Mexican, and U.S. economies being integrated as they are now with NAFTA, this is a common problem that we have to share, and it will take cooperation to deal with it.

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<sup>7</sup> See *Mayor Giuliani Tempers His Trash Talk as Virginia Objects to N.Y. Garbage Run*, STAR-LEDGER (Newark, N.J.), Jan. 19, 1999, at 37:

[P]eople in Virginia like to utilize New York because it is a culture center and business center. What goes along with being a cultural and a business center is you're very crowded. . . We don't have room here to handle the garbage that's produced not just by New Yorkers, but the 3 million more people who come here that utilize the place every day. . . This is a reciprocal relationship.

QUESTION, MR. McLLROY: I would like to ask one quick question. Matt, you mentioned plastic bottles, and I know there have been complaints from U.S. brewers about the Ontario requirement mandating reusable bottles, as U.S. brewers ship in cans. Do you think we are going to see waste management/environmental measures used as a non-tariff barrier?

ANSWER, DR. SCHAEFER: There is always that risk. At various times, there have been threats to challenge these laws in terms of paper recycling laws, *et cetera*. My fear is that some congressman will say, "You know, let us allow the states to restrict garbage inflows, and if there are NAFTA problems, we will just see how it turns out." I think that is risky because then some are going to get the impression that NAFTA is an anti-environment document; and that NAFTA is the force that is preventing the states from doing just that. That is why the governments must cooperate. When you are talking about intergenerational problems, governments think short term. They react to crises; they are simply too busy to do otherwise. So how do you motivate them? I am not sure that there is a way to motivate the governments on it other than to persuade the CEC to undertake studies so as to put some sunshine on the issue, which in turn would put some pressure on the governments. Ultimately, political leadership will get it done. I do think that if the importing states continue to tinker with the laws, they will tilt the scales a little more in their favor. For instance, if Michigan regulations say that no bottles in trash will be accepted there, and if that survives dormant Commerce Clause scrutiny, that will alter the leverage a little bit. I think it is going to be a combination of all of those – political leadership, importing states that (whether we want them to or not) tinker with their own laws, and international bodies spreading some sunshine through studies.

COMMENT, MR. McLLROY: I would like thank both Matt and Ken for giving such a stimulating talk. I will close in the manner Matt started by thanking you for coming up to talk some trash with us.

