SUPREME COURT OF THE UNITED STATES

No. 91–636

FORT GRATIOT SANITARY LANDFILL, INC., PETITIONER
v. MICHIGAN DEPARTMENT
OF NATURAL RESOURCES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 1, 1992]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE BLACKMUN joins, dissenting.

When confronted with a dormant Commerce Clause challenge "[t]he crucial inquiry . . . must be directed to determining whether [the challenged statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978). Because I think the Michigan statute is at least arguably directed to legitimate local concerns, rather than improper economic protectionism, I would remand this case for further proceedings.

The substantial environmental, aesthetic, health, and safety problems flowing from this country's waste piles were already apparent at the time we decided *Philadelphia*. Those problems have only risen in the intervening years. 21 Envt. Rep. 369–370 (1990). In part this is due to increased waste volumes, volumes that are expected to continue rising for the foreseeable future. See United States Environmental Protection Agency, Characterization of Municipal Solid Waste in the United States: 1990 Update 10 (municipal solid wastes have increased from 128.1 million tons in 1975 to 179.6 million tons in 1988, expected to rise to 216 million tons by the year 2000); *id.* at ES-3 (1988 waste was the equivalent of 4.0 pounds per person per day, expected to rise to 4.4 pounds per person by the year 2000). In part it is

due to exhaustion of existing capacity. *Id.*, at 55 (landfill disposals increased from 99.7 million tons in 1975 to 130.5 million in 1988); 56 Fed. Reg. 50980 (1991) (45% of solid waste landfills expected to reach capacity by 1991). It is no secret why capacity is not expanding sufficiently to meet demand—the substantial risks attendant to waste sites make them extraordinarily unattractive neighbors. *Swin Resource Systems, Inc.* v. *Lycoming Cty.*, 883 F. 2d 245, 253 (CA3 1989), cert. denied, 493 U. S. 1077 (1990). The result, of course, is that while many are willing to generate waste—indeed, it is a practical impossibility to solve the waste problem by banning waste production—few are willing to help dispose of it. Those locales that do provide disposal capacity to serve foreign waste effectively are affording reduced environmental and safety risks to the States that will not take charge of their own waste.[1]

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[1]I am baffled by the Court's suggestion that this case might be characterized as one in which garbage is being bought and sold. See *ante*, at 5. There is no suggestion that petitioner is making payment in order to have garbage delivered to it. Petitioner is, instead, being paid to accept the garbage of which others wish to be rid. There can be little doubt that in accepting this garbage, petitioner is also imposing environmental and other risks attendant to the waste's delivery and storage.

The State of Michigan has stepped into this quagmire in order to address waste problems generated by its own populace. It has done so by adopting a comprehensive approach to the disposal of solid wastes generated within its borders. The legislation challenged today is simply one part of a broad package that includes a number of features: a state-mandated state-wide effort to control and plan for waste disposal, Mich. Comp. Laws §§299.427 and 299.430 (1984 and Supp. 1991), requirements that local units of government participate in the planning process, *ibid.* and §299.426 (Supp. 1991), restrictions to assure safe transport, §299.431 (1984), a ban on the operation of a waste disposal facilities unless various design and technical requirements are satisfied and appropriate permits obtained, *ibid.* and §299.432a (Supp. 1991), and commitments to promote source separation, composting, and recycling, §299.430a (Supp. 1991). The Michigan legislation is thus quite unlike the simple outright ban that we confronted in *Philadelphia*.

In adopting this legislation, the Michigan Legislature also appears to have concluded that, like the State, counties should reap as they have sown—hardly a novel proposition. It has required counties within the State to be responsible for the waste created within the county. It has accomplished this by prohibiting waste facilities from accepting waste generated from outside the county, unless special permits are obtained. In the process, of course, this facially neutral restriction (i.e. it applies equally to both interstate and intrastate waste) also works to ban disposal from out-of-state sources unless appropriate permits are procured. But I cannot agree that such a requirement, when imposed as one part of a comprehensive approach to regulating in this difficult field, is the stuff of which economic protectionism is made.

If anything, the challenged regulation seems likely

to work to Michigan's economic disadvantage. This is because, by limiting potential disposal volumes for any particular site, various fixed costs will have to be recovered across smaller volumes, increasing disposal costs per unit for Michigan consumers. 56 Fed. Reg. 50987 (1991). The regulation also will require some Michigan counties— those that until now have been exporting their waste to other locations in the State—to confront environmental and other risks that they previously have avoided. Commerce Clause concerns are at their nadir when a state act works in this fashion—raising prices for all the State's consumers, and working to the substantial disadvantage of other segments of the State's population—because in these circumstances "`a State's own political processes will serve as a check against unduly burdensome regulations.'" *Kassel* v. *Consolidated Freightways Corp. of Delaware*, 450 U. S. 662, 675 (1981) (quoting *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U. S. 429, 444, n.18 (1978)). In sum, the law simply incorporates the commonsense notion that those responsible for a problem should be responsible for its solution *to the degree they are responsible for the problem but not further*. At a minimum, I think the facts just outlined suggest the State must be allowed to present evidence on the economic, environmental and other effects of its legislation.

The Court suggests that our decisions in *Brimmer* v. *Rebman,* 138 U. S. 78 (1891), and *Dean Milk Co.* v. *Madison,* 340 U. S. 349 (1951), foreclose the possibility that a statute attacked on Commerce Clause grounds may be defended by pointing to the statute's effects on intrastate commerce. But our decisions in those cases did not rest on such a broad proposition. Instead, as the passages quoted by the Court make clear, in both *Brimmer* and *Dean Milk* the Court simply rejected the notion that there could be a noneconomic protectionist reason for the bans at

issue, because the objects being banned presented no health or environmental risk. *See Brimmer*, 138 U. S., at 83 ("[i]f the object of Virginia had been to obstruct the bringing into that State, for uses as human food, of all beef, veal and mutton, *however wholesome*" (emphasis added)); see *also ibid.* (comparing the statute to one which bans meat from other States "in whatever form, and although *entirely sound and fit* for human food") (emphasis added); *Dean Milk*, 340 U. S., at 354 (the statute "excludes from distribution in Madison *wholesome* milk" (emphasis added)). It seems unlikely that the waste here is "wholesome" or "entirely sound and fit." It appears, instead, to be potentially dangerous—at least the State has so concluded. Nor does the legislation appear to protect "a major local industry against competition from without the State." *Ibid.* Neither *Dean Milk* nor *Brimmer* prohibits a State from adopting health and safety regulations that are directed to legitimate local concerns. See *Maine* v. *Taylor*, 477 U. S. 131 (1986). I would remand this case to give the State an opportunity to show that this is such a regulation.

We confirmed in *Sporhase* v. *Nebraska*, 458 U. S. 941 (1982), that a State's effort to adopt a comprehensive regime to address a major environmental threat or threat to natural resources need not run afoul of the Commerce Clause. In that case we noted that "[o]bviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State." *Id.*, at 955–956. Substitute "attractive and safe environment" for "water" and one has the present case. Michigan has limited the ability of its own population to despoil the environment and to create health and safety risks by excessive and uncontrolled waste disposal. It does not thereby violate the Commerce Clause when it

seeks to prevent this resource from being exported—the effect if Michigan is forced to accept foreign waste in its disposal facilities. Rather, the "resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage." *Id.* at 957. Of course the State may choose not to do this, and in fact, in this case Michigan does permit counties to decide on an individualized basis whether to accept out-of-county waste. But such a result is not constitutionally mandated.

The modern landfill is a technically complex engineering exercise that comes replete with liners, leachate collection systems and highly regulated operating conditions. As a result, siting a modern landfill can now proceed largely independent of the landfill location's particular geological characteristics. See 56 Fed. Reg. 51009 (1991) (EPA-approved "composite liner system is designed to be protective in all locations, including poor locations"); *id.*, at 51004–51005 (outlining additional technical requirements for only those landfill sites (1) near airports, (2) on floodplains, (3) on wetlands, (4) on fault areas, (5) on seismic impact zones, or (6) on unstable areas). Given this, the laws of economics suggest that landfills will sprout in places where land is cheapest and population densities least. See Alm, ``Not in My Backyard:'' Facing the Siting Question, 10 EPA J. 9 (1984) (noting the need for each county to accept a share of the overall waste stream equivalent to what it generates so that "less populated counties are protected against becoming the dumping ground of the entire region"). I see no reason in the Commerce Clause, however, that requires cheap-land States to become the waste repositories for their brethren, thereby suffering the many risks that such sites present.

The Court today penalizes the State of Michigan for what to all appearances are its good-faith efforts, in

turn encouraging each State to ignore the waste problem in the hope that another will pick up the slack. The Court's approach fails to recognize that the latter option is one that is quite real and quite attractive for many States—and becomes even more so when the intermediate option of solving its own problems, but only its own problems, is eliminated.

For the foregoing reasons, I respectfully dissent.