Waste & the Dormant Commerce Clause – A Reprise

Richard A. Epstein

I take a great deal of comfort in Jonathan Adler's reply to my recent contribution to the *Green Bag* on *Waste and the Dormant Commerce Clause*.[1] His article is written in two parts. The first part deals with the theoretical question of whether different dormant commerce clause regimes are appropriate to bads and goods – assuming that we can distinguish between them. The second half offers a ground-level assessment that concludes that the externality risks in modern waste storage are so small that they can be safely neglected. My own sense is that Adler fares better at the empirical than the theoretical level. On the latter, I think that he underestimates the delicacy of reconciling free trade with protection against externalities, but he does an excellent job in showing that these theoretical concerns have little or no bite in this particular context.

On the narrow focus of concern, his empirical evidence seems sufficiently strong that we need not tarry over our theoretical disagreement. As I stressed in the original paper, if the negative externalities are contained then the strong bias in favor of free trade survives intact. "If those externalities are fully and adequately controlled by local legislation, then this [orthodox free trade] model goes through without much of a hitch: transactions in waste are service transactions whose only externalities are the pecuniary externalities of financial markets."[2] Happily, that seems to be the case.

The Theoretical Problem

Adler's central theoretical claim is this: "Allowing buyers and sellers to exchange money for goods and services generates a positive sum game even when the provision of the desired

Richard A. Epstein is the James Parker Hall Distinguished Service Professor of Law at the University of Chicago.

1 Jonathan Adler, *Waste & the Dormant Commerce Clause – A Reply*, 3 Green Bag 2d 353 (2000), responding to Richard A. Epstein, *Waste & the Dormant Commerce Clause*, 3 Green Bag 2d 29 (1999).

2 Epstein at 35.

good or service generates an imperfectly controlled externality."[3] In principle this claim has to be implausible, for two plusses (to the trading partners) need not exceed a single minus (to the outsiders). Everything depends on the relative size of the gains and losses generated in the complex set of choices on the creation, shipment and storage of waste. Stated more concretely, consider a stylized situation in which a community generates x amount of local waste all of which pollutes the local environment. Assume next that it can store the waste at some local site (with capacity x) such that half the pollution is eliminated while half of it remains. On these simplified assumptions, the local community would build that waste disposal site if it were confident that only its internal waste would be collected there, for then it could internalize the full gains from pollution reduction. The net effect is that pollution is reduced from x to $0.5x$, where we shall assume, for sake of argument, that it is equally distributed over the same individuals in both cases.

Next assume that the site is subject to an antidiscrimination norm by which the site must take pollution from all comers. Assume further that in equilibrium the out-of-state sources will constitute 75 percent of the material stored there. On these assumptions the local facility will no longer be built: If $0.75x$ of the pollution from the original site remains undiminished, and the new site is filled up, so that $0.50x$ pollution is added from in-state and out-of-state sources, then the local community has $1.25x$ pollution after the site is built as compared to $1.00x$ before. Therefore, all other things being equal, the local community will prefer not to build the site, even though that new site would improve the overall situation, taking into account all local and out-of-state interests. The equal access to the new site does not generate equal local and foreign benefits, however, for only the storage of local waste diminishes the amount of local pollution. A set of differential taxes or local preferences might, I suggested, be able to cure this difficulty, but these are blocked under the conventional application of the nondiscrimination norms of the dormant commerce clause.[4] I then speculated that the ostensible shortage of sites had led to the Federal legislation, the Low-Level Radioactive Waste Policy Amendments (LRWPA), to obviate the difficulties in question.

I do not see anything in Jonathan Adler's examples that negates this theoretical concern. By limiting my concern to wastes I meant to exclude the crude protectionist efforts to exclude out-of-state steel from being sold in home markets.[5] If anything, that situation represents the reverse problem where local citizens may have to endure pollution in order to facilitate out-of-state sales. But those problems could be redressed under local law, without raising any interstate concerns. His other examples are similarly unresponsive. To be sure, some forms of trash really do count as other folks' treasure.[6] But once we know that waste will be recycled then the storage problem will no longer remain, so the example no longer illustrates the point in dispute. Likewise examples that deal with restrictions on local mining and hog farming[7] are also beside the point, although for a different reason. All limitations on local waste produce local dislocations and generate some external benefits, so that it is not likely that anyone outside the state would challenge conditions that benefit them. Finally, the waste problem that I iden-

3 Adler at 353-54.

4 *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

5 Adler at 355-56.

6 Adler at 354.

7 Adler at 356.

tify is clearly distinguishable from *Dean Milk Co., v. Madison*,[8] which did not involve any nuisance or pollution issues at all. There the City was unable to offer any evidence that its local inspections improved the safety of pasteurized milk. All systems of inspection, wherever located, operated at the same level of efficiency, so spillover effects on third parties simply were not part of the case. The case was one of naked protectionism, disguised as a health issue.

The nub of the issue is best revealed in Adler's instructive examples of interstate markets for medical services, especially for contagious diseases. If the services in question were for the treatment of the usual conditions of heart disease and cancer, then I see no difficulties in applying the usual nondiscrimination analysis to what are pure service transactions. It is very hard to see why local interests would want to keep out customers from out-of-state, so I am hard pressed to see how the issue could arise at all. Rather, the hard question arises with contagious airborne diseases. At this point we do have a problem, for at the very least we have to decide whether the contagion is real or the entire program is simply a sham imposed for illicit anticompetitive purposes. There is little doubt that the nineteenth century cases that dealt with contagion did not take an unthinking free trade approach.[9] The standard procedure allowed for quarantine and return for immigrants to the United States from foreign lands if contagion was an issue. In this case no private action in tort could deter the spread of the disease or compensate other individuals who died or were crippled by infection. So alternative procedures, distinctive to foreigners, were set up. If the immigrants were cured after quarantine, they could enter; if not, then the steamship companies were obligated to return them home. The rule was not that persons suffering contagious afflictions had to be admitted into the United States where they were subject to the same set of restrictions as local citizens with the same conditions. One way to justify that rule is to note that they posed additional perils to the community, but had contributed nothing to the public health and medical programs designed to counteract those risks. We do not know exactly how these restrictions would play out if people with contagious diseases sought to move from community to community, but it is far from obvious to me that the right response would be first to let them in and then to subject them to the same health restrictions as everyone else. Exclusion has to be considered as a principled response. Nor are these isolated questions. We constantly have to deal with complications that come from out-of-state efforts to promote local gambling and prostitution. Here again if it is easier to keep fledgling interests from getting started, then perhaps (but only perhaps) a differential ban could be justified.

The Empirical Evidence

I conclude therefore that my theoretical concern survives the examples lodged against it. The free trade analogy does not fit perfectly when strong uncorrected externalities are generated by the free movement of bads across boundaries. The empirical question is: What does this have to do with the waste issue? On this score, I think that Adler's informative summary of the state of the industry deserves

8 340 U.S. 349 (1951), discussed in Adler at 357.

9 Quarantine laws were mentioned as grounds for state intervention in lots of commerce clause cases, including: *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824) (treating "inspection laws, quarantine laws, health laws of every description" as legitimate local laws that act on people and goods before they enter into interstate commerce); *The Passenger Cases*, 48 U.S. 283 (1849) (sustaining challenges to taxes on masters of ships to defray costs of examining and quartering passengers with contagious diseases).

high marks. The basic story that he tells is the familiar one in which technological advances manage to outpace legal developments. Let us assume therefore that the hazardous waste issue was a serious one in 1980, and that state governments responded to it by taking into account only local concerns. The local sentiment to keep out foreign waste put states into an awkward position under the antidiscrimination rule: they had to refuse to create facilities for their own waste. By default every state had a strong incentive to become a potential net exporter of waste. The upshot could have been a systematic shortage in waste storage facilities.

It is at this point that Adler's critique takes hold, for the theoretical issue drops out when the externality is no longer to be found. Critically, we must remember that externality problems are always a function of technology. Adler shows that the recent advances in the art point conclusively to the superiority of the large, well-managed dump site to the small, local site (which does impose serious neighborhood risks). On that state of affairs, any regulation that prevents the movement of waste across state boundary lines will unnecessarily hamper the concentration of waste in a few well-chosen dumpsites. Matters are yet more difficult if, as Adler persuasively argues, the transportation risk is larger than the storage risk, for now all the states through which the waste travels have incentives to resort to severe regulations in the hopes of inducing people to reroute their waste. Here of course the rules would apply to the local shipment of locally created waste. But if the percentage of waste shifted from out of state is very large, ironically it could well be that the nondiscrimination rule might not prove strong enough to counteract the worst of the risks, and perhaps some uniform federal standards are required to facilitate transfers.

Under these circumstances, Adler is surely correct that the nondiscrimination rule is preferable to any constitutional rule that leads to the balkanization of a nation by the imposition of petty local restrictions. The irony of all this, however, is that the restrictions that he deplores under the LRWPA did not arise because the Court suspended the nondiscrimination principle in ways that I might have thought wise. Rather, they arose because the Court's nondiscrimination rule is always trumped by Congressional regulation no matter how unwise or foolish that might be. The hard – indeed, radical – question of ideal constitutional design therefore is to ask whether restrictions on state legislation should be beyond the power of Congress to alter. There is a great deal of attractiveness to that novel approach. Certainly a powerful prohibition against Congressional override poses no harm if it prevents Congress from creating local cartels for the diary industry. And it surely warns us that the externality of today may disappear under the technical advances of tomorrow.

On the particular question of interstate waste disposal, Adler has returned this wayward sheep safely to the free-trade fold. If he is right, then the current political agenda should not pander to the NIMBY crowd, but use federal regulation in exactly the opposite direction – to facilitate national markets for large waste-dump sites. It should take care to establish uniform standards for the shipment of waste across state boundaries so that local variations in safety rules, such as those which were struck down in *Southern Pacific Ry. v. Arizona*,[10] do not become the order of the day. Alas, there always remains in network industries some role for federal legislation. What is needed is careful empirical work to make sure that the sound theoretical concerns do not receive undue attention because of their deep

10 325 U.S. 761 (1945).

intellectual interest, when they have been controlled in practice. Adler underplays the former. As currently advised, I am confident that he is right on the latter. But at this point, the pleading issues, as it were, dominate. Adler has offered a demurrer and a denial. The demurrer is overruled. Judgment, perhaps summary judgment, on the denial.