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Love of Landfill: Trashing the Maine Constitution to Solve a Garbage Problem

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I. Introduction

The human family is engaged in a noble struggle against the law of entropy, seeking to turn back or at least retard the inexorable process by which all matter in the known universe passes from useful to useless form. The political and legal system generally refers to useless matter as solid waste; in Maine the Legislature has chosen to wage this struggle against entropy and discourage production of entropic by-products through the enactment of the state’s first comprehensive waste management law, “An Act to Promote Reduction, Recycling and Integrated Management of Solid Waste and Sound Environmental Regulation” (hereinafter “the Act”).

In broad terms, the Legislature sought to discourage the production of solid waste through the establishment of a solid waste hierarchy that makes the reduction of waste generation the top priority, and “land disposal of waste” the least preferable of five identified alternatives to reduction. The Act set forth ambitious recycling goals and established the Maine Waste Management Agency as the

1. The Author wishes to thank the following people, whose insight, comments, and time were of invaluable assistance in the preparation of this Comment: Attorney Martha Gaythwaite; T. William Glidden of the Maine Legislature’s Office of Policy and Legal Analysis; Professor Alison Rieser of the University of Maine School of Law; Attorney Jeffrey A. Thaler; Maine Representative Sharon A. Treat; Henry Warren, Director of the Office of Siting and Disposal Operations at the Maine Waste Management Agency.

Thanks are also due to Maine Times, for unwittingly underwriting countless hours of useful legal and field research on this subject during the Author’s tenure as a staff writer at the newspaper prior to undertaking the study of law.


3. It is the policy of the State to plan for and implement an integrated approach to solid waste management, which shall be based on the following order of priority:
   A. Reduction of waste generated at the source, including both amount and toxicity of waste;
   B. Reuse of waste;
   C. Recycling of waste;
   D. Composting of biodegradable waste;
   E. Waste processing which reduces the volume of waste needing land disposal, including incineration; and
   F. Land disposal of waste.

4. The Act specified that Maine should recycle 50% of its municipal solid waste generated each year by 1994, with an “interim goal” of 25% to be achieved by 1992. Id. § 2132(1).
branch of state government with primary responsibility for achieving the goals of the legislation.\textsuperscript{5} The most controversial aspect of these reforms in solid waste policy has been, undoubtedly, the provisions mandating that the Agency identify Maine's need for additional landfill capacity and then proceed to build and operate such facilities as are needed to meet this capacity.\textsuperscript{6} The Agency's initial effort to choose two "special waste" landfill sites, one in southern Maine and another in the northern section of the state, was a failure; on January 9, 1992, the Agency's Facility Siting Board unanimously rejected the last of the proposed sites despite the Agency's expenditure of $400,000 in consulting fees and studies over a period of more than two years.\textsuperscript{7} The Agency thus was unable to meet its statutory deadline of March 1, 1992 to identify disposal capacity sufficient to meet Maine's needs through 1995.\textsuperscript{8} By mid-1992, the Agency had changed course and was openly admitting that there may not have been such a pressing need for additional capacity after all; the official in charge of the siting project admitted that a commercial facility just over the New

\begin{itemize}
\item 5. Id. § 2102.
\item 6. Id. §§ 2151-2164.
\item 7. "Special waste" is defined as:
\begin{itemize}
\item [A]ny solid waste generated by sources other than domestic and typical commercial establishments that exists in such an unusual quantity or in such a chemical or physical state, or any combination thereof, that may disrupt or impair effective waste management or threaten the public health, human safety or the environment and requires special handling, transportation and disposal procedures. Special waste includes, but is not limited to:
\begin{itemize}
\item A. Oil, coal, wood and multifuel boiler and incinerator ash;
\item B. Industrial and industrial process waste;
\item C. Waste water treatment plant sludge, paper mill sludge and other sludge waste;
\item D. Debris and residuals from nonhazardous chemical spills and cleanup of those spills;
\item E. Contaminated soils and dredge spoils;
\item F. Asbestos and asbestos-containing waste;
\item G. Sand blast grit and non-liquid paint waste;
\item I. High and low \textit{pH} waste;
\item J. Spent filter media and residue; and
\item K. Other waste designated by the [Board of Environmental Protection], by rule.
\end{itemize}
\end{itemize}
\end{itemize}
\begin{itemize}
\item Id. § 1303-C(34).
\item In general, the "special waste" designation is designed to achieve a regulatory middle ground between garden variety municipal solid waste (i.e., common household trash) and hazardous waste.
\end{itemize}
Hampshire border would meet Maine's needs in the immediate future and the Maine siting project would therefore refocus on creating a "safety net" in the event the New Hampshire facility was no longer available.\textsuperscript{10}

This Comment represents an effort to assess Maine's landfill siting process, to identify constitutional flaws in the statutory and regulatory approach that contributed to the 1992 siting deadlock, and to make proposals for legislative and regulatory reform designed to address Maine's waste disposal needs while remaining sensitive to environmental concerns and the unpopularity of solid waste facilities among their proposed neighbors. In essence, the recommendation is that Maine get out of the landfill business itself while adopting a series of strict safeguards designed to assure that entities remaining in the landfill business do not site or operate their facilities capriciously.

II. PRELUDE: TRASH TO CASH AND ASH

Nineteen eighty-six was a year of crisis for Maine with respect to garbage. The advent of strict environmental regulations had brought an end to the dominance of the "town dump" as the final resting place for most of Maine's household trash. As a result, most Maine municipalities had turned to the private sector to provide disposal capacity via either commercially developed "secure" landfills\textsuperscript{11} or the construction of so-called "waste-to-energy" facilities that burn garbage and generate electricity for sale to local utilities or steam for local industry.\textsuperscript{12} Maine's two major commercial secure landfills\textsuperscript{13} were the only facilities in the state that could legally accept ash from local incinerators. Demand for commercial landfill space from neighboring, more populous states also made it financially advantageous for Maine landfill operators to import waste from beyond Maine's borders. A York County businessman therefore sought to

\textsuperscript{10} Telephone Interview with Henry Warren, Director of the Office of Siting and Disposal Operations, Maine Waste Management Agency (July 13, 1992). For a further discussion of the Agency's 1992 siting efforts, see infra notes 83-87 and accompanying text.

\textsuperscript{11} A "secure" landfill is one that includes a series of plastic and/or clay liners and a system for the collection of leachate (meaning liquids leaching out of the disposed waste pile). Me. Dept of Envtl Protection Reg. 400, § 1 (AAAA) (May 24, 1989). The purpose of such safeguards is to prevent toxins from leaking into the groundwater around the landfill site, a preventive measure that was wholly absent from the unlined, municipal landfills that had been the norm for much of the twentieth century. Bill Breen, Lifting the Lid: Garbage Dictionary, Garbage, Jan.-Feb., 1992, at 13.

\textsuperscript{12} For an overview of Maine's solid waste situation at the close of 1986, see Donald M. Kreis, Big Bucks, Big Promises: Boston University, Central Maine Power, and a Lot of Others Apparently Got Taken In, ME. TIMES, Dec. 12, 1986, at A16.

\textsuperscript{13} The Consolidated Waste Services landfill is in Norridgewock and the Sawyer Environmental Resources Facility is in Hampden.
create a lucrative Maine commercial landfill monopoly by acquiring control of the two existing landfills and developing a third site, the so-called Hebo-Hybo landfill in Lebanon, Maine. The consumer fraud and antitrust division of the state attorney general’s office eventually intervened to prevent such a market domination, and the Legislature responded with a one-year moratorium on landfill development followed, in 1987, with provisions designed to assure that environmental permits would go only to those commercial landfills that met Maine’s “capacity needs” rather than demand from beyond the state’s borders.

A test of this new capacity needs process came in 1988 when the owners of Maine’s two major privately developed waste-to-energy facilities, the Maine Energy Recovery Company (MERC) plant in Biddeford and the Penobscot Energy Recovery Company (PERC) facility in Orrington, filed an application with the Board of Environmental Protection (BEP) and the Land Use Regulation Commission (LURC) to construct a landfill repository for ash and other by-products. The proposed location of the facility was a site

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15. State v. Trainor, CV-87-260 (Me. Super. Ct., Ken. Cty., June 11, 1987) (Brody, J.) (Consent Decree of William Trainor Sr.). Allegations of fraud also swirled about the proposed monopoly, which was known as Eastern States Management. The demise of Eastern States Management began in the summer of 1986 when Central Maine Power (CMP) abruptly cancelled preliminary plans to work with Eastern States on developing a new waste-to-energy plant at CMP’s Mason Station in Wiscasset. CMP apparently balked because the chairman of Eastern States had allegedly sought to conceal his criminal record from utility officials. See Clark T. Irwin, Signature Disparity Kills Deal, PORTLAND PRESS HERALD, Aug. 12, 1986, at B1. It is generally conceded that the controversy involving Eastern States Management, and the emphatic local opposition to the proposed Hebo-Hybo landfill, contributed to the sense in state government that waste disposal was in a state of crisis and required prompt legislative action.
17. ME. REV. STAT. ANN. tit. 38, § 1310-N(1) (West Supp. 1990-1991). The statute requires the Maine Board of Environmental Protection (BEP) to license only those landfills that provide a “substantial public benefit,” defined as a facility that will serve to satisfy the capacity needs identified pursuant to § 1310-O. Id. § 1310-N(3)(A). Section 1310-O, since repealed, called for the BEP to analyze the state’s need for waste facilities every two years. See P.L. 1987, ch. 517, § 25. Section 2121, added in 1989, now vests the responsibility for creating that analysis in the Office of Planning of the Waste Management Agency. ME. REV. STAT. ANN. tit. 38, § 2121 (West Supp. 1991-1992).
19. The other by-products consist largely of “front-end waste,” meaning waste that was considered unsuitable for combustion, as opposed to ash, which is what remains of the burned waste following combustion. Me. Dep’t of Envtl. Protection Reg. 400, § 1(NN) (May 26, 1989).
in Township 30 in Washington County, Maine's easternmost county. While the Township 30 proposal was pending, the Legislature's Energy and Natural Resources Committee in 1989 replaced the "capacity needs" and "substantial public benefit" tests with the comprehensive solid waste act which, while retaining the earlier effort to assure Maine landfills were built only to house Maine waste, placed this requirement in the broader context of ambitious recycling goals and a waste management hierarchy designed to slow Maine's waste "stream" to a trickle under the direction of the new Maine Waste Management Agency.\(^\text{21}\)

It appears to have been significant from a policy standpoint that the Legislature crafted the waste management act against the backdrop of the ultimately unsuccessful Township 30 proceeding. There was speculation that the Township 30 developers had chosen their site not with environmental suitability or even proximity to the waste generators as an important criterion, but with the notion that they could foist their unpopular residue on an area without sufficient population or political influence to oppose the facility successfully.\(^\text{22}\) This created a perception that the selection of landfill sites should no longer rest in private hands and that government's role should be expanded from mere site permitting to site selection, all to ensure that objective, scientific criteria, rather than business or political considerations, become the driving force in siting decisions.\(^\text{23}\)

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22. For instance, Turkel, supra note 20, concludes that a landfill site "must be off the beaten path" as "a nod to NIMBY." The article quotes an official of the proposed landfill as saying that the developers chose their rural site "not to avoid the NIMBY situation, but to affect as few people as possible." Id. at A19. Several months later, Randall Parenteau, Operations Manager at the Maine Energy Recovery Company (MERC) incinerator in Biddeford, Maine, addressed this issue more squarely in a letter to the *Biddeford-Saco Journal Tribune*. "[T]he public outcry from the Hebo-Hybo landfill process raised great concerns as to whether a landfill could ever be built in Southern Maine by a private company. The attempt to locate in Township 30 was geared to offset the 'not in my backyard' mentality." Randall J. Parenteau, *Letter to the Editor*, BIDDEFORD-SACO J. TRIB., Mar., 1989.


Siting has become a very difficult and sometimes contentious issue. The decision making process is difficult for all concerned parties: abutting prop-
Another effect of the Township 30 proceeding was the perception among lawmakers that local opposition could and would stymie the development of facilities that, while meeting the disposal needs of the state as a whole, were targeted for environmentally suitable areas in communities or regions that may not require the facility to meet local disposal needs. Thus, the legislators rejected an approach advocated by the Natural Resources Council of Maine (NRCM) that would have vested the siting power not in a centralized state agency, but in regional authorities.24

The Legislature’s enactment of the solid waste act in 1989 was followed later that year by unanimous rejection of the Township 30 landfill by both the BEP and LURC. As a result, the apparent need for landfill capacity for residue from the MERC and PERC incinerators became the first test of the new Waste Management Agency’s site selection process.25

The 1990 provisions followed detailed consideration of plans submitted by the governor’s office and NRCM. Both plans focused on selection of landfill sites at the regional level, as opposed to the state level. NRCM emphasized public participation. The enacted bill prohibited development of new commercial landfills, but decided that a statewide agency, the Maine Waste Management Agency Facility Siting Board, would make the siting decisions. Environmental prop-

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24. In arguing for this proposal, NRCM made clear its belief that local authority over waste management decisions should be enhanced rather than reduced. The environmental group argued for “regional waste management and recycling plans [to be] adopted with substantial municipal and citizen input, and potential host communities [to] retain intervention and local zoning and enforcement rights.” Id. (statement of Sharon Treat, Lobbyist for the Natural Resources Council of Maine) (on file with the Maine Legislature’s Office of Policy and Legal Analysis).

25. This was the case although it is by no means clear that such a special waste landfill was the state’s most critical waste disposal need in the eyes of the Legislature. Following the Waste Management Agency’s announcement that the development of special waste landfills for incinerator residue would be the first task of the Agency’s Facility Siting Board, the Legislature responded by amending § 2156 of the Act to clarify legislative intent. P.L. 1991, ch. 517, § C-2. One significant change came to Section 2156, specifying that landfills for municipal solid waste, rather than special waste, should be the top priority of the Waste Management Agency. The original language of Section 2156 stated that the Agency “shall develop facilities sufficient to meet the projected needs identified in the analysis conducted under former Section 1310-O and the state plan and to serve all geographic areas of the state.” P.L. 1989, ch. 585, § 7. The amendment clarified that the Legislature meant projected needs “for municipal solid waste,” and added this sentence: “On or before January 1, 1995, the office may develop facilities sufficient to meet the projected needs for special waste identified in the analysis conducted under former Section 1310-O and the state plan and to serve all geographic areas of the State.” P.L. 1991, ch. 517, § C-2 (codified at ME. REV. STAT. ANN. tit. 38, § 2156 (West Supp. 1991-1992)).
mitting would remain with the Department of Environmental Protection (DEP).

III. SITING CRITERIA: AN AMBIGUOUS GARBAGE "CONDUIT"

The U.S. Supreme Court observed nearly sixty years ago that the separation of powers doctrine forbids the Legislature from abdicating "the essential legislative functions with which it is [constitutionally] vested" to an executive branch agency.26 But this proscription does not deny the legislative body

the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.27

The Maine Legislature sought to meet this test when it vested landfill siting authority in the Waste Management Agency and its Facility Siting Board by enumerating seven criteria that are to guide the site selection process.28 These criteria include: proximity to waste generators, proximity to transportation systems, consistency with projections of demand for landfill space, consistency with other waste management objectives, the existence of a fair and reasonable price for the proposed site, conformity with environmental standards set jointly by the BEP and LURC, and compatibility with adjacent land uses.29 Facially, such a detailed set of legislative directions meets the constitutional requirements set forth by both the U.S. Supreme Court and the Maine Supreme Judicial Court.

The Maine Supreme Judicial Court, sitting as the Law Court, has declared in State v. Dube that "[t]he agency must be given clear standards to prevent the exercise of authority beyond the scope intended by the legislature and to assure that the citizen is protected against arbitrary or discriminatory action by public officials."30 In that case, a legislative mandate to promote public safety on highways and efficient performance by carriers was sufficient to allow the state Public Utilities Commission to require truck drivers working

29. Id.
30. State v. Dube, 409 A.2d 1102, 1104 (Me. 1979) (citing Schechter Corp. v. United States, supra note 26, and Panama Refining Co. v. Ryan, supra note 27, and State v. Boynton, 379 A.2d 994 (Me. 1977)). See also Maine Real Estate Comm'n v. Kelby, 360 A.2d 528, 532 (Me. 1976) (real estate licensing standards could be held void for vagueness if they forced people of common intelligence to guess at the meaning of the standards) and Danish Health Club v. Town of Kittery, 562 A.2d 663, 666 (Me. 1989) (a massage ordinance that could have been drafted with greater precision does not necessarily violate the vagueness doctrine).
for common carriers to be at least twenty-one years old. More recently, in the environmental context, the court decided *Swift River Co. v. Board of Environmental Protection*, approving a BEP decision not to license a hydroelectric dam where the BEP’s decision was based on the delegated authority to deny permits if such a proposal “diminishes the significant resource values of the river or stream segments.” The court observed that it would be “difficult to conceive of any clearer statement” and noted that “[t]here is no ambiguity in the word ‘diminishes.’”

Is Section 2153 of the waste management act similarly unambiguous? Clearly, the fact that the Law Court found clarity in a one-word instruction, “diminishes,” does not mean that the siting criteria, purporting to contain seven separate instructions from the Legislature, is necessarily more clear than the directive the court found unambiguous in *Swift River*. The *Swift River* court also found “articulable criteria” in the Maine Department of Conservation’s 1982 Maine Rivers Study, which the Legislature had adopted by specific reference in the statute.

In fact, the directives in Section 2153 are arguably an order of magnitude more vague than the simple direction to the BEP to permit no dams that diminish any of the values articulated in the 1982 Maine Rivers Study. The first two siting criteria, proximity to generators and proximity to transportation systems, are binding on the agency in its site selection decisions only “to the extent possible.” The “capacity or size” of the proposed facility “must be consistent with the projected demand as determined in the state plan.” It is not clear whether this means the facility must meet all or part of that demand. The proposed site “must meet preliminary environmental standards developed jointly by the [D]epartment [of Environmental Protection] and the Maine Land Use Regulation Commission, including ground water and geological standards.” This is presumably designed to cause the Agency to choose sites that are likely to sustain subsequent permitting review by the DEP and LURC. But sites that meet the permitting standards of the relevant regulatory agencies are not necessarily the optimal sites from an environmental standpoint. The doctrine of *Schechter, Panama Refining* and its Maine analogues suggests that it is for the Legislature, not environmental permitting agencies, to identify the optimal envi-

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32. Id.
33. Id.
35. Id. § 2153(1)(C).
36. Id. § 2153(1)(F)
The argument against Section 2153 on vagueness grounds is the opposite of the one presented by the plaintiffs in Swift River, who contended that the Legislature's directive to the regulatory agency was too brief to achieve sufficient clarity. Here the directive is actually seven different policy preferences, potentially mutually exclusive, and the statute offers no guidance as to which preferences are to take precedence over the others.

The Law Court has indicated that it is not necessary to provide precise standards to an agency in every conceivable situation, holding in the 1974 case of Finks v. Maine State Highway Commission that a general directive to enhance "natural scenic beauty" was sufficient guidance to the State Highway Commission in the exercise of eminent domain:

[In such cases in which the statutory enactment of detailed specific standards is impossible, the presence of adequate procedural safeguards to protect against an abuse of discretion by the administrators of the law, compensates substantially for the want of precise legislative guidelines and may be taken into consideration in resolving the constitutionality of the delegation of power.]

Given the specificity of Section 2153, it does not appear that landfill siting constitutes an area in which the enactment of specific statutory standards is impossible. But assuming, arguendo, that such standards are beyond the ability of the Legislature to articulate, a credible argument can be made that the solid waste act does not contain adequate procedural safeguards to protect against abuse of

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37. It should further be noted that from a practical standpoint the ostensible aim of this provision would have been well served by adding the United States Environmental Protection Agency and the United States Army Corps of Engineers to the list of agencies developing preliminary standards, since those two federal agencies enjoy the right to veto the development of any site within the wetlands jurisdiction of Section 404 of the Clean Water Act. See Water Pollution Prevention and Control (Clean Water) Act § 404 (codified at 33 U.S.C. § 1344 (1988)).

38. For example, an agency with an obstructionist attitude toward landfills could opt to develop only those sites that are immediately adjacent to one or more waste generators, citing the proximity criterion as paramount; the agency could choose to develop only sites that are within a half mile from an interstate highway, citing the "proximity to transportation" criterion; an agency with a zealous desire to develop special waste landfills could project a demand using very liberal criteria and then develop sites accordingly; or the agency could adjust its definition of a "fair and reasonable" price (Me. Rev. Stat. Ann. tit. 38, § 2153(1)(E) (West Supp. 1991-1992)) to fit its desire to develop a site or sites—all in full compliance with the Legislature's directives regarding siting criteria. While Section 2153 requires the Waste Management Agency to implement the criteria by rule, thus putting the requirements of administrative procedure as a check on Agency caprice with respect to siting, the Agency is still wholly free to weigh the already vague legislative criteria as it sees fit.

39. 328 A.2d 791, 796 (Me. 1974).

40. Id. (footnote omitted).
discretion. There are ample opportunities for opponents of a specific site, or opponents of the policies that drive a siting choice generally, to bring that opposition to bear on the environmental permitting process. The site selection process does not provide for that kind of public participation. The regulations of the Waste Management Agency, while providing for public participation in formal proceedings before the Facility Siting Board, provide no avenue for the public to challenge the decision to conduct a specific facility search in the first place. Neither is there a mechanism for the public to participate in the creation of either the capacity needs analysis that triggers such a search or the waste management plan that is supposed to guide such an endeavor. In fact, there is no formal role for the public in the selection process until that process reaches the "finalist" stage. The candidate sites are presented by agency staff to the Siting Board.

What informed the court's holding in Finks was the justices' previous and exhaustive consideration of the delegation issue in City of Biddeford v. Biddeford Teachers Association. The court found itself evenly divided on the question of whether a state law requiring binding arbitration in employment disputes between teachers and school districts did not furnish the arbitrators with adequate stan-

41. Me. Waste Management Agency Reg. 401, § 5(G) (1991), provides:

To assist the Agency in collecting the information needed to make technically sound and informed decisions, it is the policy of the Agency to conduct its proceedings in a manner that encourages and facilitates participation by the general public. Any member of the general public may participate in an Agency proceeding by reviewing and commenting on petitions, applications or other filings. In addition, public participants have the right to:
1. have notice of the proceeding...
2. obtain access to non-confidential Agency files and records concerning any proceeding;
3. participate in any pre-hearing meeting or conference;
4. participate in any hearing as a public witness or intervenor... and
5. have notice of and submit comments on any draft decision prepared by the presiding officer.

See also Me. Waste Management Agency Reg. 401, § 6(K), which specifies that public participation shall be governed by the provisions of the Administrative Procedure Act, Me. Rev. Stat. Ann. tit. 5, § 9054 (West 1989), and Me. Waste Management Agency Reg. 401, § 6(L), authorizing formal intervenor status for "any person showing that he or she is a member of a class which is or may be substantially and directly affected by the proceeding."

42. 304 A.2d 387 (Me. 1973). The Finks court explicitly distinguished Biddeford Teachers, noting that the State Highway Commission is a public body, unlike the private parties (arbitrators) who had allegedly received the improperly delegated authority in the Biddeford Teachers case. Finks v. Maine State Highway Comm'n, 328 A.2d at 795 n.2. Superficially, the delegation in the Waste Management Act is more like Finks than Biddeford Teachers since the Facility Siting Board is a public body. It bears noting, however, that much of the substantive selection-making in the 1989-1992 special waste landfill search became the province of hired consultants.
standards. The statute was therefore not voided on this basis, but the court decided the case by finding that the arbitrators had exceeded their statutory authority in their resolution of several substantive issues in dispute.42 Happily for students of the delegation doctrine, this division prompted Justice Wernick to write a lengthy opinion tracing the history of unconstitutional delegation and striving for an appropriate means to consider such a matter in areas that represent theretofore uncharted extensions of the Legislature’s police powers.44

Wernick noted that it was the philosopher John Locke who contributed the notion that “[t]he Legislature neither must nor can transfer the power of making laws to anybody else,”45 as a safeguard against absolutism.46 But, Wernick continued, the arrival of the policy complexities inherent in industrialization strained the 18th and 19th Century notion that administrative agencies were simply factfinding bodies. This notion, Wernick said, became a “fiction,”47 so courts evolved a delegation doctrine that allowed legislatures to cede what amounts to lawmaking authority to agencies “so long as consent of the governed is channeled through the legislature to be a continuing indirect source of control over the actions of a body not immediately responsible to the people.”48 The linchpin of what Wernick called a “conduit” principle was the requirement that the Legislature articulate a “primary standard” for the administrators to adopt as their own.49

Thus, Wernick concluded, transfer of power itself will not rise to the level of constitutional infirmity.

[I]t is rather the manner of the transfer—whether it places unbridled legislative authority in a body not responsible to the electorate and thus precipitates the potential for an absolutism of power (the primary evil apprehended by Montesquieu and Locke to require the protections embodied in the concepts of “separation” and “checks and balances”).50

Wernick found it necessary to undertake such a careful analysis of delegation doctrine because the Biddeford Teachers court faced a situation in which the Legislature had extended the police power into a new realm—contractual relations with government employees.51 The siting provisions of the Maine Waste Management Act

43. City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d at 403.
44. Id. (Wernick, J., agreeing in part and disagreeing in part).
45. Id. at 404.
46. Id. at 405.
47. Id. at 404.
48. Id. at 405.
49. Id.
50. Id. (citing Hampton & Co. v. United States, 276 U.S. 394, 409 (1928)).
51. Wernick suggested that such an exercise is not truly a “police” function:

For one hundred fifty years the “unconstitutional delegation” doctrine
require a similar exercise in "pioneering analysis," which Wernick defined as attention to the extent to which the Lockian underpinnings of delegation analysis have "reasonable applicability" to the particular kind of police power being exercised.\(^5\)

\[\text{Assessment must be made of whether the powers here granted . . . operate in a domain so attenuated [to the Legislature's] relationship to "law-making" activity—and, therefore, outside areas likely to precipitate the kinds of value judgments which demand channeling the consent of the governed through the legislature as a continually operative control—that insistence upon a "primary standard" or "intelligible principle" becomes realistically unnecessary.}\(^\text{54}\)

It would seem beyond question that the siting of publicly owned landfills precipitates the kind of value judgments described above—perhaps to an even greater extent than more traditional exercises of police power would. The virulent opposition that has accompanied every attempt to site a special waste landfill in Maine since 1986 speaks for itself on this issue. So, too, does the intense interest on the part of industry, environmental and regional organizations in the ongoing debate over solid waste policy and priorities.

Wernick agreed in \textit{Biddeford Teachers} that arbitrating public school teachers' contracts is an exercise of police power that requires at least an "intelligible principle" to guide the regulators.\(^5\) He found that intelligible principle in the Legislature's decision to exclude questions of educational policy from the arbitrators' realm (leaving working conditions and hours within their purview),\(^5\) a contention the opinion of the opposing plurality rejects.\(^5\) Writing for the opposing plurality, Justice Weatherbee hinted that "the to-

\footnotesize{has been developed largely in relation to the sovereign's exercise of "police power" externally to control and regulate private personal and property rights.

In the instant statute sovereignty appears in a different role. Here, its contours are directed fundamentally inward to meet internal problems arising from governmental functioning as an "employer" of "employees" in the "business" of providing essential services to the public.}

\textit{Id. at} 409.\(^5\) Id.\(^5\) \textit{Id. at} 408.\(^5\) Id.\(^5\) \textit{Id. at} 409.\(^5\) Id.\(^5\) \textit{Id. at} 414.\(^5\) \textit{Id. at} 400. It should be noted that, although Justice Weatherbee's opinion appears in the \textit{Atlantic Reporter} as the opinion of the Court, with which Justice Wernick's opinion is "agreeing in part and disagreeing in part," \textit{Id. at} 403, it is the Wernick opinion that states the view with precedential value as to the vagueness issue. This is not readily apparent from reading the published opinions and I am grateful to Justice Wernick for clarifying this point in a personal conversation about the case.}
tality of legislative expression” might yield such an intelligible principle. Weatherbee suggested that the “intelligible principle” standard would not necessarily satisfy our own constitutional demand for standards in this case.\textsuperscript{58}

The landfill siting provisions of the Maine Waste Management Act satisfy neither the Wernick intelligible principle nor the test articulated by Weatherbee. The Act’s ostensible statement of purpose, found in the waste management hierarchy delineated in Section 2101, has no meaningful application to the landfill siting process.\textsuperscript{59} The Section 2153 standards themselves are too vague and potentially contradictory to furnish such an intelligible principle. And while they appear to be specific standards, thus facially satisfying the test set forth by the Biddeford Teachers majority, closer examination reveals them to be without substance.

In sum, the landfill siting provisions as written create the kind of tyrannical situation that Locke and the constitutional framers feared would result from situations in which the Legislature abdicates its authority as the people’s representative. The law allows the Waste Management Agency and the Facility Siting Board nearly unfettered discretion in siting landfills that are not necessarily in the public interest nor even consistent with the objectives of the Waste Management Act.

IV. THE AGENCY’S WHIMSICAL SITING CRITERIA

Due process requires that an agency must not be “unduly arbitrary or capricious” in the exercise of its legislatively delegated authority.\textsuperscript{60} The Maine Supreme Judicial Court has not had occasion to articulate the standard to any greater detail in the context of a regulatory agency.

The Maine solid waste act may provide such an opportunity. Assuming the validity of the criteria enumerated in Section 2153, the record is ambiguous at best as to whether the Waste Management Agency and the Facility Siting Board were not arbitrary and capricious in their implementation of the statutory mandate—either in the rules formally adopted by the Agency and Board or in the decisions made under the aegis of those rules.

Governing the process used by the Agency and the Facility Siting

\textsuperscript{58} Id.

\textsuperscript{59} One example of such a meaningful application would be a requirement that the Agency demonstrate that it has affirmatively subjected the would-be landfilled waste to the five disposal priorities (reduction, reuse, recycling, composting, and volume reduction) that precede landfilling on the statute’s pecking order. Another would be a requirement that any landfill facility or search process also make provision for the implementation of the other, higher, waste management priorities.

\textsuperscript{60} Seven Islands Land Co. v. Maine Land Use Regulation Comm’n, 450 A.2d 475, 483 (Me. 1982) (citing State v. Rush, 324 A.2d 748, 752-53 (Me. 1974)).
Board during their initial attempt to site disposal facilities were the so-called Chapter 450 Rules adopted by the Facility Siting Board on May 16, 1990. These rules set forth the siting criteria adopted as required by Section 2153 of the Waste Management Act. The Board then sought to translate the seven statutorily imposed policy prescriptions into a series of "exclusion and preference criteria."

The exclusion criteria in their entirety sought to implement the "preliminary environmental standards" developed jointly by the BEP and LURC pursuant to Section 2153(1)(F) of the Act, and dealt with groundwater hydrology, surface water hydrology (including proximity to protected water bodies and wetlands), natural areas (i.e., wildlife refuges and management areas), protection of scenic and recreational resources, and protection of archaeological and historical resources. There were no exclusionary criteria based on failure to be consistent with projected demand, failure to "be consistent with, and actively support" the state's official waste management objectives, or lack of a fair and reasonable price for the site—the three other Section 2153 criteria that are exclusionary in character. Thus, pursuant to the 1990 regulations, it would have been possible for the Facility Siting Board to fail to exclude sites that do not meet those three statutory standards. When the Agency and the Facility

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61. Me. Waste Management Agency Reg. 450 (May 30, 1990). These rules cover the siting of both disposal and incineration facilities, but for purposes of this Comment analysis will be limited to the sufficiency of the disposal siting provisions promulgated pursuant to Section 2153 of the Waste Management Act.


64. Id. § 5(A). The preliminary environmental standards themselves appear as an appendix to the Chapter 450 Rules, with the notation that the standards "appear for informational purposes only" and are not part of the actual rules. Me. Waste Management Agency Reg. 450 (May 30, 1990) (Appendix). The letter of transmittal, written by the two submitting agencies and accompanying the standards, emphasizes that the standards "are not to be construed as to be more than a general guide to sites that have a higher probability of gaining approval from the Commission and Department." Id. § A-2.


66. It appears to be the view of the Agency itself that another serious flaw in the exclusionary standards contributed significantly to the failure to site a landfill during the initial search. Section 5(A)(3)(f) excludes from consideration "those sites that require the filling of a combined total of more than ten acres of . . . wetlands." Me. Waste Management Agency Reg. 450 (May 30, 1990), § 5(A)(3)(f). Henry Warren, Director of the Agency's Office of Siting and Disposal Operations, commented: "This limit seemed, by inference, to imply that filling of ten acres would be acceptable when in fact no such determination had been made. The ten acre limit was apparently based on a verbal statement from a federal agency staff person that proposals for filling above that level would require a full blown Environmental Impact Statement process with a hearing." Office of Siting and Disposal Operations, Special Waste
Siting Board substantially revised the Chapter 450 Rules in 1992, they did not address this problem.67

Conversely, the 1990 preference criteria68 authorized the Board to give preference to criteria that are properly considered exclusionary pursuant to Section 2153. The standards relating to hydrogeology (both surface and sub-surface), geology, natural areas, scenic and recreational resources, archaeological resources, and historical resources were all adopted pursuant to the Section 2153(1)(F) requirement that the site meet preliminary environmental standards. That the Legislature intended these standards to be mandatory, rather than preference criteria, is clear from the existence in the same section of explicit preference criteria relating to the proximity of sites to waste generators and transportation systems.69 Again, the 1992 revision of the Rules does not address this issue.70

A similar, though more egregious, problem existed with respect to the criterion that give[s] preference to sites that will be consistent with and actively support other waste management objectives, including waste reduction and recycling. Site screening and selection must account for the need to integrate disposal facilities into the overall management of solid waste and the achievement of the state’s solid waste and recycling goals. Solid waste landfills should, whenever appropriate, be located to accommodate waste reduction, recycling and composting facilities at the same location.71

This is in conflict with the statute’s affirmative declaration that

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"[a] site and its considered use must be consistent with, and actively support, other waste management objectives, including waste reduction and recycling." It also conflicts with the waste management hierarchy set forth in Section 2101. This hierarchy is properly viewed as the statement of the Legislature's overall purpose in enacting the legislation and manifestly not a mere "preference" for the Waste Management Agency in any of its enterprises. And, as with the problems discussed above, the 1992 revisions of the Chapter 450 Rules do not address this inconsistency.

Several Agency decisions made pursuant to the 1990 regulations during the special waste landfill search process also appear to have no basis in the regulations and were also arguably without support in the statutory mandate. The most significant of these decisions was the Agency's determination that it would focus its initial siting process on special waste capacity. The original language in Section 2156 of the Act, authorizing the initial site development process, did not mention special waste but, rather, required the Facility Siting Board to seek disposal capacity sufficient to meet the State's needs generally. Although much of the public controversy that led to the enactment of the Solid Waste Act concerned incinerator ash and other special waste, it was not reasonable to infer from the actual statutory language that the Legislature wished the Agency to make special waste landfills the top siting priority. To reinforce the unreasonableness of such an inference, the Legislature in 1991 amended Section 2156 to read that the 1995 facility development deadline applied only to facilities needed for "municipal solid waste," thereby emphasizing that the lawmakers were not requiring special waste landfill siting.

74. For an extensive colloquy with respect to this allegation, consult the Basis Statement appended to the final version of the 1992 edition of the Chapter 450 Rules. Me. Facility Siting Bd. Reg. 450 (Aug. 19, 1992) (Basis Statement). E.g., the Agency stated that its purpose was to "clarify" the process rather than make it easier to site landfills, and further stressed the notion that the preference criteria are not binding on the Agency. Id. at 3. The Agency also attempted to refute the allegation that the changes make it easier to select sites requiring the filling in of some wetland areas. Id. at 5-6.
76. P.L. 1991, ch. 517, § C-2. The amended text of § 2156(1) reads: Initial state facility required. On or before January 1, 1995, the office shall develop facilities sufficient to meet the projected needs for municipal solid waste identified in the analysis conducted under former section 1310-0 and the state plan and to serve all geographic areas of the State. On or
In light of the amendment, there is considerable puzzlement as to why the agency pressed on with its search for special waste facilities for as long as it did. Section 2156 authorizes facility development only to meet identified in-state capacity needs, and by the fall of 1991 the Agency possessed abundant evidence that the special waste "crisis" that had grabbed headlines from 1987 to 1990 had abated—if it had, in fact, ever existed at all. Nevertheless, the

before January 1, 1995, the office may develop facilities sufficient to meet the projected needs for special waste identified in the analysis conducted under former section 1310-O and the state plan and to serve all geographic areas of the State.


Subsection 2 of Section 2156, authorizing subsequent development of solid waste facilities, was similarly amended to emphasize that the Agency is required only to develop facilities for municipal solid waste, and that development of special waste facilities is a discretionary matter as long as the agency has identified a need for such facilities. Id. § 2156(2). 77.

The 1990 "State of Maine Waste Management and Recycling Plan," adopted by the Waste Management Agency pursuant to Sections 2122-2223 of the Waste Management Act, identified "disposal capacity for ash from several of the state's waste-to-energy facilities" as "the most pressing need at the state level." Me. Waste Management Agency, State of Maine Waste Management and Recycling Plan (July, 1990), at 74. The Plan went on to state that the MERC and PERC incinerators would run out of ash disposal capacity by mid-1991 and that a new incinerator being built in Auburn would also require ash disposal capacity. Id. at 74-75. Formal update of this Plan and its estimates is not required until two years after its publication. See ME. REV. STAT. ANN. tit. 38, § 2122(2) (West Supp. 1991-1992).

MERC and PERC did not run out of ash disposal space; in fact, the MERC facility in 1991 signed a longterm disposal contract with the Consolidated Waste Services landfill in Norridgewock operated commercially by Waste Management, Inc. Interview with Henry Warren, Director, Office of Siting and Disposal Operations (Jan. 17, 1992). PERC was in the process of making a similar arrangement. Id. The "Maine Special Waste Capacity Siting Process Update," issued by the Agency in October of 1991, stated that the new Auburn incinerator had also made ash disposal plans and that the Auburn facility's requirements were no longer being included in the projected capacity needs for state facilities. Me. Waste Management Agency, Maine Special Waste Capacity Siting Process Update (Oct. 1991) at 7.

The October 1991 revision, which Warren confirmed was the document being used by the Agency and the Facility Siting Board in pinpointing the capacity needs to be met by the proposed landfills, strongly suggests that the Agency was seeking to develop facilities for which the need was speculative at best. The 1991 report begins its discussion of capacity needs by misidentifying "special waste disposal capacity" as "the state's most pressing disposal need" as declared in the 1990 Waste Management and Recycling Plan. Id. at 2. As noted above, the 1990 report stated that ash disposal was the critical need. The distinction is significant because the 1991 revision confirms that municipal incinerator ash is only 8.5% of Maine's annual production of special waste. Id. Of the 2.2 million tons of special waste Maine is believed to generate a year, fully half is paper mill sludge, much of which is not even landfilled. Id. at 3. At the time of the 1991 Update, the five major generators of paper mill sludge were either operating their own landfills or seeking permits to operate them. Id. at 4. (Recall that the Waste Management Act prohibits the development of new commercial landfills but does not prohibit commercial generators of waste to construct landfills to
Agency continued to state publicly that it believed there was an “acute” need for the state to develop special waste facilities immediately.\textsuperscript{78} Not only did the Legislature expect the Agency to focus on municipal solid waste rather than special waste, but it prohibited the Agency from developing facilities for which there was not a specifically identified need—a missing element as the Agency worked to narrow its list of potential sites in the last half of 1991.

Also without real basis in statute or regulation was the Agency’s decision to limit its search to areas within a 50 mile radius of the MERC facility in Biddeford and the PERC incinerator in Orrington.\textsuperscript{79} The stated reason for this decision was the mandate in Section 2153(1)(A) of the Waste Management Act to locate disposal facilities near the waste generators that will use the facilities if possible.\textsuperscript{80} This had an air of political convenience, since it seemed to address the vociferously stated concerns from past siting controversies that communities were being asked to accept incinerator ash that the communities had no part in generating. Defining and bifurcating the search in this manner also had the effect of making each of the state’s two major population areas (defined roughly as Cumberland and York counties in the south and greater Bangor area to the east) the target of a landfill search. But this criterion was arbitrary in that it did nothing to assure that these special waste facilities would, in fact, be located in proximity to the majority of waste generators since MERC and PERC together account for just 92,000 of the 2.2 million tons of special waste generated in Maine each year.\textsuperscript{81} Moreover, the Agency had every reason to believe that MERC and PERC would not even be using the landfills the Agency was seeking to develop.\textsuperscript{82}

\textsuperscript{78} Sherry Huber, Executive Director of the Maine Waste Management Agency, stated on November 6, 1991 that “[t]he situation regarding disposal capacity has not improved since . . . the adoption of the 1990 Waste Management and Recycling Plan. The Agency’s most recent analysis of available disposal capacity for special waste is that the need for reliable disposal capacity is more acute than originally realized.” Public Hearing re Site No. 19, Alton, Maine, Nov. 6-7, 1991, State of Maine Waste Management Agency Facility Siting Board, Record of Proceedings, Part III, at 341.


\textsuperscript{80} \textit{Id.}


\textsuperscript{82} An ambiguity in the statute itself also deserves mention in this context. “To
A highly ironic footnote to the failed siting saga came to light in mid-1992, when the Agency announced that it had found a site it wanted to develop, located in a remote section of Eastern Maine on land owned by a major paper company that would, presumably, not be a hostile landowner. That, of course, is precisely what the Township 30 landfill developers had sought to do. The Township 30 site had been located on land owned by the Georgia Pacific Corporation some 90 miles east of Bangor; the new “Carpenter Ridge” site is 60 miles north of Bangor on land owned by the Lincoln Pulp and Paper Company.

the extent possible, a site shall be located in proximity to the entities that generate the wastes placed at the site.” ME. REV. STAT. ANN. tit. 38 § 2153(1)(A) (West Supp. 1991-1992) (emphasis added). Since the Legislature used the word “entities” rather than “municipalities,” it is not clear whether the statute contemplates special waste landfills in proximity to the actual garbage generators or the waste-to-energy plants that generate the actual waste to be placed at the special waste sites. This reflects a policy tension that has dogged Maine regulators and lawmakers: Who bears responsibility for incinerator ash from commercial facilities like MERC and PERC, the for-profit owners of the incinerators or the municipalities that rely on the commercial incinerators for waste disposal? MERC and PERC promoted themselves as an inexpensive and complete solution to municipal trash troubles; only after signing long-term contracts with dozens of communities and constructing the incinerators with tax-exempt financing did the owners declare that they faced an ash disposal crisis that, they argued, the state ought to solve. See Donald M. Kreis, Don’t Throw Away This Story, M. TIMES, June 17, 1988, at A8, A9, quoting the Vice President of the firm that developed MERC and PERC threatening bankruptcy over ash disposal problems. Ultimately, MERC and PERC used the threat of bankruptcy not to site landfills but to renegotiate its contracts with municipalities, increase disposal fees paid by towns, and presumably use the added revenue to purchase additional space and commercially available special waste facilities.

83. Jill Higgins, Porter Cut from Landfill Search, PORTLAND PRESS HERALD, July 11, 1992, at 1. By July of 1992, the Agency and the Facility Siting Board were considering a pair of sites that had been volunteered by their owners. One, rejected by the Board at the urging of the Agency, was located in the southwestern Maine town of Porter, near the New Hampshire border, and had been the focus of earlier efforts by its owner to build a commercial landfill at the site. The other, which became the only site under active consideration as of July 1992, was located on land owned by the Lincoln Pulp and Paper Company about 60 miles north of Bangor. Id. The Agency, however, conceded that the immediate need to site a special waste landfill had abated (thanks, in large part, to the availability of large scale amounts of permitted capacity in the Turnkey Landfill, operated by Waste Management, Inc., just over the Maine border in Rochester, New Hampshire) and that the Agency was pressing ahead with its siting project to create a “safety net.” Telephone Interview with Henry Warren, Director of Siting and Disposal Operations, Maine Waste Management Agency (July 13, 1992) [hereinafter Interview with Henry Warren]. “We need to get a site permitted and then sit on it,” Warren said. Id. This, of course, raises the question of whether “safety net” siting is what the Legislature envisioned when it required the Agency to create facilities based on the state’s documented capacity needs.

84. See supra note 22.
V. "CHURLISH OBSTINACY" AND EMINENT DOMAIN

The abrupt halt in the landfill siting process in early 1992, or at least the effort to impose such a facility on unwilling landowners located in uncooperative communities, left a nagging question unresolved. Before the Agency decided to find a willing host in a paper company,85 four potentially affected municipalities and three potential landfill abutters filed suit in Kennebec County Superior Court against the Waste Management Agency claiming a variety of procedural and constitutional infirmities.86 The broadest and most intriguing claim of this mooted proceeding was that the agency's proposed exercise of eminent domain to acquire special waste landfill sites was unconstitutional.87

85. The Lincoln Pulp and Paper Company would be a major user of any such facility and, thus, has a business incentive to volunteer its land for a waste facility that the state would bear the expense of getting permitted. The company even volunteered to remove and treat all the leachate from the Carpenter Ridge site, if it is developed. Interview with Henry Warren, supra note 83.

86. Town of Arundel v. Maine Waste Management Agency, CV-91-457 (Me. Super. Ct., Ken. Cty., Dec. 18, 1991) (Chandler, J.). In addition to Arundel, plaintiffs included the City of Biddeford and the Towns of Alton and Herman, all of which were being considered as possible host municipalities at the time the suit was filed in September, 1991. See generally, Plaintiffs' Amended Petition for Review of Final Agency Action. Id.

87. Although the Facility Siting Board's decision on January 9, 1992 to withdraw the proposed Arundel-Biddeford site (the last one on the list of potential sites) from consideration rendered the lawsuit moot, the suit had actually been dismissed several days earlier by the Superior Court, which granted without comment the defendants' motion to dismiss on the grounds that the actions complained of did not constitute "final agency action" within the meaning of the Maine Administrative Procedure Act, Me. Rev. Stat. Ann. tit. 5, § 5002(4) (West 1989 & Supp. 1991).

But in cases where an agency's actions are "[p]reliminary, procedural, intermediate or other[wise] nonfinal," id. § 11001(1), judicial review of such action is permitted "if review of the final agency action would not provide an adequate remedy." Id.

"[N]onfinal agency decisions are reviewable only when review of the final action would be ineffective." Northeast Occupational Exch., Inc. v. Bureau of Rehabilitation, 473 A.2d 408, 409 (Me. 1984) (citations omitted). By "ineffective" the Law Court meant that subsequent review of the final action would not prevent the nonfinal action from causing "irreparable injury" by "attach[ing] legal consequences to action taken in advance of other hearings and adjudications that may follow. . . ." Id. at 410; see Columbia Broadcasting Sys. v. United States, 316 U.S. 407, 425 (1942).

A municipality named as a "candidate site," at least under the process utilized by the Maine Waste Management Agency during its most recent landfill siting search, has arguably suffered the requisite irreparable injury, or will have suffered it prior to the final Agency action. Regardless of the ultimate outcome of the Agency's landfill siting process, the Agency's decision to impose "semifinalist" status on several municipalities threatened social and economic upheaval that would not be erased by failure to be ultimately selected as a host community.

Courts should refrain from "entangling themselves in abstract disagreements over administrative policies, and also [should] protect . . . agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Abbott Lab. v. Gardner, 387 U.S. 136, 148-49 (1967). But the Maine Waste Management Agency apparently reserved for itself
The question of how a landfill siting procedure can conform to the constitutional requirements for eminent domain is one of first impression, both in Maine and, apparently, any other U.S. jurisdiction. The courts and Legislature will therefore find limited guidance in judicial precedent, despite explicit constitutional language. Amendment V of the U.S. Constitution provides, in relevant part, that "private property shall [not] be taken for public use without just compensation." Article I, § 21 of the Maine Constitution similarly provides that "private property shall not be taken for public uses without just compensation, nor unless the public exigencies require it."

The actions of the Waste Management Agency meet the federal requirements for eminent domain, as articulated by the U.S. Supreme Court. Nearly 40 years ago in *Berman v. Parker,* the Court declined to invalidate a District of Columbia urban renewal plan, even though the land proposed for taking was to be used for private commercial purposes. The Court found a valid exercise of police power in the enabling legislation's goal of urban beautification. "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end." The justices articulated a policy of extreme deference to the legislature with respect to the declared purpose for exercising eminent domain. "[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. . . . The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."

In subsequent decisions the Court has not found occasion to deviate from this principle or to limit its application. For example, most recently in 1984, the Court found the requisite public purpose in the federal requirement that pesticide companies disclose health, safety and environmental data, even though such disclosure resulted in public release of valuable trade secrets. Acknowledging that the users of these data will arguably be other pesticide companies rather than the general public, the Court nonetheless found the taking to

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89. *Id.* at 33.
90. *Id.*
91. *Id.* at 32.
be constitutional because the Court has "rejected the notion that a use is a public use only if the property taken is put to use for the general public."

The language of the Maine statute meets the articulated tests for federal constitutionality. The Waste Management Agency's enabling legislation authorizes the Facility Siting Board to seek landfill facilities sufficient to meet specifically identified need for such disposal capacity in light of the statutorily defined hierarchy of waste management priorities. Although "land disposal of waste" is the last in the hierarchy of six waste management options, the fact that the Legislature has identified this at all is sufficient to meet the high court's public purpose test. Likewise, the fact that only a few commercial waste management operations are likely to use the proposed facilities does not violate the federal constitution.

The "public exigency" test in the Maine Constitution, however, is more exacting, as reflected by the Maine Supreme Judicial Court's more narrow view of eminent domain. A legislative declaration of "public use" will not suffice in Maine. The public exigency requirement protects Maine citizens from incursions that, while conducted through an instrumentality of government, meet a need that is more correctly characterized as private:

As between individuals, no necessity, however great, no exigency, however imminent, no improvement, however valuable, no refusal, however unneighborly, no obstinacy, however unreasonable, no offers of compensation, however extravagant, can compel or require any [person] to part with an inch of [her] estate.

The Law Court has long recognized that the Legislature is free to determine what constitutes an "exigency" without judicial intervention as long as there is a rational basis for such a determination. It is permissible for the Legislature to delegate to an agency the determination of which particular properties should be taken to meet such an exigency. But the question of whether the intended use is public or private is very much a subject for judicial review.

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93. Id. at 1014 (citing Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 243-44 (1984); Rindge Co. v. Los Angeles, 262 U.S. 700, 707 (1923); Block v. Hirsh, 256 U.S. 135, 155 (1921)).
96. Brown v. Warchalowski, 471 A.2d 1026, 1029 (Me. 1984) (quoting Bangor & Piscataquis R.R. Co. v. McComb, 60 Me. 290, 295 (1872)) (County Commissioner could not use eminent domain to take land where the taking was for private use).
99. Brown v. Warchalowski, 471 A.2d at 1033; Ace Ambulance Serv. v. City of Augusta, 337 A.2d at 663; Paine v. Savage, 126 Me. 121, 124 (1927); Brown v. Gerald,
Historically, the Law Court has been ambivalent about finding the requisite public use. For example, with the industrial revolution sweeping through Maine, the court in the 1872 case of *Allen v. Inhabitants of Jay* enjoined a town from appropriating private property so that a lumber mill might move to the town.100 “All security of private rights, all protection of private property is at an end . . . when the power is given to a majority to lend or give away the property of an unwilling minority,” bristled Chief Justice Appleton on behalf of a unanimous court.101

Does the public exigency require the building of a new saw mill [in Jay]? If there are such public use and public exigency, then anybody's land . . . may be taken from [her] by vote of the town, and leased to a lessee to be selected and voted for by the majority, and [her] money may be wrested from [her] by the tax gatherer . . . . [T]he doctrine that this right of eminent domain existing for every kind of public use, or for such use when merely convenient, though not necessary, does not seem to me, by any means, clearly maintainable.102

But thirty years later, in *Kennebec Water District v. City of Waterville*, the court permitted a municipal water district to seize an entire private water company, pausing to remind the parties that eminent domain is an “inherent attribute of sovereignty” and the Maine Constitution “does not confer the power, but by implication recognizes it as existing in the state.”103

There is, however, a principled distinction to be drawn between *Allen* and *Kennebec Water District*. In the later case, the benefits accruing to the public by ownership of its water company were direct and widespread; in *Allen* the benefits were both speculative and indirect. The court made that distinction an explicit one quickly thereafter, ruling in *Brown v. Gerald*104 that the generation and transmission of electric power was not a sufficiently public use to justify the taking of property by eminent domain.105 “[T]he

100. Me. 351, 360 (1905); Kennebec Water Dist. v. City of Waterville, 96 Me. at 241-42; Allen v. Inhabitants of Jay, 60 Me. 124, 140 (1872).

101. *Id.* at 134. Appleton went on to state that he understood that the *Allen* case also hinged on whether the town's actions were a valid exercise of the taxation power. “[T]he power of taxation, as well as the right of eminent domain, has its limits, which cannot be constitutionally transcended.” *Id.*

102. *Id.* at 136.

103. 96 Me. 234, 242 (1902).

104. 100 Me. 351 (1905).

105. *Id.* Such a holding is obviously anachronistic. But in 1905, the use of electricity in Maine was so limited that the benefits of an electric utility could hardly be described as public within the meaning of “public exigency.” Commentators recognize that the concept of public exigency is an evolving one; the Maine Waste Management Agency need not establish that its proposed public use is one that the framers of the Maine Constitution had foreseen. See Opinion of the Justices, 231 A.2d 431, 434 (Me. 1967).
Legislature . . . cannot make a private use public by calling it so.”

The Gerald court’s analysis focuses on an element that is critical to the analysis of eminent domain in the special waste landfill context. In Gerald the court explicitly rejected the notion that public use “may rest merely upon public benefit, or public interest, or great public utility . . . . Something more than mere public benefit must flow from the contemplated use.”

The Facility Siting Board’s enabling legislation authorizes the board to site landfills that meet projected landfill needs identified under Title 38, Section 1310-O (since repealed) and the state recycling plan authorized by the act. (The provisions of Section 1310-O required the Maine BEP to conduct a detailed study of the state’s landfill “capacity needs.”) It is these analyses of the state’s landfill requirements that establish whether the proposed landfills selected by the Facility Siting Board provide the “substantial public benefit” required for their licensing by the Department of Environmental Protection. While this “substantial public benefit” is presumably a valid criterion for environmental suitability, Gerald suggests that such a determination will not establish the requisite public use for purposes of demonstrating a public exigency. In fact, if this substantial public benefit is incidental to what is primarily “an aid to private enterprise,” then a law providing for such an exercise of eminent domain is “not legislation, but robbery.”

More recent cases have refined this doctrine. In Crommett v. City of Portland, the City of Portland’s exercise of eminent domain for slum clearance was a valid public exigency because public use “may be negative in character . . . . The prevention of evil may constitute a . . . public use.” But the court in that case still distinguished between “public use” and mere “public advantage.” Relying on Crommett, the Supreme Judicial Court in 1967 advised the Maine Senate that there was no constitutional bar to a proposed law conferring on municipalities the right to take property to construct public parking facilities. Such facilities are a valid public use, not just because the public would enjoy full access to them, but because

1967); Crommett v. City of Portland, 150 Me. 217 (1954). The question of when something like electric power crosses the threshold from private to public use is of interest, but need not be resolved here.

107. Id. at 370.
111. Brown v. Gerald, 100 Me. at 371 (citation omitted).
112. 150 Me. 217, 233 (1954).
113. Id. at 234.
"[t]he whole public will achieve the prevention of such impediments to safety and welfare as interference with fire and police protection and the safe and free movement of traffic upon the public ways."\textsuperscript{115}

\textit{Crommett} "narrowed the gap" between the constitutionally-required public use and the less stringent standard of public benefit.\textsuperscript{116} But the court chose not to eliminate that gap altogether, recognizing that the need for flexibility does not obviate the court's responsibility to set and maintain limits on the exercise of eminent domain.\textsuperscript{117}

Permitting an exercise of eminent domain for the development of special waste landfills would, under present circumstances, go beyond the limit heretofore delineated by the Law Court. The \textit{Crommett} case involved the clearing of "blighted" urban areas, a strategy that may, in hindsight, appear to have failed in achieving the desired urban "renewal" but which contained the necessary public purpose in the sought-after improvement in city-wide quality of life. This kind of benefit would not accrue to the public by virtue of the development of the proposed landfills; municipalities would continue sending their solid waste to incinerators as before and continue paying contractually-determined rates for such disposal. The only change is that these private incinerator companies, plus other commercial generators of special waste, would reap economic gain.
by not needing to ship their special waste to other facilities which would be more distant and more expensive.

Assuming for the sake of argument that avoiding such a need to ship, and providing such an economic advantage, is a legislatively determined exigency (and therefore a political determination the court will not review), the question of public access to the proposed facilities is relevant to the determination of whether the exigency is a public one. The Gerald court stated that it is “not necessary that all of the public should have occasion to use [the proposed facility]. It may suffice if very few have, or may ever have, occasion,” so long as the public enjoys a “right to use” it.118 Although it may indeed suffice that any member of the public with special waste to dispose would enjoy the right to use the landfills, this in no way resolves the question of when there is sufficient public use.

In that light, it is instructive to distinguish between the public parking facility the Maine Justices found acceptable in their 1967 Opinion of the Justices and one found unacceptable by the Delaware Supreme Court in Wilmington Parking Authority v. Land with Improvements.119 In finding a valid exercise of eminent domain, Maine's highest court emphasized the “full access” of the public to both the parking and the benefits to public welfare.120 In the Delaware case, the municipality proposed a parking facility that was nominally open to the public but which, the record demonstrated, was actually designed expressly to meet the demands of a major local employer for better employee parking.121 If the public's right to use had been the end of the inquiry, the court would not have reached the unconstitutional appropriation of private property expressly for private use.

The Delaware court resolved this dilemma by declaring that “when the exercise of eminent domain results in a substantial benefit to specific and identifiable private parties, 'a court must inspect with heightened scrutiny a claim that the public interest is the predominant interest being advanced.'”122 This is an appropriate approach for Maine in the present context as well, as is the view of three federal circuits that “a taking will be nullified as not being for a public purpose when it is demonstrated that a public entity acted in an arbitrary manner or in bad faith.”123

118. Brown v. Gerald, 100 Me. at 373.
119. 521 A.2d 227 (Del. 1986).
120. Opinion of the Justices, 231 A.2d at 434.
122. Id. at 231 (quoting Poletown Neighborhood Ass'n. v. City of Detroit, 304 N.W.2d 455, 459 (Mich. 1981)).
123. Amen v. City of Dearborn, 718 F.2d 789, 798 (6th Cir. 1983), cert. denied, 465 U.S. 1101 (1984); United States v. 416.81 Acres of Land, 514 F.2d 627, 631-32 (7th Cir. 1975); United States v. Agee, 322 F.2d 139, 142 (6th Cir. 1963). This is by no
Here the court is presented with a Wilmington Parking Authority-type problem overlaid, at least potentially, with the brand of arbitrariness that justified nullification in the view of the Sixth Circuit Court of Appeals in Amen v. City of Dearborn.\textsuperscript{124} The Facility Siting Board’s enabling legislation was enacted in 1989 in response to a perceived landfill impasse, where the state’s two major commercial incinerators (MERC in Biddeford and PERC in Orrington) argued that they faced imminent bankruptcy because their joint effort to site a private special waste landfill in Washington County was failing. The landfill siting program of the Waste Management Agency was created as a direct response to the commercial need for special waste landfill space articulated by MERC and PERC.\textsuperscript{125} In 1989, both MERC and PERC cited financial difficulties in demanding renegotiation of their contracts with client municipalities.\textsuperscript{126} Many municipalities responded by choosing to dispose of their solid waste elsewhere,\textsuperscript{127} a development that attenuates the finding of public exigency vis-à-vis special waste landfills even further.

The Law Court’s most recent discussion of the public exigency test came in Brown v. Warchalowski in the context of a request by a landowner for the local selectmen to facilitate access to the landowner’s holdings by laying out an easement over a neighbor’s property along the course of a previously discontinued town way.\textsuperscript{128} The court found this a constitutionally insufficient public purpose. “The exigencies of particular individuals in the enjoyment of their own

\begin{itemize}
\item[124.] Amen v. City of Dearborn, 718 F.2d at 798 (taking should be nullified when it is arbitrary or imposed in bad faith).
\item[125.] See generally, MAINE LEGISLATURE STUDY OF SOLID WASTE MANAGEMENT AND DISPOSAL POLICY (1987) and the testimony presented to the committee at its hearings on the solid waste bills that gave rise to the enacted legislation.
\item[126.] Ted Cohen, Town Wondering How to Pay for MERC Hikes, PORTLAND PRESS HERALD, Oct. 24, 1989, at 1, 10. See also Donald M. Kreis, Waste Not: The Struggling MERC and PERC Plants May Be Worth Saving, MAINE TIMES, Nov. 24, 1989, at 16.
\item[127.] Commercial landfills in Norridgewock, Maine and Rochester, New Hampshire have apparently taken up much of this waste disposal slack. Also taking part is the quasi-municipal Regional Waste Systems incinerator in South Portland, which operates its own special waste landfill and apparently does not share the MERC and PERC ash disposal dilemma.
\item[128.] Brown v. Warchalowski, 471 A.2d 1026 (Me. 1984).
\end{itemize}
property will not in and of themselves suffice to permit state, county or municipal action, in appropriating the land of another for road purposes.\footnote{129} The same reasoning applies for landfill purposes, where the agency exercising the right of eminent domain has not demonstrated that the proposed facility will do anything more than serve the exigencies of particular individuals in the enjoyment of their own property.

"The [Maine C]onstitution protects the owner of property to the extent of 'churlish obstinacy.'\footnote{130} The landowner-plaintiffs in \textit{Town of Arundel v. Maine Waste Management Agency} were churlishly obstinate when it came to the siting of a special waste landfill, a phenomenon some commentators have characterized as the "NIMBY syndrome."\footnote{131} But the framers of the Maine Constitution created the requirement of public exigency precisely to protect property owners who wish to assert what some now characterize as NIMBY rights. When the owners of MERC and PERC persuaded Maine municipalities to "privatize" their garbage disposal by contracting with a private incinerator, MERC and PERC did not gain the right to have their business needs defined as a public exigency.

\section*{VI. Interstate Commerce: Garbage Is Not Baitfish}

A primary, though unstated goal, of the Maine Solid Waste Act was to prevent the importation of waste from other states for disposal in Maine.\footnote{132} The Act achieves this objective by banning the de-
development of any new commercial solid waste facilities, and limiting the BEP's authority by allowing the Board to permit only solid waste facilities that meet in-state "capacity needs."

It has been settled law since the Supreme Court decided City of Philadelphia v. New Jersey that the Commerce Clause of the U.S. Constitution prohibits the states from banning the importation of solid waste.

"The evil of protectionism can reside in legislative means as well as legislative ends. . . . Whatever [a state's] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."

The Supreme Court has also held, however, that a state may avoid the restraints of the Commerce Clause by functioning not as a market regulator, but as a market participant. "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."

What remains unresolved is whether the market participant doctrine applies to a state that is not merely a market participant, but a monopoly participant. The Philadelphia court expressly declined comment on such a possibility.

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134. Me. Rev. Stat. Ann. tit. 38, § 2157 (West Supp. 1991-1992). This section applies not only when the Waste Management Agency is the permit-seeker as a result of its own site selection process, but also when the applicant is "any other party." Id. § 2157(1)(A). Pursuant to the ban on commercial development in Section 2158, the only other parties with the potential to file an application are either municipal or regional governmental entities, existing solid waste facilities seeking a permit to expand existing capacities, or commercial entities seeking to create solid waste disposal capacity to meet their own needs (rather than with the intent of marketing that disposal capacity to others). Id. § 2158.
136. Id. at 626-27.
137. See Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) (state could impose more stringent requirements on out-of-state processors of scrapped vehicles when the state's role was that of offering a bounty for abandoned cars) and its progeny, e.g., White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983) (city could require construction projects it funded to be performed by a workforce of at least 50 percent city residents) and Reeves, Inc. v. Stake, 447 U.S. 429 (1980) (state-owned cement plant could sell only to state residents due to cement shortage). But see South-Central Timber Dev., Inc. v. Wunnike, 467 U.S. 82 (1984) (state could not require that timber taken from state lands be processed in-state prior to export). This amounted to "downstream regulation" of the timber-processing market (as opposed to the timber-harvesting market) in which the state was not a participant. Id. at 99.
An interesting and thorough discussion of this problem appears in *Swin Resource Systems, Inc. v. Lycoming County.*\(^{140}\) The Court of Appeals for the Third Circuit ruled that a county’s attempt to preserve its landfill capacity for local residents, achieved via the county’s policy of charging a higher price to non-local customers using the county-owned landfill, met the market participant exception to Commerce Clause scrutiny.\(^{141}\) The panel expressly rejected the argument that the county was engaged in impermissible “downstream regulation” designed to have an effect not on the market in which the state was participating but on other markets.\(^{142}\) But the court based that holding on the fact that the price differentials complained of “do not pertain to the operation of private landfills and do not apply beyond the immediate market in which Lycoming transacts business.”\(^{143}\) Given that Maine's solid waste act not only regulates private landfills but effectively prohibits them, the reasoning in *Swin* arguably does not apply. The statute is vulnerable to attack as downstream regulation because the limitations imposed on the market in which the state is participating (the siting and development of landfill capacity) is arguably focused “downstream” on the use of Maine’s landfill capacity for non-Maine waste.\(^{144}\)

The U.S. District Court for the District of Rhode Island has had occasion to consider whether there should be a “monopoly exception” to market participant doctrine when a state bans foreign waste from its landfill and that landfill is the only available facility in the state.\(^{145}\) The court, in a decision unreviewed by higher authority, declined such an invitation, seeing “no distinction between this monopoly and the monopoly the State and its municipalities hold in educational services, or in police and fire protection.”\(^{146}\) But, unlike

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141. *Id.* at 250-51.
142. *Id.* at 250 (citing South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984)).
143. *Swin Resource Sys., Inc. v. Lycoming County,* 883 F.2d at 250.
144. The court validated the disputed regulation because “Lycoming’s conditions on what garbage may be dumped in its landfill do not, by their own terms, regulate what may be done with the garbage outside of the market transactions in which Lycoming is engaged.” *Id.* at 251. Thus, with respect to the distinction between downstream regulation and market participation, “Lycoming clearly falls on the market participant side of the line.” *Id.* But note the court’s dicta, observing that no court has ever compelled city-owned garbage trucks to collect waste from beyond the city limits. “We see no constitutional reason why a city cannot also limit a city-operated dump to garbage generated by city residents,” the *Swin* court stated. *Id.* Garbage collection is more properly viewed as the provision of a municipal service rather than a participation in a market, and the relevant question is not whether a city may keep non-resident garbage off its trucks and out of its landfills, but whether the city can keep foreign trash out of all trucks and landfills functioning within the city limits.
146. *Id.* at 1212.
in Maine, the existence of the monopoly in Rhode Island was not in itself a matter of statutory policy; the court noted that four landfill license applications were pending in Rhode Island at the time of the 1987 ruling and, therefore, "Rhode Island has done nothing more than purchase a natural resource, i.e., the landfill site, and offer to its customers the service of waste processing." 147

The district court that decided Lefrancois distinguished the situation in that case from the scenario in City of Philadelphia by noting the distinction between "the market in waste processing,—a service—and the market in landfill sites," which comprise a natural resource. 148 The court noted that the New Jersey statute invalidated by the Supreme Court excluded out-of-state garbage processors from both markets, where the Rhode Island statute only keeps outsiders from the market in available waste disposal services. 149 Thus, under the reasoning of Lefrancois, Maine's solid waste law would not fail constitutional analysis because the Waste Management Agency is excluding non-Maine waste from the existing landfill market (the market in which the state is participating). But the Maine statute would fail under this analysis because of the law's "downstream" effect of banning the development of any other facilities, thus effectively preventing interstate commerce in landfill sites.

Alternatively, opponents of the Maine statute would likely argue that the state cannot restrict access to its landfill capacity because there should be a "natural resource" exception to the market participant doctrine. This is suggested by the Supreme Court's ruling in Reeves, Inc. v. Stake, 150 in which the Justices held that South Dakota could refuse to sell cement from a state-owned factory to out-of-state buyers during a cement shortage. The court noted that cement is not a natural resource but the result of a complex industrial process, concluding therefore that "[w]hatever limits might exist on a State's ability to invoke the [market participant] exemption to hoard resources which by happenstance are found there, those limits do not apply here." 151 Since hydrogeological and environmental conditions suitable for landfills do, unlike cement, occur by happenstance, the Court could use a challenge to the Maine statute as the occasion for explicitly carving out a natural resources exception. 152

147. Id. at 1211.
148. Id. at 1211-12.
149. Id.
151. Id. at 444.
152. The Third Circuit declined such an invitation in Swin, calling the natural resources exception a "difficult question" that it need not reach because landfill space is not a natural resource. Swin Resource Sys., Inc. v. Lycoming County, 883 F.2d at 252. Rather, relying on Sporhase v. Nebraska, 458 U.S. 941 (1982) (state could restrict the export of its groundwater because its continuing availability was not the result of happenstance, but of prudence), the Third Circuit's panel reasoned that
Such a development, however, seems highly improbable. While Maine was struggling with its flawed landfill siting process, the U.S. Supreme Court was making clear its ongoing disinclination to permit states to erect garbage barriers. The question quickly became a political one, as the U.S. Senate took steps toward having Congress give states the authority that the judiciary has so carefully withheld.

Preceding the High Court's 1992 rulings on garbage commerce, the justices denied certiorari in National Solid Wastes Management Association v. Alabama Department of Environmental Management,\(^1\) letting stand the Eleventh Circuit's determination that Alabama's restriction on hazardous waste importation violated the Commerce Clause even though that restriction fell short of an outright ban and the waste was (contrary to the situation in City of Philadelphia) ostensibly being regulated because it is inherently dangerous.\(^2\) "The [Alabama law] plainly distinguishes among wastes based on their origin, with no other basis for the distinction," the court ruled.\(^3\)

Then, on June 1, 1992, the Supreme Court all but eliminated the notion that the Commerce Clause would ever allow barriers to interstate trade in trash. Over the vociferous objection of Chief Justice Rehnquist, joined by Justice Blackmun, the rest of the Court held in Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of

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2. The Eleventh Circuit rejected the argument that hazardous waste is something a state could ban importation of based on its right to quarantine highly dangerous articles. This is of local interest to Maine readers because such an argument springs from Maine v. Taylor, 477 U.S. 131 (1986), holding that Maine could ban the import of baitfish carrying an undesirable parasite.

3. Id. at 721-22.
Natural Resources\textsuperscript{156} that a state cannot authorize local governments to ban out-of-county waste. And, in an accompanying case, the Court (with Rehnquist alone dissenting) ruled in Chemical Waste Management v. Hunt\textsuperscript{157} that states cannot impose a special fee on waste imported for landfilling from outside the state's borders.

The state of Michigan's argument in Fort Gratiot, which convinced the Sixth Circuit Court of Appeals, was that a ban on out-of-county waste does not violate the Commerce Clause because such a ban treats all non-local waste equally, whether it comes from a neighboring county in Michigan or the profligate garbage producers beyond Michigan's borders.\textsuperscript{158} Writing for the majority, Justice Stevens did not merely disagree, but suggested that the Supreme Court had dispatched such a notion as unconstitutional more than a century ago.\textsuperscript{159} Political subdivisions of a state, White declared, cannot do what the Commerce Clause prohibits states from doing.\textsuperscript{160} He went on to reject the health and safety argument, reasoning that Michigan trash and non-Michigan trash are equally hazardous (or non-hazardous) to the well-being of Michigan residents.\textsuperscript{161} Stevens stated unequivocally that neither state had succeeded in digging out from under the City of Philadelphia interstate garbage.\textsuperscript{162} As far as the United States Supreme Court is concerned, our nation of fifty states is one big landfill, indivisible, with garbage and interstate commerce for all. This unequivocal reaffirmation of City of Philadelphia, after more than a decade of legislative bids to tunnel around it, has already begun to reverberate through state trash statutes, and state trash piles around the country.\textsuperscript{163}

\textsuperscript{158} Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 112 S.Ct. 2019, 2023 (citing Bill Kettewell Excavating, Inc. v. Michigan Dep't of Natural Resources, 931 F.2d 413, 417 (6th Cir. 1991)).
\textsuperscript{159} Justice Stevens cited Brimmer v. Rebman, 138 U.S. 78 (1891) (special inspection fees on meat slaughtered more than 100 miles from point of sale), and Dean Milk Co. v. Madison, 340 U.S. 349 (1951) (city ordinance banning sale of milk as pasteurized if it was processed more than five miles from downtown). Fort Gratiot Landfill v. Michigan Dep't of Natural Resources, 112 S.Ct. at 2025.
\textsuperscript{160} Id. at 2024.
\textsuperscript{161} Id. at 2027-28. Justice Stevens carefully distinguished this case from Maine v. Taylor, 477 U.S. 131 (1986), stating that Michigan had failed to do what Maine succeeded in doing in the case of the baitfish importation ban: Proving that the state had legitimate reason, based on other characteristics than state of origin, for banning a particular article of commerce. Id.
\textsuperscript{162} Id. at 2023-24, 2028.
\textsuperscript{163} See, e.g., Southern States Landfill v. Georgia Dep't of Natural Resources, 1992 U.S. Dist. LEXIS 12093. The District Court, citing Chemical Waste Management v. Hunt and Fort Gratiot Sanitary Landfill, invalidated a Georgia statute imposing a $10 per ton fee on out-of-state waste imported for landfilling. Id. at *19. The drafters of the Georgia statute in question wrote their law so that the fee did not
As he did in *City of Philadelphia*, Chief Justice Rehnquist refused in *Fort Gratiot* or *Hunt* to condemn what he regards as a laudable local attempt to preserve environmental quality by eschewing what Mainers would call trash "from away." In *Fort Gratiot*, Rehnquist was able to attract the support of Justice Blackmun, apparently by urging a remand rather than an outright affirmation of the Michigan statute. In *Hunt*, Rehnquist would have affirmed the Alabama tax on non-Alabama hazardous waste, and attracted no support from his colleagues for his notion that it is not Alabama that is seeking economic isolation, but the thirty-four states that have no hazardous waste facilities within their borders.

In other words, Rehnquist refused to see this as a Commerce Clause problem. One might fault the Chief Justice for resolutely ignoring the fact that the article of commerce in question is landfill space, highly tangible if not terribly fungible, but one must also sympathize with his effort to grapple with a problem never envisioned by the founders of the republic. The drafters of the Constitution would have been bewildered by the notion of interstate garbage shipments, not because this commodity was less ubiquitous then—at least one "garbologist" thinks there may have been more trash per capita before the industrial revolution than there is now—but because environmental awareness generally and concerns about toxic chemicals in garbage particularly were unknown in 1789. So, in a sense, Rehnquist is doing what his forebears on the Court did during the *Lochner* era. He is seeking constitutional legitimacy for natural law. But the natural law that masked a mere policy preference explicitly apply to out-of-state waste, but only to "special solid waste," defined as waste not subject to regulation under Section 12-8-24 of the Georgia law. *Id.* at *7* (citing *GA. CODE ANN.* § 12-8-22(34) (1992)). Duly following this obfuscatory trail, the court noted that the only waste not subject to such regulation is waste that originates outside of Georgia and, "consequently, 'special solid waste' is really just another name for out-of-state waste." *Id.* at *8.

164. *Fort Gratiot Landfill v. Michigan Dep't of Natural Resources*, 112 S.Ct. at 2028 (Rehnquist, C.J., dissenting). Justices Rehnquist and Blackmun would have remanded for a determination as to whether the county-by-county approach to regulating waste importation in Michigan flows from legitimate health and safety concerns rather than economic protectionism. *Id.* The majority trashed that suggestion summarily by noting that Michigan had not sought such a remand nor suggested it could "further health and safety concerns that cannot adequately be served by nondiscriminatory alternatives." *Id.* at 2027 n.8.


166. See, for example, Chief Justice Rehnquist's assertion that he is "baffled" by the majority's view that the *Fort Gratiot Landfill* case involves garbage being bought and sold since the garbage is not being purchased. *Fort Gratiot Landfill v. Michigan Dep't of Natural Resources*, 112 S.Ct. at 2028 n.1 (Rehnquist, C.J., dissenting).

against statutes the U.S. Supreme Court dealt with in the *Lochner*
era is altogether different from the truly natural law of entropy with
which Rehnquist, and all of modern trash jurisprudence, seeks to
grapple. For the Chief Justice, the entropical reality forces the Con-
stitution to embrace a doctrine of environmental protectionism, or
"the commonsense notion that those responsible for a problem
should be responsible for its solution to the degree that they are
responsible for the problem but not further."168

Enter Senator Max Baucus, Democrat of Montana, and his pro-
posed Interstate Transportation of Municipal Waste Act of 1992,169
passed by the Senate on July 23, 1992 by an overwhelming 89-2 vote
and sent to the House of Representatives. The Baucus bill would
allow state governors to limit, or in some instances altogether ban,
waste importation if requested by an "affected local government."170
The governor of a state that imports more than a million tons of
out-of-state municipal waste per year could restrict but not elimi-
nate waste imports without the request of any local government.171

While the Baucus bill would thus effectively neutralize much of
*City of Philadelphia* and its recent progeny, it does not give states
like Maine carte blanche to stop the garbage haulers at the bor-
der.172 And Maine and other states that would seek to isolate them-
sehes from out-of-state waste will still confront a judiciary deter-
mined to detect the bouquet of protectionism in such garbage
initiatives. States that would rely on legislative largesse with respect
to warding off the hostile judiciary would do well to bear in mind
that Congressional sympathy for protectionist measures is rooted in
the perception that some states are being forced to become regional
landfills for their more populous neighbors.173 Where Maine's stat-

168. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources,
112 S.Ct. at 2029 (Rehnquist, C.J., dissenting). Such views may endear Rehnquist to
opponents of landfills, but such opponents will be dismayed to discover that he bases
his view that communities should solve their own waste problems and no other on a
potentially misguided faith in engineered systems like liners and leachate collection
systems. *Id.* at 2030. One wonders how Chief Justice Rehnquist would rule on a case
involving Maine's siting criteria in light of his conclusion that "siting a modern land-
fill can now proceed largely independent of the landfill location's particular geological
characteristics." *Id.*

170. *Id.* § 2 (proposed amendment to 42 U.S.C. §§ 6941-6949 (1992)).
171. *Id.* (proposed section 4011(a)(2)).
172. See, for example, *id.* at proposed section 4011(b), providing some sweeping
exceptions to a governor's authority to limit waste importation. In particular, gover-
nors could not block importation by landfills that were previously in compliance with
all relevant state and local environmental and waste disposal laws. Note, also, that
such "grandfathering" raises the potential for antitrust problems in states like Maine
where the number of previously permitted commercial landfills is very small and the
Baucus bill would add new commercial disincentives to the development of new
facilities.

173. See, e.g., *Press Conference with Senator Dan Coates, Fed. News Serv., June*
ute has helped transform the state from a net waste importer to a net waste exporter (with no facility within its borders for hazardous waste), both Congress and the federal courts would have no trouble turning against the Maine Solid Waste Act as a matter of law or policy. Maine can no more divorce itself from the regional or national waste disposal conundrum than it can isolate itself from the rest of the U.S. economy.

VII. THE "NIMBY" PROBLEM

No assessment of the Maine Waste Management Act could reasonably ignore the extent to which the legislation met one of its primary objections vis à vis the siting of solid waste facilities: defusion of the so-called NIMBY, or "Not In My Back Yard," phenomenon. One journalist observing the phenomenon described it as the inevitability that "[a]ny project for the greater public good will be strongly opposed by local residents." One legal scholar has called NIMBY "the art, if you will, of using public participation and organized grassroots opposition to keep out what [towns and citizens' groups] want to keep out." One finds a dearth of material in the legal literature that supports the so-called NIMBY movement, and much commentary that is contemptuous of such activism. Perhaps a more constructive view of

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1. Tux Turkel, Battle Over Ash Dump Plan a Classic Case of NIMBY, ME. SUNDAY TELEGRAM, Nov. 13, 1988, at 19A.

2. Orlando E. Delogu, "NIMBY" Is a National Environmental Problem, 35 S.D. L. REV. 198 (1990) (footnote omitted). Delogu admits that "[o]ne must readily concede there is more than a little legitimacy to concerns over siting, particularly hazardous waste or other high risk facilities." Id. at n.3. The Delogu article is of particular interest because, like the framers of the Maine solid waste law, Delogu was reacting in part to the failure of the proposed Township 30 landfill in Washington County, Maine. See, e.g., id. at 203, n.19; 206, n.27; and 213, n.47. Despite his call for sweeping anti-NIMBY legislation on the federal level, arguably similar in approach to the Maine statute, id. at 212-19, Delogu appears to concede that NIMBY opposition was not the reason the Township 30 landfill was never built. "[T]here is credible reason to believe that the ultimate rejection of . . . [the Township 30 site] was because [it was] unsuitable on the basis of a wide range of objective criteria that . . . [the Board of Environmental Protection and the Land Use Regulation Commission] brought to bear." Id. at 207, n.29.

3. Most commonly this appears as the phrase "NIMBY syndrome." See, e.g., id. at 198; Julienne L. Adler, United States' Waste Export Control Program: Burying Our Neighbors in Garbage, 40 AM. U. L. REV. 685, 687 n.14 (1991) ("Public opposition to landfills and incinerators is termed the NIMBY—not in my back-
NIMBY is to regard it as what a Maine commentator has termed "trickle-up policy" whereby local opposition to something like a waste disposal facility imposes new costs and pressures on the body politic generally, leading to a broad policy shift toward alternatives to disposal facilities, such as recycling. Under this view, the NIMBY activism fails to become a "syndrome" because the local opposition is merely the first step toward a more broad coalescence; "[t]hrough such exercises, community values emerge and are reaffirmed, obliquely and subtly, but vigorously nonetheless. The search for common values often begins with common opposition."

This has arguably occurred in Maine since the first anti-landfill NIMBY groups emerged in the mid-1980s. Activists who opposed...
the development in 1986 of the Hebo-Hybo landfill in Lebanon have remained involved in the process, assisting subsequent landfill opponents in Norridgewock and Washington County and lobbying at the State House. An abutting landowner to the proposed Arundel landfill cross-examined witnesses in 1991 when the Board of Environmental Protection considered the expansion of the Norridgewock facility. The leader of the Township 30 anti-landfill group went on to run an independent campaign for governor. It does not seem far-fetched to conclude that the broad policy shift embodied in the Maine Waste Management Act, away from landfilling and toward source reduction, reuse and recycling is attributable at least in part to the "trickle-up" phenomenon.

Nevertheless, the Act also sought to "cure" the NIMBY "syndrome" with provisions designed to thwart local opposition to facility siting. The creation of a centralized, government-run siting mechanism and objective criteria to guide that mechanism was an attempt to assure that no locality could argue that it was being unfairly singled out for political reasons. Township 30 landfill opponents vehemently asserted this argument. But the quid pro quo was Section 2173 of the Act—somewhat ironically included in the subchapter entitled "host community benefits"—limiting municipal jurisdiction over facilities created by the Agency or regional government entities.180 Under this provision, municipalities are circumscribed in their authority to enact local solid waste ordinances; pursuant to such ordinances municipal authorities may "issue a local permit containing the same findings, conclusions and conditions contained in the license issued by the [D]epartment [of Environmental Protection]. . . ."181 Municipalities may only attach additional conditions if those conditions do not "unreasonably restrict the operation of the facility."182

Divesting municipal governments of their right to veto a disposal site within their borders has not, however, had the effect of thwarting the NIMBY movement. Adherents to the "disease" metaphor must concede that the "syndrome" grew all the more virulent during the landfill siting process that culminated in January, 1992; NIMBY groups sprang up in most if not all localities named as potential candidate sites by the Agency. Among those municipalities that became official "candidate sites," virtually each one set about hiring attorneys and consultants in an effort to erect every possible barricade to landfill siting. "Trickle up" theorists will see a positive development here in the awakening to activism among citizens previously uninvolved in solid waste policy.

The principle of mutual interdependence would force the environ-

181. Id.
182. Id.
mental activist to agree with the landfill developer that it is not appropriate for a community that reaps the benefits of globally-derived wealth to enjoy a summary veto of responsibility for the by-products of that wealth. But, of course, this is also true of the state that seeks to erect barriers to the importation of waste from other states. The failure of the Maine Waste Management Act to stop NIMBY activism testifies to the futility of such preventive measures; even the most inarticulately and selfishly shouted demands for accountability have value. Landfill developers, whether ultimately answerable to stockholders or voters, should be forced to prove that their incursions into the backyards of America are environmentally unassailable.

VIII. Conclusions and Recommendations

Notwithstanding the good faith of everyone involved, and recognizing that budget crises have sharply limited the Maine Waste Management Agency’s ability to accomplish its multifaceted mission, the landfill siting provisions of the Maine Waste Management Act have proven themselves to be a legislative experiment that has failed. At a time when devoting attention and resources to innovative recycling and source reduction programs would have administered a boost to the economy and the achievement of the policy goals of the Act, the Agency spent upwards of $400,000 in consulting fees and studies alone on a doomed search for landfill whose need was anything but established.183 Had the process been allowed to continue, litigation would in all likelihood have invalidated the siting program, both because of the constitutional insufficiency of the statute itself and because of the procedural inadequacies of the Waste Management Agency’s activities. The Legislature should devote attention in 1993 to a comprehensive rewrite of the Maine Waste Management Act.

Critical to that task is the recognition, reluctant though it may be, that the Commerce Clause of the U.S. Constitution prohibits Maine from seeking to ban the importation of waste as contemplated by the present version of the Act. If it is true that avaricious waste entrepreneurs are conspiring to foist mountains of toxic residue on allegedly helpless states like Maine, Congress is the appropriate body to confront this problem. A strictly worded provision imposing strict, joint and several liability on the developers as well as the contributors of any leachate leaking from a special waste landfill would be a welcome safeguard.184 This would attenuate the profit motive in

the expedient development of commercial landfills and act as an economic disincentive to the generation of waste generally. Freed from the need to establish Maine as a market participant, state government could absent itself from an enterprise that it is ill qualified to undertake. 185

The proper scope of the Agency's role in facility development is to assure that proposed facilities operate in conformance with the waste management hierarchy of source reduction, reuse, recycling, composting, processing and finally landfilling. 186 A revised statute, requiring such a capacity needs determination from the Agency as a precondition to permitting from environmental agencies, should clarify the present criteria to state that a developer, whether private or public, must affirmatively demonstrate that it has taken steps to subject any waste landfilled or incinerated to each preceding step in the hierarchy. Conformity to the hierarchy should take precedence over all other criteria.

The other criteria must be divested of their vagueness so it is clear which ones take precedence. The most troubling one, relating to soils, must cease to be a conundrum whereby landfills move inexorably toward wetlands, the development of which is prohibited by federal laws. Two things should occur: The law and the regulations should recognize that glacial tills (such as those found in Norridgewock) are suitable for development, and the federal government should resolve its current muddle over definition of wetlands. Once wetlands are properly defined (and they should be defined strictly) the Maine statute should clarify that their exploitation as landfill sites is unacceptable as a matter of state and federal law.

Several other states in the northeast have adopted approaches that Maine would do well to emulate. Massachusetts and Rhode Island both require the developer of any landfill to engage in negotia-

185. The Act itself as presently worded concedes that development and operation of landfills is best left in private hands. The statute calls for the Agency to “provide for solid waste disposal facilities by contracting with private vendors for facility design, construction or operation or, if necessary, undertaking facility development itself.” Me. Rev. Stat. Ann. tit. 38, § 2156(2) (West Supp. 1990-1991). This provision of the Act was something of a boon to the private landfill companies the statute was intended to disenfranchise, since it freed the companies from the most irksome aspect of their business (site selection, acquisition and permitting) and mandated that the state hire them, presumably at levels that allowed a reasonable profit, to do what the companies feel they do best—run the waste facilities.

186. See supra note 3. It is worth noting that the Agency and the Facility Siting Board have themselves effectively conceded that they are ill-suited to the task of finding the best possible site for a landfill—even given the broad power of eminent domain that private developers do not enjoy. The Agency and Board have conceded that “it is not practical to obtain the resource data needed to identify the theoretically ‘best’ landfill site” and that suggestions to the contrary engender “false expectations.” Maine Facility Siting Bd. Reg. 450 (Aug. 19, 1992), Basis Statement at 2.
tions with the host municipality. This has the effect of directing NIMBY energy into a constructive partnership with the developer whereby benefits (i.e., profits) and liabilities are shared equitably. Since 1970, New Jersey has subjected waste disposal facilities to price regulation by the state’s public service commission. Such a reform is long overdue in Maine. The antitrust division of the Maine Department of the Attorney General has repeatedly urged such a move on the Legislature, noting that the barriers to entry—whether the business be incinerators or commercial landfills, are so high as to create an oligopoly with nearly unfettered market power. (The present ban on commercial landfill development, combined with the provision that permits existing facilities to expand, arguably gives the present owners of commercial landfills absolute market power.) Thus, successful efforts by the MERC and PERC incinerators, beginning in 1989 to tear up all municipal disposal contracts and renegotiate them is best viewed in the context of a decade in which disposal prices generally have risen by an order of magnitude. Any reestablishment of the private sector's role in waste management without the simultaneous establishment of price regulation would be an act of sublime irresponsibility. Waste management facilities have become essential public services just as power and telephone companies have, and, as with those utilities, economic efficiency suggests the public's waste management needs are best served by regulated monopolies.

Even the most responsible-minded and sober observer of the evolution in Maine's solid waste policy during the past six years would have to concede that what has transpired was more soap-opera than problem solving. When University of Arizona’s famed “garbage archaeologist,” William Rathje, recently warned against adopting a crisis stance with respect to garbage policy making, surely the Maine Waste Management Act and its landfill siting process were among the “ill conceived and counterproductive initiatives” he had in mind.

189. Note that submission of the rate increase requests by MERC and PERC to the Public Utilities Commission (PUC) probably would have resulted in their approval as reasonable under the circumstances.
190. Defining waste facilities as essential, regulated public service enterprises would also have the potential effect of justifying the exercise of eminent domain for development of such facilities—provided that the regulatory agency must certify the existence of the need as the PUC presently does with the companies it regulates.
191. William Rathje and Cullen Murphy, Rubbish! The Archaeology of Garbage 238 (1992). Rathje does not mention Maine in his book, but the first of his “ten commandments” of garbage policy is, “Don't think of our garbage problems in terms of a crisis.” Id. “Our garbage is not about to overwhelm us; there are a number of options available; and most communities have time to think about those options and
Development of new facilities pursuant to the Act has been at a near standstill, but so has the implementation of the waste management hierarchy that was supposed to move Maine away from the wholesale generation of trash. Week upon week of hearings have taken place from Machias to Buxton, full of sound and fury but signifying nothing. Meantime, entropy has continued to wreak its inexorable havoc. Maine deserves a solid waste policy that slows entropy as much as practicable, thereby prolonging the usefulness of at least the small corner of the planet under Maine's jurisdiction.

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choose among them wisely.” Id. This clearly applies to Maine.