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## **South Carolina Loses a Battle in the Hazardous Waste Wars: Using the Dormant Commerce Clause to Invalidate South Carolina's Hazardous Waste Laws in *Environmental Technology Council v. Sierra Club***

*Dear Jim:*

*We recently learned the North Carolina Council of State rejected the transfer of state-owned land for use as a comprehensive hazardous waste treatment and disposal facility. By this action, it is apparent North Carolina will be unable to meet the milestone dates set forth in the Regional Agreement established with the states of Alabama, Kentucky, Tennessee and South Carolina.*

*As you know, under the terms of the regional agreement a party state failing to meet the milestones set forth will be eliminated automatically. Therefore, effective January 1, 1991, if the permit milestone is not met, North Carolina will be eliminated automatically from the agreement and lose all its rights and privileges. . . .*

*It is unfortunate North Carolina has chosen not to abide by its agreement to shoulder the burden for their own wastes and to share their capacity with the agreement states. Hopefully, North Carolina and her industries are prepared to suffer the consequences of this irresponsible decision by the Council of State.<sup>1</sup>*

These harsh words from the Governor of South Carolina to the Governor of North Carolina<sup>2</sup> represent one of the most recent battles in the "war" among the states over the disposal of hazardous waste.<sup>3</sup> Approximately 214 million tons of hazardous waste are generated in

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1. Letter from Carroll A. Campbell, Jr., then-Governor of South Carolina, to James G. Martin, then-Governor of North Carolina (Dec. 17, 1990), Record at Joint Appendix 673, *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781 (4th Cir. 1991) (No. 91-2317) [hereinafter *Campbell Letter*].

2. *See id.*

3. *See generally* William David Bridgers, Note, *The Hazardous Waste Wars: An Examination of the Origins and Major Battles to Date, with Suggestions for Ending the Wars*, 17 VT. L. REV. 821 (1993) (providing a background and history of the hazardous waste wars that began when states with facilities began to resent "being dumping grounds for the other states"); John Holusha, *In Some Parts the Battle Cry Is "Don't Dump on Me,"* N.Y. TIMES, Sept. 8, 1991, § 4, at 5 (describing the growing garbage problem and the escalating "interstate war").

the United States each year.<sup>4</sup> The State of South Carolina imports over 138,000 tons of hazardous waste per year, and over 58,000 tons comes from North Carolina alone.<sup>5</sup> Hazardous waste includes waste that is more environmentally dangerous than typical municipal waste, and hazardous waste is defined by its serious threat to human health.<sup>6</sup> There are few landfills in the country that accept hazardous waste, and it is extremely difficult to build a new hazardous waste facility because people have adopted a "Not In My Back Yard" attitude.<sup>7</sup> This limitation on the availability of hazardous waste disposal capacity has led to "hazardous waste wars" between states that have

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4. See S. REP. NO. 102-301, at 4 (1992); OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVIRONMENTAL PROTECTION AGENCY, NATIONAL BIENNIAL RCRA HAZARDOUS WASTE REPORT ES-3 (1997) [hereinafter HAZARDOUS WASTE REPORT] (based on 1995 data); Michael B. Gerrard, *Fear and Loathing in the Siting of Hazardous and Radioactive Waste Facilities: A Comprehensive Approach to a Misperceived Crisis*, 68 TUL. L. REV. 1047, 1056 (1994). Total hazardous waste generation decreased from 258 million tons in 1993 to 214 million tons in 1995. See HAZARDOUS WASTE REPORT, *supra*, at ES-3. Approximately 96% of the hazardous waste regulated by the Resource Conservation and Recovery Act of 1976 ("RCRA") is treated on-site by the generator. See Gerrard, *supra*, at 1056. Only about 2% of RCRA-regulated hazardous waste is ever transported for disposal. See Bridgers, *supra* note 3, at 822. In 1995, over 10 million tons of waste was shipped, and 25 million tons was disposed by burial in landfills or by underground injection. See HAZARDOUS WASTE REPORT, *supra*, at ES-5, ES-7. Although the percentage is small, there are so few hazardous waste disposal facilities and such stiff federal regulations governing hazardous waste disposal that hazardous waste wars have become almost inevitable. See Bridgers, *supra* note 3, at 822-23; see also *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 337 (1992) (discussing the fact that there are only 21 hazardous waste landfills in operation in the United States).

5. See THE STATE OF SOUTH CAROLINA CAPACITY ASSURANCE PLAN tbl. III-2 (1989), Record at Joint Appendix 254, 263, *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781 (4th Cir. 1991) (No. 91-2317) [hereinafter SOUTH CAROLINA CAPACITY ASSURANCE PLAN].

6. RCRA defines "hazardous waste" as:

a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5) (1994).

7. See William L. Andreen, *Defusing the "Not in My Back Yard" Syndrome: An Approach to Federal Preemption of State and Local Impediments to the Siting of PCB Disposal Facilities*, 63 N.C. L. REV. 811, 813 (1985); Gerrard, *supra* note 4, at 1052. The phenomenon of "Not In My Back Yard" or "NIMBY" causes local officials to face huge obstacles in planning and siting facilities that are necessary for the community. See DAVID MORELL & CHRISTOPHER MAGORIAN, *SITING HAZARDOUS WASTE FACILITIES: LOCAL OPPOSITION AND THE MYTH OF PREEMPTION* 96-97 (1982).

hazardous waste disposal facilities and those that do not.<sup>8</sup> At the heart of the matter, states that have built hazardous waste disposal facilities are concerned when their facilities begin to fill up with waste from other states, leaving less long-term capacity for their own waste.<sup>9</sup> States without facilities are seeking to keep that access open and to ensure that they will have a place to send their waste.<sup>10</sup>

This conflict between states over hazardous waste disposal capacity has been exacerbated by congressional action attempting to enforce strict controls on these hazardous waste facilities and ensure availability of hazardous waste disposal.<sup>11</sup> The generation, transportation, and disposal of hazardous waste are governed and regulated by the Resource Conservation and Recovery Act ("RCRA").<sup>12</sup> RCRA requires that states either implement the federal program for managing hazardous waste or adopt a state program to handle the waste.<sup>13</sup> The state program must be "consistent with" the federal program and must provide for adequate enforcement.<sup>14</sup> Congress also enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA")<sup>15</sup> to deal with waste clean-up, and in 1986 Congress adopted amendments to CERCLA, known as the Superfund Amendments and Reauthorization Act ("SARA").<sup>16</sup> Under SARA, states must submit additional plans to the Environmental Protection Agency (the "EPA") to show that they will be able to deal with their hazardous waste for the next twenty years.<sup>17</sup> States may meet this

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8. See *Bridgers*, *supra* note 3, at 823.

9. See *id.* These states are understandably reluctant to spend the money and take the political backlash involved with building a facility, only to have it filled by other states unwilling to take the necessary steps to manage their own waste. See *id.*; see also *County Torn over Hazardous Waste Facility as North Carolina Searches State for Location*, 21 ENV'T REP. 1839, 1840 (1991) (discussing the political backlash in North Carolina over the proposed construction of a hazardous waste facility).

10. See *Bridgers*, *supra* note 3, at 821.

11. See *id.* at 823, 829-38.

12. Resource Conservation and Recovery Act of 1976 ("RCRA"), Pub. L. No. 94-580, 1976 U.S.C.A.N. (90 Stat.) 2795 (codified as amended at 42 U.S.C. §§ 6901-6992k (1994)).

13. See 42 U.S.C. § 6926(b).

14. See *id.*

15. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), Pub. L. No. 96-510, 1980 U.S.C.A.N. (94 Stat.) 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1994)).

16. Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 1986 U.S.C.A.N. (100 Stat.) 1613 (codified at 42 U.S.C. §§ 9601-9675 (1994) (amending CERCLA)).

17. See 42 U.S.C. § 9604(c)(9).

requirement by either demonstrating that they have adequate capacity within their boundaries to dispose of their own hazardous waste for twenty years, or by arranging for the disposal of their hazardous waste in other states under an interregional agreement that provides sufficient disposal capacity for twenty years.<sup>18</sup>

Congress had hoped that these provisions would force states to take action to build hazardous waste facilities and find long-term solutions to the hazardous waste crisis.<sup>19</sup> Instead, the provisions caused an escalation in the hazardous waste wars.<sup>20</sup> States with disposal facilities enacted laws to limit out-of-state waste in order to assure that their facilities would have sufficient capacity to hold in-state waste for twenty years as required by SARA.<sup>21</sup> Some states entered into interregional agreements and sought to limit disposal in their facilities by any states that were not part of the agreement. These disposal limits were designed to ensure adequate disposal capacity for states that were in the agreement, as required by SARA.<sup>22</sup> Meanwhile, states without disposal facilities sought to force other states to keep access open in order to ensure a site for disposal of their waste.<sup>23</sup> Waste haulers and facility owners also resisted

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18. See *id.* These proposals are known as Capacity Assurance Plans ("CAPs"). See Bridgers, *supra* note 3, at 838. If a state fails to submit a CAP, it will be ineligible to receive Superfund money to pay for hazardous waste cleanup within the state. See 42 U.S.C. § 9604(c)(9).

19. See S. REP. NO. 99-11, at 22-23 (1985); Bridgers, *supra* note 3, at 823, 837-38.

20. See Bridgers, *supra* note 3, at 823, 838.

21. See, e.g., Act of June 20, 1989, No. 196, 1989 S.C. Acts 1575, 1581 (codified at S.C. CODE ANN. § 44-56-205 (Law Co-op. 1996)) (giving preference to in-state waste generators); S.C. Exec. Order No. 89-17 (1989), Record at Joint Appendix 40-45, Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781 (4th Cir. 1991) (No. 91-2317) [hereinafter S.C. Exec. Order No. 89-17] (same).

22. See SARA CAPACITY ASSURANCE REGIONAL AGREEMENT FOR REGION IV STATES (1989), Record at Joint Appendix 249, Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781 (4th Cir. 1991) (No. 91-2317) [hereinafter SARA CAPACITY ASSURANCE REGIONAL AGREEMENT]; Campbell Letter, *supra* note 1. North Carolina entered into a regional hazardous waste agreement with Alabama, Kentucky, South Carolina, and Tennessee. See SARA CAPACITY ASSURANCE REGIONAL AGREEMENT, *supra*; Supplemental Memorandum of Defendants State of South Carolina, et al., in Response to Plaintiff's Letter of December 10, 1990, C.A. No. 3:90-1402-0, Record at Joint Appendix 667, Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781 (4th Cir. 1991) (No. 91-2317) [hereinafter Supplemental Memorandum]. Under the agreement, North Carolina was required to begin issuing permits for construction of a treatment facility by the end of 1990. See Supplemental Memorandum, *supra*, at 2, Record at Joint Appendix 668. When North Carolina failed to meet this requirement, waste wars erupted as South Carolina attempted to prohibit importation of any North Carolina waste. See *Judge Blocks S.C. Ban on N.C. Waste Disposal*, CHARLOTTE OBSERVER (S.C. Edition), Jan. 12, 1991, at B1.

23. See *Judge Blocks S.C. Ban on N.C. Waste Disposal*, *supra* note 22, at B1.

disposal limitations because it restricted their business.<sup>24</sup>

The courts became involved in these interstate waste wars in the late 1970s and have applied the dormant Commerce Clause<sup>25</sup> to prevent states from enacting laws that discriminate against out-of-state waste.<sup>26</sup> In *Environmental Technology Council v. Sierra Club*,<sup>27</sup> the Court of Appeals for the Fourth Circuit further limited the power of states to enact such statutes and ruled that congressional action under RCRA and SARA did not preempt application of the dormant Commerce Clause.<sup>28</sup>

This Note first discusses the facts of *Environmental Technology Council* ("ETC") and the procedural history of the case as it traveled through the federal courts over the past five years.<sup>29</sup> The Note then considers the holding and reasoning of the Fourth Circuit in *ETC*.<sup>30</sup> After considering the historical line of cases addressing waste management statutes and the dormant Commerce Clause,<sup>31</sup> the Note analyzes the standing and influence of *ETC* within this line of cases.<sup>32</sup> Finally, the Note considers the ramifications of *ETC* for states that are attempting to devise waste management plans as required by federal statutes but that are limited in their ability to do so by the

24. See, e.g., *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 782 (4th Cir. 1991) (illustrating a challenge to South Carolina laws by an association of commercial waste businesses); *National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management*, 910 F.2d 713, 715 (11th Cir. 1990) (illustrating a challenge by a waste industry group to Alabama laws limiting waste import), as modified upon denial of reh'g, 924 F.2d 1001 (11th Cir. 1991).

25. The United States Constitution grants Congress the power "to regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3. This provision is referred to as the Commerce Clause, and it has a "dormant" or "negative" aspect that prevents states from burdening interstate commerce even if Congress has not acted. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-29 (1978). Congress may act and give the states power to affect commerce, but in the absence of congressional action, the dormant Commerce Clause limits states' ability to affect interstate commerce. See *id.*; see also *infra* notes 85-98 and accompanying text (discussing the holding in *City of Philadelphia* and reviewing the Court's dormant Commerce Clause analysis).

26. See *City of Philadelphia*, 437 U.S. at 629 (holding that a New Jersey statute prohibiting importation of out-of-state waste was invalid under the dormant Commerce Clause); see also *infra* notes 85-162 (discussing the cases during the past twenty years invalidating state statutes under the dormant Commerce Clause).

27. 98 F.3d 774 (4th Cir. 1996), cert. denied, 117 S. Ct. 2478 (1997).

28. See *id.* at 782-85.

29. See *infra* notes 34-63 and accompanying text.

30. See *infra* notes 64-80 and accompanying text.

31. See *infra* notes 85-162 and accompanying text.

32. See *infra* notes 163-204 and accompanying text.

dormant Commerce Clause.<sup>33</sup>

South Carolina is one of the few states with hazardous waste treatment and disposal facilities.<sup>34</sup> As a result, it imports a large amount of hazardous waste generated in other states.<sup>35</sup> Under SARA and as part of the state management plan required by RCRA, South Carolina promulgated several laws governing the management of hazardous waste.<sup>36</sup> These laws were designed to ensure long-term disposal capacity for South Carolina's hazardous waste in the in-state facilities by setting some limits on out-of-state waste and by requiring that a certain amount of space be reserved each year for in-state hazardous waste.<sup>37</sup> The laws also prohibited importation of waste from states that did not have a long-term disposal plan or an interregional agreement as required by SARA.<sup>38</sup>

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33. See *infra* notes 205-35 and accompanying text.

34. See *ETC*, 98 F.3d at 778-79.

35. See *id.* at 779; see also SOUTH CAROLINA CAPACITY ASSURANCE PLAN, *supra* note 5, at tbl.III-2, Record at Joint Appendix 263 (showing that South Carolina imports over 138,000 tons of hazardous waste per year).

36. See Act of June 13, 1990, No. 590 § 2, 1990 S.C. Acts 2494 (codified at S.C. CODE ANN. § 44-56-60 (Law Co-op 1996)); Act of June 20, 1989, No. 196 § 9, 1989 S.C. Acts 1575, 1581 (codified at S.C. CODE ANN. § 44-56-205); S.C. Exec. Order No. 89-25 (July 6, 1989), Record at Joint Appendix 57, Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781 (4th Cir. 1991) (No. 91-2317) [hereinafter S.C. Exec. Order No. 89-25]; S.C. Exec. Order No. 89-17, *supra* note 21; Hazardous Waste Management Planning, 14 S.C. Reg. 20-22 (1990) (adopting South Carolina DHEC Regulation 61-99), available in Record at Joint Appendix 37, Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781 (4th Cir. 1991) (No. 91-2317) [hereinafter S.C. DHEC Reg. 61-99].

37. See Act of June 13, 1990, No. 590 § 2, 1990 S.C. Acts 2494; Act of June 20, 1989, No. 196 § 9, 1989 S.C. Acts 1575, 1581; S.C. Exec. Order No. 89-25, *supra* note 36; S.C. DHEC Reg. 61-99, *supra* note 36.

38. See Act of June 20, 1989, No. 196, 1989 S.C. Acts 1575, 1581; S.C. Exec. Order No. 89-17, *supra* note 21. The South Carolina provisions included several different components that discriminated against out-of-state waste. First, South Carolina had a "blacklisting" provision that prohibited South Carolina facilities from accepting waste generated in a state that prohibited in-state treatment of waste or was not part of an interregional treatment agreement required under SARA. See Act of June 20, 1989, No. 196 § 9, 1989 S.C. Acts 1575, 1581. Second, South Carolina imposed a limit on all waste to be buried in the state. See Act of June 13, 1990, No. 590 § 2, 1990 S.C. Acts 2494. This limiting provision provided that no more than a certain number of tons of waste could be buried in South Carolina facilities each year, but provided that the limit could be lifted if necessary to protect the health and citizens of South Carolina and only if the waste was generated in South Carolina. See *id.* The same act provides for discriminatory "floors" and "ceilings." See *id.* A "floor" on in-state waste provided that facilities must reserve at least the same capacity as the previous year for South Carolina waste. See *id.* A "ceiling" on out-of-state waste provided that facilities must accept no more waste from any given state than was accepted the previous year. See *id.* South Carolina also instituted quota preferences for in-state waste and limited the amount of waste that could be imported from any single state. See S.C. Exec. Order No. 89-25, *supra* note 36. Finally, South Carolina imposed a "needs" requirement for obtaining permission to expand any

South Carolina enacted these laws in an effort to demonstrate long-term capacity for in-state waste under SARA.<sup>39</sup> However, the owners of the commercial hazardous waste facilities wanted to be able to continue accepting greater amounts of desired waste from any source. The owners resisted the restrictions that South Carolina placed on the facilities' growth and on their ability to accept out-of-state waste.<sup>40</sup> These facility owners are part of a consortium known as the Environmental Technology Council ("ETC"),<sup>41</sup> and the Council sued under the dormant Commerce Clause to enjoin South Carolina from enforcing these laws.<sup>42</sup>

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hazardous waste facility. See S.C. DHEC Reg. 61-99, *supra* note 36. South Carolina hazardous waste facilities were prohibited from expanding unless they could demonstrate the "need" to expand. See *id.* However, this "need" could be based only on reference to South Carolina waste and to needed disposal capacity for in-state waste. See *id.*; see also *ETC*, 98 F.3d at 780-81 (explaining this requirement).

39. See *ETC*, 98 F.3d at 780-81. SARA requires states to assure adequate long-term hazardous waste disposal capacity for in-state waste. See 42 U.S.C. § 9604(c)(9) (1994). SARA provides:

Effective 3 years after October 17, 1986, the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which—

- (A) have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agreement and to be disposed of, treated, or destroyed,
- (B) are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority,
- (C) are acceptable to the President, and
- (D) are in compliance with the requirements of Subtitle C of the Solid Waste Disposal Act.

*Id.*

40. See *ETC*, 98 F.3d at 778.

41. See *id.* The consortium was formerly known as the Hazardous Waste Treatment Council. See Environmental Tech. Council v. South Carolina, 901 F. Supp. 1026, 1028 n.2 (D.S.C. 1995), *aff'd sub nom.* Environmental Tech. Council v. Sierra Club, 98 F.3d 774 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2478 (1997). "ETC is a non-profit association of commercial firms that provide services for the treatment, recycling, and disposal of hazardous wastes." *ETC*, 98 F.3d at 778 n.1. Three commercial hazardous waste facilities in South Carolina were owned and operated by members of ETC, and ETC sued to challenge the South Carolina laws restricting disposal at its facilities. See *id.* at 778.

42. See *ETC*, 98 F.3d at 782. ETC also challenged the laws under the Supremacy Clause and the Privileges and Immunities Clause of the United States Constitution, as well as under § 1983. See *id.* at 778; see also U.S. CONST. art. VI, cl. 2 (Supremacy Clause); *id.* art. IV, § 2, cl. 1 (Privileges and Immunities Clause); 42 U.S.C. § 1983 (1994) (allowing for civil actions by citizens deprived of their constitutional rights). However, the district court addressed only the Commerce Clause issue. See *ETC*, 98 F.3d at 778 n.2. The Court of Appeals for the Fourth Circuit found that it was unnecessary to reach the



The ETC challenge to South Carolina's discriminatory laws wound through the federal court system for over five years.<sup>43</sup> The dispute began in 1990 when South Carolina eliminated North Carolina from a regional agreement<sup>44</sup> designed to ensure long-term disposal capacity for member states.<sup>45</sup> As part of the agreement, North Carolina was required to begin the permit process by the end of 1990 for construction of an incinerator.<sup>46</sup> However, in December 1990, North Carolina's Council of State rejected the transfer of certain state-owned lands as a site for the incinerator.<sup>47</sup> Because North Carolina failed to meet its obligations under the regional agreement, South Carolina eliminated North Carolina from the compact.<sup>48</sup> Under South Carolina law, South Carolina facilities would be prohibited from accepting waste from North Carolina because North Carolina was no longer part of a regional agreement under SARA.<sup>49</sup>

In January 1991, the United States District Court for the District of South Carolina issued a preliminary injunction to keep South Carolina from enforcing the challenged laws until the case was decided.<sup>50</sup> South Carolina appealed the decision to the Fourth Circuit, and the court affirmed the district court's preliminary injunction.<sup>51</sup> The Fourth Circuit agreed that the Commerce Clause

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validity of the laws under these additional provisions because the laws were invalid under the Commerce Clause. *See id.*

43. *See Hazardous Waste Treatment Council v. South Carolina*, 766 F. Supp. 431 (D.S.C.), *aff'd in part and remanded in part*, 945 F.2d 781 (4th Cir. 1991), *on remand*, 901 F. Supp. 1026 (D.S.C. 1995), *aff'd sub nom. Environmental Tech. Council v. Sierra Club*, 98 F.3d 774 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2478 (1997).

44. *See ETC*, 98 F.3d at 786; Campbell Letter, *supra* note 1.

45. *See SARA CAPACITY ASSURANCE REGIONAL AGREEMENT*, *supra* note 22; Supplemental Memorandum, *supra* note 22, at 1-2, Record at Joint Appendix 668.

46. *See Supplemental Memorandum*, *supra* note 22, at 2, Record at Joint Appendix 668.

47. *See Campbell Letter*, *supra* note 1; *Judge Blocks S.C. Ban on N.C. Waste Disposal*, *supra* note 22, at B1.

48. *See Supplemental Memorandum*, *supra* note 22, at 2, Record at Joint Appendix 668; Campbell Letter, *supra* note 1.

49. *See Campbell Letter*, *supra* note 1; *see also supra* notes 36-38 and accompanying text (describing the South Carolina laws and the blacklisting provision); *supra* note 39 (describing the requirements of SARA).

50. *See Hazardous Waste Treatment Council v. South Carolina*, 766 F. Supp. 431, 442 (D.S.C.), *aff'd in part and remanded in part*, 945 F.2d 781 (4th Cir. 1991), *on remand*, 901 F. Supp. 1026 (D.S.C. 1995), *aff'd sub nom. Environmental Tech. Council v. Sierra Club*, 98 F.3d 774 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2478 (1997).

51. *See Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 795 (4th Cir. 1991), *on remand*, 901 F. Supp. 1026 (D.S.C. 1995), *aff'd sub nom. Environmental Tech. Council v. Sierra Club*, 98 F.3d 774 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2478 (1997).

challenge presented a "grave and serious question" that justified the granting of a preliminary injunction.<sup>52</sup> Although the court noted that only "broad outlines" were necessary at the preliminary injunction stage, it still embarked on an extensive consideration of both the federal statutes at issue and the South Carolina statutes being challenged.<sup>53</sup> However, the court chose to limit its ruling to the issue of a preliminary injunction and declined to decide the case on the merits.<sup>54</sup> The court analyzed South Carolina's requirements under the dormant Commerce Clause and held that RCRA and CERCLA did not show any clear intention to authorize such discriminatory state actions.<sup>55</sup> The court found that irreparable harm would be highly likely if a preliminary injunction was not granted.<sup>56</sup> Therefore, the Fourth Circuit affirmed the preliminary injunction granted by the district court, remanding the case for minor modifications of the order.<sup>57</sup>

On remand from the Fourth Circuit, ETC moved for summary judgment before the district court in South Carolina.<sup>58</sup> The district

52. See *id.* at 782.

53. See *id.* at 782-86.

54. See *id.* at 789. The Hazardous Waste Treatment Council urged the court to decide the case on the merits, but the court chose not to do so, finding that "facts remain[ed] in dispute." *Id.* at 789 n.11. The court also noted that "the complexities inherent in the hazardous waste situation would make perilous any attempt to decide the case on the merits at the early preliminary injunction stage." *Id.*

55. See *id.* at 789-95.

56. See *id.* at 795. The court noted the policy concerns in this area:

Perhaps most importantly, the effect of every state designing particular limits and bars for out-of-state waste could be catastrophic. Indeed, such treatment of hazardous waste—in essence, ensured nontreatment of some hazardous waste—might destroy not only the theoretical principle of a national economic union, but contains the real potential to destroy land, if not also persons, within the union. Unless and until Congress alters the law, the apparent congressional intent of RCRA and SARA would seem to remain—better that hazardous waste be treated and disposed of somewhere, even if spread disproportionately among the states, than that future Superfund sites arise.

*Id.* at 792.

57. See *id.* at 795. The court remanded the case in part for modification by the district court. Part of the decision by the district court implied that the statutes were held invalid and that all of the waste management statutes were included in the holding. See *Hazardous Waste Treatment Council v. South Carolina*, 766 F. Supp. 431, 441-42 (D.S.C.), *aff'd in part and remanded in part*, 945 F.2d 781 (4th Cir. 1991). The Fourth Circuit affirmed the grant of a preliminary injunction but remanded those portions to the district court to modify the order so that only the challenged statutes and orders were included and so that it was clear the laws were being preliminarily enjoined but not yet declared invalid. See *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 795.

58. See *Environmental Tech. Council v. South Carolina*, 901 F. Supp. 1026, 1028

court granted summary judgment for ETC, finding that the laws discriminated on their face and were subject to strict scrutiny under the Commerce Clause.<sup>59</sup> The district court refused to refer the case to the EPA under the doctrine of primary jurisdiction,<sup>60</sup> holding that primary jurisdiction involved the referral of factual rather than legal issues.<sup>61</sup> Because there were no real factual disputes and because the constitutional issues were more properly before the court rather than the EPA, the district court refused to defer to the EPA and ruled on the legal issues itself.<sup>62</sup> The court considered the history of waste management cases and discriminatory laws under the Commerce Clause and concluded that the challenged laws should be permanently enjoined as invalid under the dormant Commerce Clause.<sup>63</sup>

South Carolina, frustrated with this permanent injunction against enforcing its waste limitations, appealed the grant of summary judgment to the Fourth Circuit in the primary case, *Environmental Technology Council v. Sierra Club* (“ETC”).<sup>64</sup> South Carolina argued that the dormant Commerce Clause should not apply since Congress gave states the authority to act in this manner through RCRA and SARA.<sup>65</sup> The dormant Commerce Clause limits states’ ability to affect interstate commerce only if Congress has not

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(D.S.C. 1995), *aff’d sub nom.* *Environmental Tech. Council v. Sierra Club*, 98 F.3d 774 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2478 (1997). The court did not make any modification to the preliminary injunction because the grant of summary judgment meant that “any modification of the preliminary injunction is now moot.” *Id.* at 1029. The court granted a permanent injunction and denied any motion to modify the preliminary injunction. *See id.*

59. *See id.* at 1029-30.

60. The doctrine of primary jurisdiction is based on the idea that leaving questions of fact for the appropriate agency to decide will aid in uniformity and will make use of the agency’s specialized knowledge and expertise. *See United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956); *see also infra* notes 192-204 and accompanying text (discussing the primary jurisdiction holding in *ETC*).

61. *See Environmental Tech. Council*, 901 F. Supp. at 1029.

62. *See id.*

63. *See id.* at 1035-38; *see also infra* notes 85-162 and accompanying text (describing the development of waste management cases and the dormant Commerce Clause analysis in this context).

64. 98 F.3d 774, 778 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2478 (1997). Even though South Carolina was the primary party and appellant, the Sierra Club was listed as the appellant, *see id.*, because it was able to intervene in the case. *See In re Sierra Club*, 945 F.2d 776, 780-81 (4th Cir. 1991) (remanding the case to the district court with directions to reconsider the Sierra Club’s right to intervene and noting that the Sierra Club would offer a different perspective).

65. *See ETC*, 98 F.3d at 781-82.

acted.<sup>66</sup> South Carolina argued that Congress had acted and had given states the ability to enact ordinances necessary to meet the long-term disposal capacity assurance plan required by SARA.<sup>67</sup> South Carolina also argued that the EPA had approved the South Carolina plan as "consistent" with federal law and that the EPA had primary jurisdiction in determining whether South Carolina's laws were constitutional.<sup>68</sup> South Carolina urged the court to defer to the decision of the EPA.<sup>69</sup>

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66. See *id.* at 782. The court noted that "[w]here Congress has acted in an area specifically authorizing state or local government action, the dormant Commerce Clause is . . . inapplicable, even if the state action interferes with interstate commerce." *Id.*; see also *Northeast Bancorp., Inc. v. Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985) ("When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984) (noting that Congress may authorize state regulation that would otherwise violate the dormant Commerce Clause, but "congressional intent must be unmistakably clear"); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983) ("Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce.").

67. See *ETC*, 98 F.3d at 779, 782-83; see also *supra* note 39 (discussing the requirements under SARA). South Carolina analogized its position to that of the Jicarilla Apache Tribe in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). See *ETC*, 98 F.3d at 782-83. In *Merrion*, the Tribe imposed a severance tax on all oil and gas removed from tribal lands. See *Merrion*, 455 U.S. at 133. The tax was challenged as a violation of the dormant Commerce Clause. See *id.* at 152-53. However, the Court found that the dormant Commerce Clause did not apply because "Congress has affirmatively acted by providing a series of federal checkpoints that must be cleared before a tribal tax can take effect." *Id.* at 155. The Tribe was required to get administrative approval at two stages before the tax could take effect. See *id.* South Carolina argued that this approval process was analogous to the approval process under SARA and RCRA, which require EPA approval of state waste management plans at several checkpoints. See *ETC*, 98 F.3d at 782-83. However, the Fourth Circuit rejected this argument. See *id.* at 783; see also *infra* note 68 (describing the EPA's approval of this plan and the Court's reasoning for rejecting that argument).

68. See *ETC*, 98 F.3d at 781-83. As required under RCRA, South Carolina submitted its hazardous waste management plan to the EPA. See Brief for the United States as Amicus Curiae in Support of Appellee at 11, *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781 (4th Cir. 1991) (No. 91-2317) [hereinafter Brief for the United States]. The EPA approved the RCRA plan in 1985 and approved South Carolina's Capacity Assurance Plan in 1990. See *id.* at 11-12. RCRA required that the plan be "consistent" with federal law and other state laws. See *ETC*, 98 F.3d at 779 (citing 42 U.S.C. § 6926(b) (1994)); see also *supra* notes 12-14 and accompanying text (describing the requirements of RCRA). However, the court disagreed "with South Carolina's contention that EPA has specifically addressed and authorized some of the challenged provisions." *ETC*, 98 F.3d at 781 n.11. In particular, the court may have been influenced by the fact that the plan was approved in 1985, long before the restrictive provisions were enacted in South Carolina. See *id.*; Brief for the United States, *supra*, at 11. For additional discussion of the EPA's position and involvement in this case, see *infra* notes 192-204 and accompanying text.

69. See *ETC*, 98 F.3d at 782.

The Fourth Circuit rejected South Carolina's arguments and permanently enjoined the state from enforcing any of the challenged laws.<sup>70</sup> The court's decision included three major holdings. First, the court held that RCRA, CERCLA, and SARA do not override the dormant Commerce Clause.<sup>71</sup> The court determined that the dormant Commerce Clause applies unless congressional intent is "unmistakably clear" or "expressly stated" to allow the discriminating law.<sup>72</sup> The court held that RCRA, CERCLA, and SARA do not contain any such clear statement of intent to allow states to enact laws that discriminate against other states or burden interstate commerce.<sup>73</sup>

Second, the court applied the dormant Commerce Clause analysis that has been used in many recent waste management cases.<sup>74</sup> For laws that discriminate on their face or in their effect, the court applies a "virtual per se" rule of invalidity.<sup>75</sup> Under this per se rule, the South Carolina statutes were held to violate the dormant Commerce Clause.<sup>76</sup> Finally, the court held that the trial court did not abuse its discretion in failing to defer to the EPA under the

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70. See *id.* at 778.

71. See *id.* at 782-85.

72. See *id.* at 782 (citing *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984)). The court noted that "Congress need not state that it intends to override the dormant Commerce Clause, but it must affirmatively have contemplated the otherwise invalid state legislation." *Id.*

73. See *id.* at 783-85. The court noted that this conclusion was similar to that reached by the Court of Appeals for the Eleventh Circuit in *National Solid Wastes Management Ass'n v. Alabama Department of Environmental Management*, 910 F.2d 713, 721 (11th Cir. 1990), as modified upon denial of reh'g, 924 F.2d 1001 (11th Cir. 1991), and in *Alabama v. EPA*, 871 F.2d 1548, 1555 n.3 (11th Cir. 1989). See *ETC*, 98 F.3d at 785. For a discussion of the court's holding in *National Solid Wastes Management Ass'n* and the conclusion reached in both of these cases, see *infra* notes 100-10 and accompanying text.

74. See *ETC*, 98 F.3d at 785-89. For a discussion of the dormant Commerce Clause analyses in recent waste management cases, see *infra* notes 85-162 and accompanying text.

75. See *ETC*, 98 F.3d at 785-86. This per se rule of invalidity applies "where a state law discriminates facially, in its practical effect, or in its purpose." *Id.* at 785. Very few state statutes have been able to survive this per se rule of invalidity. To survive, the state must show the legislation is justified by a valid factor unrelated to economic protectionism and that there are no nondiscriminatory alternatives sufficient to protect the local interest. See *id.* The only state statutes that have been able to survive were related to threat of disease or death. See *id.* For example, Maine statutes were upheld limiting baitfish that could be brought into the state because outside diseases had the potential to destroy Maine's fisheries. See *Maine v. Taylor*, 477 U.S. 131, 151-52 (1986). However, no statutes limiting the importation or movement of waste have been upheld under this per se rule. See *infra* notes 85-162 and accompanying text (discussing the waste management cases and the dormant Commerce Clause).

76. See *ETC*, 98 F.3d at 786-89.

doctrine of primary jurisdiction.<sup>77</sup> The court determined that the statutes in question involved legal issues rather than factual issues; while it is appropriate to defer to the expertise of the EPA on factual issues, the EPA was in no better position than the court to interpret the constitutionality of the statutes at issue.<sup>78</sup> Based on these three major conclusions, the court held that the South Carolina statutes violated the dormant Commerce Clause and should be permanently enjoined.<sup>79</sup> The United States Supreme Court denied certiorari, and the permanent injunction remains in force.<sup>80</sup>

The South Carolina hazardous waste management statutes at issue in *ETC* were enacted as part of the state's waste management plan.<sup>81</sup> State waste management initiatives became an important focus of state and local environmental concerns during the 1970s, and litigation over waste management statutes has increased in the past two decades.<sup>82</sup> Many states were beginning to see landfills reach total capacity, and new landfills were hard to site and build due to increasing federal regulation and increasing public concern regarding environmental effects.<sup>83</sup> In order to protect the remaining capacity in its own landfills, New Jersey passed a state ordinance prohibiting the importation of "solid or liquid waste which originated or was collected outside the territorial limits of the State."<sup>84</sup> In the first "waste management" case challenged on Commerce Clause grounds, the City of Philadelphia and the operators of private landfills in New Jersey sued to enjoin New Jersey from enforcing this prohibition.<sup>85</sup> The Supreme Court held that the New Jersey prohibition was invalid under the dormant Commerce Clause,<sup>86</sup> creating the basis for subsequent challenges to waste management statutes during the next twenty years.<sup>87</sup>

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77. See *id.* at 789. For a brief discussion of the doctrine of primary jurisdiction, see *supra* note 60.

78. See *ETC*, 98 F.3d at 789. For additional discussion of this procedural argument and holding, see *infra* notes 192-204 and accompanying text.

79. See *ETC*, 98 F.3d at 778.

80. See *South Carolina v. Environmental Tech. Council*, 117 S. Ct. 2478 (1997) (denying petition for certiorari).

81. See *supra* notes 34-38 and accompanying text.

82. Cf. *Bridgers*, *supra* note 3, at 839-59 (chronicling the development of the hazardous waste wars in the courts).

83. See *id.* at 822-23, 827-28.

84. Waste Control Act Amendments of 1973, ch. 363, 1973 N.J. Laws 962 (codified at N.J. STAT. ANN. § 13.1I-10 (West 1979) (repealed 1981)).

85. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 619 (1978).

86. See *id.* at 629.

87. See *infra* notes 99-162 and accompanying text. See generally Stephen M. Johnson,

*City of Philadelphia v. New Jersey* included several major holdings regarding waste management legislation and the dormant Commerce Clause. First, the Court considered whether RCRA, which was recently enacted at that time, preempted any state legislation in this area.<sup>88</sup> The Court held that the state legislation was not preempted by RCRA and was valid absent a constitutional violation.<sup>89</sup> The Court further held that waste was an article of commerce and therefore was properly subject to the constraints of the Commerce Clause.<sup>90</sup> In a holding significant to all later waste management cases, the Court noted that “[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset. . . . Just as Congress has power to regulate the interstate movement of these wastes, States are not free from constitutional scrutiny when they restrict that movement.”<sup>91</sup>

After determining that waste is an article of commerce, the

*Beyond City of Philadelphia v. New Jersey*, 95 DICK. L. REV. 131 (1990) (analyzing the Court’s holding in *City of Philadelphia* and arguing that Pennsylvania’s solid waste management laws should survive court scrutiny); Susan Adams Brietzke, Note, *Hazardous Waste in Interstate Commerce: Minimizing the Problem After City of Philadelphia v. New Jersey*, 24 VAL. U. L. REV. 77, 91-94, 105-10 (1989) (examining the holding in *City of Philadelphia* and arguing that legislation should be adopted to allow states to manage their waste, using the Capacity Assurance Plan as a starting point).

88. See *City of Philadelphia*, 437 U.S. at 620.

89. See *id.* at 620-21. The Court did not explicitly consider whether RCRA authorized state action so that the dormant Commerce Clause would not apply. However, after determining that the state legislation was not preempted by RCRA, the Court went on to consider the constitutionality of the state legislation under the dormant Commerce Clause, implicitly assuming that the state legislation was not authorized by RCRA generally and was still subject to Commerce Clause constraints. See *id.*

90. See *id.* at 621-23.

91. *Id.* at 622-23. The Court distinguished waste from articles that older cases had excluded from Commerce Clause restrictions because they were not “legitimate subjects of trade and commerce.” *Id.* at 622 (quoting *Bowman v. Chicago & Northwestern Ry.*, 125 U.S. 465, 489 (1888)). These older cases excluded articles

“which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of small-pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption.”

*Id.* (quoting *Bowman*, 125 U.S. at 489). The Court distinguished these cases by noting that the test was whether the “articles’ worth in interstate commerce was far outweighed by the dangers inhering in their very movement.” *Id.*

In his dissenting opinion, then-Justice Rehnquist focused on these earlier cases and argued that regulations designed to handle disposal of waste were the same as regulations involving diseased meat and other noxious items. See *id.* at 629-33 (Rehnquist, J., dissenting). Justice Rehnquist argued that New Jersey should be able to treat its own waste without Commerce Clause limitations under the Court’s cases allowing these types of laws in quarantine situations and other similar cases. See *id.* at 632-33 (Rehnquist, J., dissenting).

Court considered the level of review for determining the validity of the statute under the Commerce Clause.<sup>92</sup> The Court recognized that if legislation patently discriminates against interstate trade and effects economic protectionism, a "virtual per se rule of invalidity" applies.<sup>93</sup> If, instead, legislation does not patently discriminate against interstate trade and advances other legislative objectives, a more flexible balancing test should be applied.<sup>94</sup> The Court concluded that it was irrelevant whether the purpose of New Jersey's statute was to reduce waste costs for residents or to limit pollution in the state.<sup>95</sup> Regardless of the 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."<sup>96</sup> The Court therefore concluded that New Jersey's prohibition discriminated against interstate commerce on its face because it treated waste differently based solely on its origin.<sup>97</sup> Applying the "virtual per se rule of invalidity," the Court struck down the New Jersey prohibition under the Commerce Clause and refused to let New Jersey "close its borders."<sup>98</sup>

92. See *id.* at 623-28.

93. See *id.* at 624; see also *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538 (1949) ("[S]tates are not separable economic units. . . . [W]hat is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation." (internal quotation omitted)).

94. See *City of Philadelphia*, 437 U.S. at 624. This balancing test, known as the *Pike* test, is applied if the statute regulates evenhandedly and "its effects on interstate commerce are only incidental." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). If the legislation effectuates a legitimate local public interest, the statute will be upheld unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.*

95. See *City of Philadelphia*, 437 U.S. at 626.

96. *Id.* at 626-27.

97. See *id.* at 628-29. The Court noted that the waste was not any different or any more harmful if it came from out of state, so that there was no basis for distinguishing the waste aside from its origin. See *id.*

98. See *id.* at 629. With ironic foresight, the Court noted:

Tomorrow, cities in New Jersey may find it expedient or necessary to send their waste into Pennsylvania or New York for disposal, and those States might then claim the right to close their borders. The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.

*Id.* Twenty years later, as predicted, New Jersey is one of the largest exporters of waste. See Holusha, *supra* note 3, § 4, at 5 (reprinting a chart from the National Solid Waste Management Association); see also Peter Passell, *The Garbage Problem: It May Be Politics, Not Nature*, N.Y. TIMES, Feb. 26, 1991, at C1 (describing New Jersey's waste export problem). New Jersey no longer imports any other state's garbage and instead exports garbage to Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, Ohio,



Over the next ten years, the Supreme Court failed to address any additional waste management cases. However, in 1986 Congress enacted SARA and fueled a new wave of state waste management legislation.<sup>99</sup> Disputes began to arise over this legislation, particularly over Alabama's waste management statutes.<sup>100</sup> The country's largest commercial hazardous waste facility is located in Emelle, Alabama, and, in 1989, Alabama sought to impose limits on out-of-state wastes that could be imported to its facility.<sup>101</sup> The owner and operator of the Emelle facility challenged the Alabama "blacklisting" legislation, which prohibited the importation of waste from certain states that did not meet Alabama's statutory requirements.<sup>102</sup> The owner of the

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Pennsylvania, Virginia, and West Virginia. See Holusha, *supra* note 3, § 4, at 5.

99. See Jonathan Phillip Myers, Note, *Confronting the Garbage Crisis: Increased Federal Involvement as a Means of Addressing Municipal Solid Waste Disposal*, 79 GEO. L.J. 567, 575 (1991). SARA requires states to assure long-term capacity for disposal of state hazardous waste. See 42 U.S.C. § 9604(c)(9) (1994); see also *supra* notes 16-18 and accompanying text (discussing SARA's requirements); *supra* note 39 (quoting the relevant portions of SARA). In an effort to make these assurances, states enacted laws to attempt to reserve in-state landfill capacity for in-state waste by excluding or limiting out-of-state waste.

100. See *National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management*, 910 F.2d 713, 715 (11th Cir. 1990), *as modified upon denial of reh'g*, 924 F.2d 1001 (11th Cir. 1991). Several student commentators have criticized the decision in this case. See Scott F. Cooper, Note, *Constitutional and Environmental Law—Misinterpretation of Congressional Intent and Applicable Standards for Commerce Clause Review of CERCLA—National Solid Wastes Management Ass'n v. Alabama Dep't of Environmental Management*, 64 TEMP. L. REV. 1141, 1149-59 (1991) (criticizing the Court's decision in *National Solid Wastes Management* based on the implied authority granted by CERCLA for states to enter into regional waste agreements, and arguing that invalidating these laws under the dormant Commerce Clause frustrated Congress's purpose to help the states to enact long-term waste management plans); Louvin H. Skinner, Note, *National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management: Environmental Protection and the Commerce Clause—Is Environmental Protection a Legitimate Local Concern*, 37 LOY. L. REV. 189, 199-203 (1991) (discussing and analyzing the Court's opinion). But see Michael J. Tomko, Note, *National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management: A Failed Attempt to Escape City of Philadelphia*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 285, 300-07 (1992) (analyzing the opinion in the context of the Court's dormant Commerce Clause analysis, and arguing that the decision was correct because Congress did not authorize states to ban out-of-state waste). See generally Robert O. Jenkins, Note, *Constitutionally Mandated Southern Hospitality: National Solid Wastes Management Association and Chemical Waste Management, Inc. v. Alabama Department of Environmental Management*, 69 N.C. L. REV. 1001 (1991) (discussing the Court's opinion in the context of the dormant Commerce Clause and arguing that Alabama should be able to put some limits on hazardous waste import in order to protect the health and safety of its citizens and to effectuate the congressional purpose behind SARA).

101. See *National Solid Wastes Management*, 910 F.2d at 715, 717.

102. See *id.* at 716-17. The Alabama statute prohibited Alabama commercial waste facilities from accepting waste from any state that prohibited treatment of hazardous waste within its borders or did not have a state treatment facility or a regional agreement

facility and the trade association argued that this "blacklisting" provision was invalid under the dormant Commerce Clause, and the Court of Appeals for the Eleventh Circuit agreed.<sup>103</sup>

In *National Solid Wastes Management Ass'n v. Alabama Department of Environmental Management*,<sup>104</sup> the Eleventh Circuit first held that hazardous waste is an article of commerce subject to the limitations of the Commerce Clause.<sup>105</sup> Following Supreme Court precedent, the court applied the virtual per se rule of invalidity for state legislation that overtly blocked the flow of interstate commerce at the state's borders.<sup>106</sup> Finding that Alabama's legislation blocked the flow of interstate commerce, the court noted that there were alternative means for meeting the state's goals of environmental protection.<sup>107</sup> The legislation was therefore invalid under the virtual per se rule.<sup>108</sup>

Alabama argued that the dormant Commerce Clause should not apply since Congress had authorized states to enact this type of legislation as part of the capacity assurance plan required by

for the disposal of hazardous waste. See Act of May 11, 1989, No. 89-788, 1989 Ala. Acts 1572 (the "Holley Bill") (codified at ALA. CODE § 22-30-11 (1989)). This provision is identical to the "blacklisting" provision at issue in *ETC*, except that the Alabama statute required that Alabama approve the regional agreement before the agreement could qualify for the statutory exception. See *National Solid Wastes Management*, 910 F.2d at 717; see also *ETC*, 98 F.3d at 780-81 (describing South Carolina's similar blacklisting provision). The owner of the facility also challenged Alabama regulations that required Alabama preapproval before other states could send waste to Alabama and that required more stringent pretreatment of out-of-state hazardous waste than similar EPA regulations. See *National Solid Wastes Management*, 910 F.2d at 715.

103. See *National Solid Wastes Management*, 910 F.2d at 718.

104. 910 F.2d 713 (11th Cir. 1990), as modified upon denial of reh'g, 924 F.2d 1001 (11th Cir. 1991).

105. See *id.* at 718. The court based its conclusion on the Supreme Court's holding in *City of Philadelphia v. New Jersey*, 437 U.S. 617, 620 (1978). The court noted that "[a]lthough the hazardous waste involved in this case may be innately more dangerous than the solid and liquid waste involved in *City of Philadelphia*, we cannot say that the dangers of hazardous waste outweigh its worth in interstate commerce." *National Solid Wastes Management*, 910 F.2d at 719.

106. See *National Solid Wastes Management*, 910 F.2d at 719-20. The test consists of two parts. The first part examines whether the statute discriminates on its face. See *id.* If it does, then the second part requires that there be a legitimate local purpose that could not be met by any less discriminatory means. See *id.* This virtual per se rule of invalidity is a strict scrutiny test for any state statute that discriminates on its face. See *id.* The court found that Alabama could meet its goals of health and safety by less discriminatory means and thus held the statutes invalid under the dormant Commerce Clause. See *id.*

107. See *id.* at 720. The court noted that Alabama could fulfill its capacity assurance plan under SARA by contracting with the Emelle facility for long-term capacity for Alabama waste rather than blocking the facility from accepting other waste by state statute. See *id.*

108. See *id.* at 719 (citing *City of Philadelphia*, 437 U.S. at 624).

SARA.<sup>109</sup> The court considered this argument but concluded that “nothing in SARA evidences congressional authorization for each state to close its borders to wastes generated in other states to force those other states to meet federally mandated hazardous waste management requirements.”<sup>110</sup>

With landfill capacity decreasing rapidly and SARA requiring long-term capacity assurances, Alabama modified its statutes, and other states enacted similar legislation to test ways to limit the importation of hazardous waste.<sup>111</sup> As these statutes proliferated and were challenged in the courts, splits in decisions began to develop.<sup>112</sup> Just one year after denying certiorari in *National Solid Wastes Management*, the Supreme Court agreed to hear two cases in which courts upheld state waste management legislation following a dormant Commerce Clause challenge.<sup>113</sup> The first case involved Alabama statutes that were modified after the “blacklisting” provisions were struck down by the Eleventh Circuit.<sup>114</sup> The new Alabama legislation provided for an additional fee on out-of-state waste disposed in commercial facilities in Alabama.<sup>115</sup> In *Chemical*

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109. See *id.* at 721; see also *supra* note 39 (quoting the relevant portions of SARA).

110. *National Solid Wastes Management*, 910 F.2d at 721. The court noted that congressional intent to authorize states to affect interstate commerce must be “expressly stated” and “unmistakably clear.” *Id.* The court also cited an earlier Eleventh Circuit case in which the court noted that “[a]lthough Congress may override the commerce clause by express statutory language, it has not done so in enacting CERCLA.” *Id.* (quoting *Alabama v. EPA*, 871 F.2d 1548, 1555 n.3 (11th Cir. 1989)). The Supreme Court denied certiorari and let this ruling stand. See *Alabama Dep’t of Envtl. Management v. National Solid Wastes Management Ass’n*, 501 U.S. 1206 (1991) (denying petition for certiorari).

111. See *Bridgers*, *supra* note 3, at 839-59.

112. Two courts held that discriminatory waste management legislation did not violate the dormant Commerce Clause, in direct opposition to the Eleventh Circuit’s holding in *National Solid Wastes Management*. Compare *Bill Kettlewell Excavating, Inc. v. Michigan Dep’t of Natural Resources*, 732 F. Supp. 761, 765 (E.D. Mich. 1990) (finding that amendments to the Solid Waste Management Act requiring county approval for disposal of out-of-state waste did not violate the Commerce Clause), *aff’d*, 931 F.2d 413 (6th Cir. 1991), *rev’d sub nom.* *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep’t of Natural Resources*, 504 U.S. 353 (1992), and *Chemical Waste Management, Inc. v. Hunt*, 584 So. 2d 1367, 1376, 1390 (Ala. 1991) (holding that a statute imposing a base fee and an additional fee for out-of-state waste did not violate the Commerce Clause), *rev’d*, 504 U.S. 334 (1992), with *National Solid Wastes Management*, 910 F.2d at 718 (holding that discriminatory state legislation violated the dormant Commerce Clause).

113. See *Fort Gratiot*, 504 U.S. 353; *Chemical Waste Management*, 504 U.S. 334.

114. See *National Solid Wastes Management*, 910 F.2d at 719; see also *supra* notes 100-10 and accompanying text (discussing the Eleventh Circuit’s holding that struck down these blacklisting provisions).

115. See *Chemical Waste Management*, 504 U.S. at 338. The Alabama provisions also limited the amount of waste that could be disposed in any one-year period and provided

*Waste Management, Inc. v. Hunt*,<sup>116</sup> the Supreme Court found that this fee provision was subject to the limits of the dormant Commerce Clause.<sup>117</sup>

The Supreme Court applied the rule from *City of Philadelphia v. New Jersey* and held that “[n]o State may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade.”<sup>118</sup> The Court concluded that the fee on out-of-state waste discriminated against an article of commerce based solely on its origin and was subject to the virtual per se rule of invalidity.<sup>119</sup> The Court considered the legitimate local purposes presented by Alabama but found that there were less discriminatory alternatives to achieve the goals of decreasing the volume and transport of waste in Alabama.<sup>120</sup> As in its holding in *City of Philadelphia*, the Court in *Chemical Waste Management* refused to recognize the fee as analogous to quarantine laws or to laws that allowed states to prohibit the import of noxious articles.<sup>121</sup> The Court therefore determined that under the virtual per se rule, the Alabama

that the amount of hazardous waste disposed during the first year with the new fees became the permanent ceiling for disposal in later years. *See id.* The statutes provided for a base fee of \$25.60 per ton with an additional fee for out-of-state waste of \$72.00 per ton. *See Act of April 17, 1990, No. 90-326, 1990 Ala. Acts 448 (codified as amended at scattered sections of ALA. CODE §§ 22-30B-1 to -18 (1990)).*

116. 504 U.S. 334 (1992).

117. *See id.* at 340. The Court noted that “[t]he Commerce Clause thus imposes some constraints on [Alabama’s] ability to regulate these transactions,” and it cited *National Solid Wastes Management Ass’n v. Alabama Department of Environmental Management*, 910 F.2d 713, 718-19 (11th Cir. 1990), *as modified on denial of reh’g*, 924 F.2d 1001 (11th Cir. 1991). *Chemical Waste Management*, 504 U.S. at 340 n.3.

118. *Chemical Waste Management*, 504 U.S. at 339-40.

119. *See id.* at 341-42.

120. *See id.* at 343-45. The Court noted that Alabama could impose the additional fee on all waste including in-state waste, or could charge a per-mile tax on all vehicles transporting waste in Alabama regardless of origin. *See id.*

121. *See id.* at 346-47. The Court distinguished the quarantine laws by noting that “Alabama permits both the generation and landfilling of hazardous waste within its borders and the importation of still more hazardous waste subject to payment of the additional fee,” whereas the quarantine laws “did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin.” *Id.* In a dissenting opinion, Chief Justice Rehnquist argued that states should be able to limit the import of waste as a “noxious article” under the quarantine laws. *See id.* at 349-51 (Rehnquist, C.J., dissenting). With clear foresight, Chief Justice Rehnquist also noted:

Assuming that those States that are currently the targets for large volumes of hazardous waste do not simply ban hazardous waste sites altogether, they will undoubtedly continue to search for a way to limit their risk from sites in operation. And each new arrangement will generate a new legal challenge, one that will work to the principal advantage only of those States that refuse to contribute to a solution.

*Id.* at 351-52 (Rehnquist, C.J., dissenting).

fee provisions violated the dormant Commerce Clause.<sup>122</sup>

On the same day that the *Chemical Waste Management* case was decided, the Supreme Court also ruled that states could not skirt the limits of the Commerce Clause by making the import bans effective at the county level rather than at the state level.<sup>123</sup> In *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*,<sup>124</sup> the Court considered Michigan regulations that provided that waste generated outside a county could not be accepted for disposal within the county unless the county plan explicitly authorized the disposal.<sup>125</sup> The owner of a waste facility in St. Clair County sought permission from the County Planning Committee to dispose of out-of-state waste in his facility.<sup>126</sup> His request was denied, effectively preventing the facility from accepting any waste that did not originate in St. Clair County.<sup>127</sup> The Supreme Court applied the rule from *City of Philadelphia* and noted that subdivisions of a state cannot do what a state is prohibited from doing under the Constitution.<sup>128</sup> The Court reiterated its position that waste is an article of commerce<sup>129</sup> and held

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122. See *id.* at 347-49. The Court did not address the issue of congressional authorization allowing state statutes to affect interstate commerce and making the dormant Commerce Clause inapplicable. The Court noted that “[v]arious *amici* assert that the discrimination patent in the Act’s additional fee is consistent with congressional authorization. We pretermitt this issue, for it was not the basis for the decision below and has not been briefed or argued by the parties here.” *Id.* at 346 n.9. For a general discussion of the Court’s decision in *Chemical Waste Management*, see Edward A. Fitzgerald, *The Waste War: Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep’t of Natural Resources and Chemical Waste Management, Inc. v. Hunt*, 13 STAN. ENVTL. L.J. 78, 83-102, 118-21 (1994) (discussing the Court’s decision and its dormant Commerce Clause analysis, and arguing that the decision undermined the ability of states to protect the health and safety of their citizens), and Kenneth G. Cole, Comment, *Hunt v. Chemical Waste Management, Inc.: Alabama Attempts to Spread the Nation’s Hazardous Waste Disposal Burden by Imposing a Higher Tax on Out-of-State Hazardous Waste*, 67 NOTRE DAME L. REV. 1215, 1233-67 (1992) (analyzing the Court’s decision and proposing a uniform tax on waste generators as an alternative solution following the invalidation of Alabama’s laws).

123. See *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep’t of Natural Resources*, 504 U.S. 353, 361, 363 (1992).

124. 504 U.S. 353 (1992).

125. See *id.* at 355-57; see also Solid Waste Management Act Amendments of 1988, No. 475, 1988 Mich. Pub. Acts 1902 (codified at MICH. COMP. LAWS §§ 299.413a, 299.430(2) (repealed and replaced by Natural Resources and Environmental Protection Act of 1994, No. 451, 1994 Mich. Pub. Acts 2215 (codified at MICH. COMP. LAWS §§ 324.11513, 324.11538))).

126. See *Fort Gratiot*, 504 U.S. at 357.

127. See *id.*

128. See *id.* at 361.

129. See *id.* at 359 (citing *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622-23 (1978)).

that the Michigan prohibitions clearly discriminated against interstate commerce because they authorized each county to isolate itself from the national problem of hazardous waste management.<sup>130</sup>

Michigan argued that the regulations did not discriminate against interstate commerce on their face and were evenhanded because they prohibited any importation of waste into the county, regardless of whether the waste originated in Michigan.<sup>131</sup> The Court rejected this argument and found that the regulations were facially discriminatory; states cannot avoid the limits of the Commerce Clause by acting through their subdivisions.<sup>132</sup> The Court held that since the regulations were facially discriminatory, they were invalid under the virtual per se rule unless Michigan could show that they advanced a legitimate local purpose, and that no less discriminatory alternatives were available.<sup>133</sup> Michigan failed to meet this burden because it could not show that out-of-state or out-of-county waste was any more harmful than in-state or in-county waste.<sup>134</sup> The Court therefore struck down the Michigan regulations as an invalid exercise of state power under the Commerce Clause.<sup>135</sup>

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130. See *id.* at 361.

131. See *id.*

132. See *id.*; see also *Dean Milk Co. v. Madison*, 340 U.S. 349, 355-57 (1951) (holding that limits on a state are also limits on subdivisions of the state); *Brimmer v. Rebman*, 138 U.S. 78, 82-84 (1891) (same).

133. See *Fort Gratiot*, 504 U.S. at 366-67.

134. See *id.* at 367. See generally Shaun Anderson, Comment, *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources: Solid Waste Management and the Dormant Commerce Clause*, 28 NEW ENG. L. REV. 745, 758-81 (1994) (analyzing the Court's decision in *Fort Gratiot* and concluding that the Court was moving firmly toward the *City of Philadelphia* per se rule and away from the *Pike* balancing test); Christine E. Carlstrom, Case Comment, *Constitutional Law—State Law Banning Private Landfill's Importation of Solid Waste Without County Authorization Violates Commerce Clause—Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 112 S. Ct. 2019 (1992), 27 SUFFOLK U. L. REV. 203, 208-12 (1992) (analyzing the Court's decision in *Fort Gratiot* and concluding that it "may . . . generate a disincentive for states to engage in landfill conservation, since the states effectively must 'export' the benefit of increased landfill capacity to less conscientious states"); Howard G. Hopkirk, Note, *The Future of Solid Waste Import Bans Under the Dormant Commerce Clause: Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 4 VILL. ENVTL. L.J. 395, 409-16 (1993) (discussing the Court's decision and concluding that the decision in *Fort Gratiot* could be a catalyst for adoption of a national solid waste management program).

135. See *Fort Gratiot*, 504 U.S. at 367-68. Chief Justice Rehnquist again dissented and argued that given the increased problem of waste management, states should be able to enact legislation necessary to protect these important local interests. See *id.* at 368 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist argued that the Court's decision forced states with facilities to afford "reduced environmental and safety risks to the States that will not take charge of their own waste." *Id.* at 369 (Rehnquist, C.J., dissenting).

In a variation on the Alabama fee struck down in *Chemical Waste Management*, Oregon attempted to impose a "compensatory fee" on out-of-state waste disposed in Oregon.<sup>136</sup> The fee was designed to pass along the actual cost of disposal.<sup>137</sup> Oregon argued that because the surcharge was expressly tied to the actual costs incurred by state and local governments in disposal, it was a constitutional "compensatory fee."<sup>138</sup> In *Oregon Waste Systems, Inc. v. Department of Environmental Quality*,<sup>139</sup> the Supreme Court rejected this distinction and held that the Oregon surcharge was discriminatory on its face and therefore subject to the virtual per se rule of invalidity.<sup>140</sup> Under this virtual per se rule, the Court found

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The Chief Justice also repeated his arguments that garbage should be considered a "noxious substance" that states could regulate under the quarantine laws. *See id.* at 371-72 (Rehnquist, C.J., dissenting). He also argued that as a matter of policy, "[t]he Court today penalizes the State of Michigan for what to all appearances are its good-faith efforts, in turn encouraging each State to ignore the waste problem in the hope that another will pick up the slack." *Id.* at 373 (Rehnquist, C.J., dissenting).

136. *See Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, 511 U.S. 93, 95-97 (1994).

137. *See id.* at 95-96. The Court in *Chemical Waste Management* "left open the possibility that such a differential surcharge might be valid if based on the costs of disposing of waste from other States." *Id.* at 95; *see also* *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 346 n.9 (1992) (noting that a surcharge might be valid if based on actual costs of disposal).

138. *See Oregon Waste*, 511 U.S. at 97-98. The Oregon Supreme Court held that the surcharge was a compensatory fee that was constitutional because compensatory fees are invalid only if they are "manifestly disproportionate to the services rendered." *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, 849 P.2d 500, 508 (Or. 1993) (quoting *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 599 (1939)), *rev'd*, *Oregon Waste*, 511 U.S. at 97-98.

139. 511 U.S. 93 (1994).

140. *See id.* at 99-100. The Court relied heavily on the decisions in *Chemical Waste Management*, 504 U.S. at 342, and *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 626 (1978). The Court held that

even if the surcharge merely recoups the costs of disposing of out[-]of-state waste in Oregon, the fact remains that the differential charge favors shippers of Oregon waste over their counterparts handling waste generated in other States. In making that geographic distinction, the surcharge patently discriminates against interstate commerce.

*Oregon Waste*, 511 U.S. at 100. Some commentators have criticized this decision. *See* Edward A. Fitzgerald, *The Waste War: Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 23 B.C. ENVTL. AFF. L. REV. 43, 50-80, 84-85 (1995) (analyzing the Court's opinion and arguing that the Court should have applied the *Pike* balancing test and upheld the statute instead of requiring Congress to intervene to stop the "waste wars"); Kristina Kelchner, Note, *State Options Are Wasting Away: Oregon Waste Systems v. Department of Environmental Quality and America's Solid Waste Crisis*, 74 OR. L. REV. 1395, 1404-11 (1995) (analyzing the Court's decision and concluding that the time has come for Congress to act to deal with the waste crisis in this country). *But see* Susan Krisko, Note, *Oregon Waste Systems, Inc. v. Department of Environmental Quality: The Supreme Court Determines That State Surcharges on Out-of-State Generated Waste Are Invalid*, 21 OHIO N.U. L. REV. 1271, 1271-82 (1995) (discussing the facts of the

that Oregon's statute was invalid since Oregon could not show a legitimate local purpose that was not adequately served by less discriminatory means.<sup>141</sup> The Court found that the "compensatory fee" was not equal to any similar surcharge on in-state commerce; even if state income taxes were used to fund the facilities, those taxes were too different to be considered substantially equivalent to the surcharge.<sup>142</sup> The Court also held that even if landfill space is considered a "natural resource," Oregon "may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders."<sup>143</sup> Oregon could not charge more for disposal of out-of-state waste, even if the charge was just passing along the actual costs of disposal. The Court therefore closed off this small area left open in *Chemical Waste Management* and ruled that Oregon's surcharge was invalid under the dormant Commerce Clause.<sup>144</sup>

The most recent waste management case before the Supreme Court involved local ordinances that put a twist on past legislation. Legislation challenged in earlier cases typically prohibited the import of out-of-state or out-of-county waste.<sup>145</sup> In *C & A Carbone v. Clarkstown*,<sup>146</sup> the legislation involved "flow control" ordinances, or "export bans," which required that all of the waste originating in a particular county or area be sent to a specific waste treatment

case, analyzing the Court's decision, and concluding that the Court was correct in its decision because "[s]tates should not be allowed to protect resources against other states").

141. See *Oregon Waste*, 511 U.S. at 100-07. The Court noted that "[t]he State's burden of justification is so heavy that 'facial discrimination by itself may be a fatal defect.'" *Id.* at 101 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979)).

142. See *id.* at 102-04. To qualify as a valid "compensatory fee," the fee must be substantially equivalent to some other in-state tax or fee. See *id.* at 103. There was no such equivalent tax or fee in Oregon, and the Court determined that general income taxes used to support the regulation or inspection of the facility were not substantially equivalent. See *id.* at 104.

143. *Id.* at 107 (quoting *City of Philadelphia*, 437 U.S. at 627).

144. See *id.* at 108. Chief Justice Rehnquist again dissented, complaining that:

Once again, . . . as in [*City of Philadelphia* and *Chemical Waste Management*], the Court further cranks the dormant Commerce Clause ratchet against the States by striking down such cost-based fees, and by so doing ties the hands of the States in addressing the vexing national problem of solid waste disposal.

*Id.* at 109 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist also noted that "Oregon's neighbors will operate under a competitive advantage against their Oregon counterparts as they can now produce solid waste with reckless abandon and avoid paying concomitant state taxes to develop new landfills and clean up retired landfill sites." *Id.* at 112 (Rehnquist, C.J., dissenting).

145. See *supra* notes 84, 102, 125 and accompanying text.

146. 511 U.S. 383 (1994).



facility.<sup>147</sup> Local governments used these ordinances to guarantee that a minimum amount of waste would be delivered to the specific facility.<sup>148</sup> The facility could charge a per-ton tipping fee, and the local government could use the flow control ordinance and the tipping fee to guarantee financing for construction of the facility.<sup>149</sup> The town of Clarkstown, New York had such an ordinance, and the town sued a recycling facility that was violating the ordinance and taking its waste to facilities other than the designated town facility.<sup>150</sup> The recycling facility sought to have the flow control ordinance declared unconstitutional under the Commerce Clause.<sup>151</sup>

The town argued that an export ban was different from the import bans invalidated in prior cases.<sup>152</sup> According to Clarkstown, these export bans were not facially discriminatory and were evenhanded because they treated in-state and out-of-state waste and waste facilities the same.<sup>153</sup> The ordinances required that no matter where the waste was processed, if it originated in the town, it first had to go through the town treatment and sorting facility.<sup>154</sup> The Court rejected this argument and held that the ordinance regulated interstate commerce because the economic effects were interstate in reach.<sup>155</sup> The Court then held that the ordinance discriminated against interstate commerce and thus was invalid under the Court's rule in *City of Philadelphia v. New Jersey*.<sup>156</sup> In applying the virtual per se rule of invalidity, the Court noted that the health and safety objectives of the town could be served through less discriminatory alternatives such as uniform safety regulations, and the need to finance new facilities could be subsidized through general taxes or

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147. *See id.* at 386.

148. *See id.* at 386-87; David Stickney, Note, *Throwing away "Flow Control": Effective Solid Waste Management Succumbs to the Dormant Commerce Clause*, 64 U. CIN. L. REV. 283, 283-85 (1995).

149. *See Carbone*, 511 U.S. at 386-87.

150. *See id.* at 387-88.

151. *See id.* at 388.

152. *See id.* at 389.

153. *See id.* at 390.

154. *See id.*

155. *See id.* at 390-91. The Court noted that the flow control ordinance has the same "design and effect" as import bans. *See id.* at 392. "It hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility." *Id.*

156. *See id.* at 390, 392. The Court held that "[d]iscrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Id.* at 392.

municipal bonds.<sup>157</sup> Because the ordinances were facially discriminatory and any legitimate local purpose could be served through less discriminatory means, the Court held that the ordinances were unconstitutional under the dormant Commerce Clause.<sup>158</sup>

In a concurring opinion, Justice O'Connor argued that the ordinance was not facially discriminatory.<sup>159</sup> She agreed that the ordinance was unconstitutional but urged that the proper test was the balancing test used for facially neutral statutes with an incidental effect on interstate commerce.<sup>160</sup> Justice O'Connor's concurrence also directly addressed the argument raised by the National Association of Bond Lawyers as *amicus curiae* that these flow control ordinances were authorized by congressional action and therefore should not be subject to dormant Commerce Clause analysis.<sup>161</sup>

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157. See *id.* at 393-94.

158. See *id.* at 386, 392-94. Justice Souter wrote a dissenting opinion in which Chief Justice Rehnquist and Justice Blackmun joined. See *id.* at 410 (Souter, J., dissenting). Justice Souter argued that this ordinance was not the sort of protectionist measure that states enacted against one another and that "the majority is in fact greatly extending the Clause's dormant reach." *Id.* at 411 (Souter, J., dissenting). Justice Souter further argued that the correct test was the balancing test under *Pike v. Bruce Church*, 397 U.S. 137, 145 (1970), and he asserted that the ordinance should be upheld based on the important local interests it served. See *Carbone*, 511 U.S. at 422-30 (Souter, J., dissenting).

Several commentators also have criticized the Court's decision in *Carbone*. See Rachel D. Baker, *C & A Carbone v. Clarkstown: A Wake-up Call for the Dormant Commerce Clause*, 5 DUKE ENVTL. L. & POL'Y F. 67, 73-93 (1995) (analyzing the Court's decision in *Carbone*, arguing that the Court should have applied the *Pike* balancing test instead of the *City of Philadelphia* per se rule, and urging Congress to pass legislation to authorize this type of state regulation); Howard E. Shapiro, *C & A Carbone, Inc. v. Clarkstown: Supreme Court Uses the Commerce Clause to Nix a Local Trash Flow-Control Ordinance*, 9 NAT. RESOURCES & ENV'T 20, 47 (1994) (concluding that the Court's decision in *Carbone* will restrict the ability of local governments to finance private facilities without raising taxes or increasing debt, and predicting that Congress will soon act to allow such state activity); Stickney, *supra* note 148, at 293-318 (analyzing the Court's decision, arguing that the Court should have used the *Pike* balancing test, and arguing that RCRA provides congressional authorization for this action even if the action violates the dormant Commerce Clause).

159. See *Carbone*, 511 U.S. at 401 (O'Connor, J., concurring in the judgment).

160. See *id.* at 401, 407 (O'Connor, J., concurring in the judgment). This balancing, known as the *Pike* balancing test, applies to regulations that are not discriminatory but that have an incidental effect on interstate commerce. See *Pike*, 397 U.S. at 145. The balancing involves a comparison of the local benefits conferred and the excessiveness of the burden on interstate trade. See *id.*; see also *Carbone*, 511 U.S. at 402 (O'Connor, J., concurring in the judgment) (describing the *Pike* balancing test).

161. See *Carbone*, 511 U.S. at 407-08 (O'Connor, J., concurring in the judgment). Although this argument was not raised by the parties to the action, Justice O'Connor noted that this argument was "substantial" and considered it "appropriate to address it directly." *Id.* at 408 (O'Connor, J., concurring in the judgment).

Justice O'Connor stated that RCRA did not provide authorization for these state statutes because RCRA does not provide "unmistakably clear" evidence that Congress intended to authorize state action that would otherwise violate the dormant Commerce Clause.<sup>162</sup>

Against this background of cases, it is not surprising that the Fourth Circuit chose to follow the trend and hold in *ETC* that the South Carolina import restrictions were invalid under the dormant Commerce Clause.<sup>163</sup> The court followed the decision in *City of Philadelphia* and noted that hazardous waste is commerce and is subject to the limitations of the Commerce Clause.<sup>164</sup> In addition, the court followed the Supreme Court holdings in finding that South Carolina's restrictions limiting import of waste solely on the basis of origin were facially discriminatory and were subject to the *City of Philadelphia* virtual per se rule of invalidity.<sup>165</sup> Like earlier cases, the

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162. *Id.* at 408-10 (O'Connor, J., concurring in the judgment). The National Association of Bond Lawyers ("NABL") pointed to provisions in RCRA that require states to submit waste management plans to the EPA. *See id.* at 408-09 (O'Connor, J., concurring in the judgment); *see also* 42 U.S.C. § 6943(a)(2) (1994) (setting forth the waste requirements for state plans). These plans must not prohibit states or localities from entering into long-term contracts for the supply of solid waste to facilities. *See* 42 U.S.C. § 6943(a)(5). A House Report addressing this provision noted that the section is "not to be construed to affect state planning which may require all discarded materials to be transported to a particular location." H.R. REP. NO. 94-1491, at 34 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6272. Justice O'Connor "agree[d] with *amicus* NABL that these references indicate that Congress expected local governments to implement some form of flow control. Nonetheless, they neither individually nor cumulatively rise to the level of the 'explicit' authorization required by our dormant Commerce Clause decisions." *Carbone*, 511 U.S. at 409 (O'Connor, J., concurring in the judgment). Justice O'Connor invited Congress to authorize local authorities to enact this sort of legislation, but found that current statutes showed no clear congressional intent to give states that authority. *See id.* at 410 (O'Connor, J., concurring in the judgment).

163. *See ETC*, 98 F.3d at 778-79.

164. *See id.* at 785-87.

165. *See id.* Interestingly, the Fourth Circuit considered the balancing test and the per se test in a similar case heard after the initial preliminary injunction but before the ultimate grant of permanent injunction in *ETC*. *See Chambers Med. Techs. of S.C., Inc. v. Bryant*, 52 F.3d 1252, 1257, 1262-63 (4th Cir. 1995). In *Chambers*, the court considered a dormant Commerce Clause challenge to a statute that set a cap on the amount of waste that a commercial infectious waste incinerator could burn. *See id.* at 1255. The annual limit was based on the amount of infectious waste generated in South Carolina. *See id.* at 1237. The court held that the cap did not discriminate on its face or in practical effect. *See id.* at 1258. The statutes at issue were analogous to the statutes at issue in *ETC*. *See id.* at 1255-57. In *Chambers*, the court held that tying the waste incineration limit to the amount of in-state waste generated did not burden out-of-state producers any more than in-state producers. *See id.* at 1258. The court also held that the analogous statute in *ETC* was not part of the preliminary injunction issued in *Hazardous Waste Treatment Council*. *See id.* at 1258 n.9. However, the court in *ETC* held that the per se rule applied, and the

court analyzed the restrictions under the per se rule and found that South Carolina had less discriminatory alternatives available.<sup>166</sup> Based on this analysis, the court granted a permanent injunction against enforcement of the South Carolina laws.<sup>167</sup> The dormant Commerce Clause analysis was not surprising, given the recent Supreme Court cases addressing waste management statutes subject to Commerce Clause challenges.<sup>168</sup>

It also was not surprising that the Fourth Circuit decided that RCRA and SARA were not sufficiently explicit to constitute congressional authorization of these discriminatory state statutes.<sup>169</sup> In the 1990 *National Solid Waste Management*<sup>170</sup> case in Alabama, the Eleventh Circuit confronted an almost identical argument in defense of the Alabama "blacklisting" provision.<sup>171</sup> The Eleventh Circuit rejected the argument and held that RCRA and SARA's requirements of long-term capacity assurance were not clear or explicit congressional authorization for discriminatory state

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court attempted to distinguish its holding in *Chambers*. See *ETC*, 98 F.3d at 788 n.22. The court in *ETC* argued that the cap in *Chambers* would violate the dormant Commerce Clause if South Carolina failed to allow consideration of out-of-state waste in deciding whether sufficient need was shown to allow construction of new facilities. See *id.*

166. See *ETC*, 98 F.3d at 786-87. The court examined each of South Carolina's motivations. First, concern for the health and safety of citizens was a legitimate purpose, but discrimination was not necessary to serve this purpose because "[h]azardous waste is equally dangerous whether generated within South Carolina or out-of-state." *Id.* at 786. Second, concern about preserving existing disposal capacity was not legitimate because natural resources "may not be hoarded under the Commerce Clause." *Id.* Third, concerns about transportation risks could be addressed by "neutral alternatives . . . regulating transportation of all hazardous waste regardless of origin." *Id.* Finally, South Carolina argued it was "shouldering an unfair burden of the nation's hazardous wastes." *Id.* However, the court stated that the "Commerce Clause does not purport to require fairness among the states in interstate commerce." *Id.*

167. See *id.* at 787.

168. See *supra* notes 85-162 and accompanying text (discussing these cases). The decision was not surprising because it followed the decisions of the Supreme Court and other circuit courts decided during the past 10 years.

169. See *ETC*, 98 F.3d at 782-85. The Fourth Circuit examined RCRA, CERCLA, and SARA and determined that there was not "unmistakably clear" congressional intent to authorize discriminatory state legislation. See *id.*; see also *supra* notes 71-73 and accompanying text (discussing South Carolina's arguments and analyzing the court's decision); *supra* notes 109-10 and accompanying text (discussing the Eleventh Circuit's treatment of this argument).

170. *National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management*, 910 F.2d 713 (11th Cir. 1990), as modified upon denial of reh'g, 924 F.2d 1001 (11th Cir. 1991).

171. See *id.* at 721; see also *supra* note 38 and accompanying text (describing the South Carolina blacklisting provision in *ETC*); *supra* note 102 and accompanying text (describing the Alabama provisions in *National Solid Wastes Management*).

statutes.<sup>172</sup> The Supreme Court denied certiorari in *National Solid Waste Management*<sup>173</sup> and later cited that Eleventh Circuit opinion in *Chemical Waste Management, Inc. v. Hunt*.<sup>174</sup>

The Eleventh Circuit decision was issued about a year before the Fourth Circuit first heard the challenge to South Carolina's provision in the preliminary injunction phase.<sup>175</sup> In its opinion preliminarily enjoining the enforcement of the South Carolina laws, the Fourth Circuit noted that the Eleventh Circuit rejected the argument that RCRA and SARA provide congressional authorization.<sup>176</sup> The Fourth Circuit chose to follow this decision of the Eleventh Circuit.<sup>177</sup> In its opinion, the Fourth Circuit similarly rejected the notion that RCRA and SARA provided explicit congressional authorization for discriminatory state statutes.<sup>178</sup> The Fourth Circuit held that the dormant Commerce Clause was therefore applicable, and not surprisingly, the court adhered to this holding five years later in granting the permanent injunction in *ETC*.<sup>179</sup>

In the most recent Supreme Court case addressing a Commerce Clause challenge to waste management statutes, *C & A Carbone, Inc. v. Town of Clarkstown*, Justice O'Connor's concurring opinion specifically addressed the issue of whether discriminatory state statutes were authorized by RCRA.<sup>180</sup> The majority did not address

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172. See *National Solid Wastes Management*, 910 F.2d at 721.

173. 501 U.S. 1206 (1991).

174. See *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 340 n.3 (1992) (describing hazardous waste as commerce and noting that "[t]he Commerce Clause thus imposes some constraints on Alabama's ability to regulate these transactions").

175. See *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 781 (4th Cir. 1991). This opinion involved the same challenge to South Carolina's discriminatory legislation as *ETC* but granted only a preliminary injunction. See *id.* The permanent injunction based on the same general reasoning came five years later in *ETC*. See *ETC*, 98 F.3d at 778.

176. See *Hazardous Waste Treatment Council*, 945 F.2d at 791-92.

177. See *id.*

178. See *id.* at 792.

179. See *ETC*, 98 F.3d at 783. The court adhered to its prior ruling and noted: We previously found at the preliminary injunction stage that RCRA, CERCLA, and SARA did not contain any language indicating "an unmistakably clear congressional intent to permit states to burden interstate commerce." Neither South Carolina, nor the intervenors have come forward with any further persuasive evidence indicating that Congress intended to permit the states, directly or by EPA authorization, to engage in actions otherwise violative of the Commerce Clause.

*ETC*, 98 F.3d at 783 (quoting *Hazardous Waste Treatment Council*, 945 F.2d at 792).

180. See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 407-10 (1994) (O'Connor, J., concurring in the judgment); see also *supra* notes 145-62 and accompanying text (discussing the facts of *Carbone* and the Court's opinion).

the issue because it was raised only by an amicus curiae rather than a party to the action.<sup>181</sup> Justice O'Connor specifically noted that RCRA did not authorize states to enact flow control ordinances that interfered with interstate commerce.<sup>182</sup> Despite some evidence of intent, Justice O'Connor concluded that RCRA did not include "explicit" authorization of such actions.<sup>183</sup> Although this was not part of the majority opinion, the Fourth Circuit in *ETC* was unlikely to reverse itself to find authorization when Justice O'Connor had found no such authorization in a separate provision of RCRA.

The opinions and statutory interpretations by the Courts of Appeals for the Fourth and Eleventh Circuits are confirmed by later political struggles to enact legislation specifically granting states the power to control waste at their borders. The circuit courts determined that Congress did not expressly authorize discriminatory state statutes that would otherwise violate the Commerce Clause.<sup>184</sup> During the early 1990s, congressional delegates repeatedly introduced legislation to specifically authorize state and local officials to enact these sorts of waste management plans even if they discriminated against interstate commerce.<sup>185</sup> However, none of these

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181. See *id.* at 407-08 (O'Connor, J., concurring in the judgment) (noting that this argument was raised by amicus NABL); *supra* note 161 and accompanying text.

182. See *id.* (O'Connor, J., concurring in the judgment).

183. See *id.* (O'Connor, J., concurring in the judgment). Justice O'Connor noted a statement in the House Report addressing 42 U.S.C. § 6943(a)(5) (1994), the section of RCRA at issue in *Carbone*, showing some evidence of concern with flow control. See *Carbone*, 511 U.S. at 409 (O'Connor, J., concurring in the judgment). The House Report noted that state planning "may require all discarded materials to be transported to a particular location." H.R. REP. NO. 94-1491, at 34 (1976), *reprinted in* 1976 U.S.C.A.N. 6238, 6272. Despite these indications of intent, which provided more evidence than South Carolina had in the separate provisions at issue in *ETC*, Justice O'Connor still argued that the language was not explicit enough to indicate congressional intent to authorize discriminatory statutes. See *Carbone*, 511 U.S. at 410 (O'Connor, J., concurring in the judgment).

184. See *Hazardous Waste Treatment Council*, 945 F.2d at 792; *National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management*, 910 F.2d 713, 721 (11th Cir. 1990), *as modified upon denial of reh'g*, 924 F.2d 1001 (11th Cir. 1991).

185. See S. 2345, 103d Cong. (1994) (granting authority to governors to freeze the level of solid waste imports); H.R. 4779, 103d Cong. (1994) (granting state and local governments some control over import of solid waste); S. 439, 103d Cong. (1993) (allowing states to ban the import of out-of-state waste); H.R. 1076, 103d Cong. (1993) (same); H.R. 963, 103d Cong. (1993) (same); H.R. 3865, 102d Cong. (1992) (amending RCRA to allow states to ban the import of out-of-state waste to new facilities that they construct); S. 2877, 102d Cong. (1992) (allowing states with local waste planning units whose landfills met all operating requirements to ban the import of out-of-state waste and freeze existing import levels); S. 976, 102d Cong. § 4014 (1992) (giving states the authority to ban out-of-state waste as part of RCRA reauthorization); H.R. 2162, 101st Cong. (1989) (giving states the right to ban out-of-state waste if the import ban was part of a

bills was ever enacted, and each involved a political battle.<sup>186</sup> This inability to pass legislation authorizing discriminatory state statutes lends some support to the notion that Congress did not intend to authorize such statutes when it enacted SARA in 1986.

The position of the Fourth and Eleventh Circuits is also supported by the presence of the Low-Level Radioactive Waste Policy statutes.<sup>187</sup> These statutes are similar to the provisions of RCRA but govern the handling and disposal of radioactive waste rather than hazardous waste.<sup>188</sup> As noted by the Eleventh Circuit in *National Solid Wastes Management*,<sup>189</sup> Congress explicitly included a provision in the Low-Level Radioactive Waste Policy Act that authorized states to enact discriminatory provisions even if they would otherwise violate the Commerce Clause.<sup>190</sup> The statute envisioned interregional compacts for radioactive waste disposal that could be enforced by states through statutes refusing to import waste from non-member states.<sup>191</sup> There is no such analogous provision in

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comprehensive, EPA-approved solid waste management plan). The Report on Senate Bill 976 explicitly acknowledged that the provision was a specific delegation of power to regulate commerce under the Commerce Clause. See S. REP. NO. 102-301, at 80 (1992).

186. See Fitzgerald, *supra* note 140, at 80-84. House Bill 4779 passed the House by a vote of 368-55. See *id.* However, the Senate's version, Senate Bill 2345, differed in the amount of power given to governors. See *id.* The House approved a compromise bill, but the Senate rejected it. See *id.* A few years earlier, Senate Bill 2877 passed quickly in the Senate. See Martin E. Gold, *Solid Waste Management and the Constitution's Commerce Clause*, 25 URB. LAW. 21, 48 n.144 (1993). However, similar legislation was proposed in the House of Representatives but died when the House adjourned without taking action. See *id.*

187. See 42 U.S.C. §§ 2021b-2021j (1994); see also Tomko, *supra* note 100, at 298-300 (comparing the statutes governing Low-Level Radioactive Waste with the statutes governing Capacity Assurance Plans, and arguing that the punishment for violating an agreement pursuant to the CAPs is loss of Superfund money, not being banned from other states' hazardous waste facilities).

188. See 42 U.S.C. §§ 2021b-2021j. The Low-Level Radioactive Waste provisions were validated, in part, by the Supreme Court in *New York v. United States*, 505 U.S. 144, 169-73 (1992) (holding that monetary and access incentives were legitimate exercises of the Commerce Clause authority). However, the Court invalidated the provision requiring states to "take title" to waste. See *id.* at 171-73 (holding that these provisions exceeded Commerce Clause authority and interfered with state sovereignty).

189. See *National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management*, 910 F.2d 713, 722 n.12 (11th Cir. 1990), as modified upon denial of reh'g, 924 F.2d 1001 (11th Cir. 1991).

190. The Low-Level Radioactive Waste Policy Act encourages states to enter into regional compacts and explicitly authorizes states to ban the import of radioactive waste from states that do not enter into a compact or do not meet federal deadlines for establishing their own facilities. See 42 U.S.C. § 2021e(e)(2), (f)(1) (1994).

191. North Carolina entered into a regional compact under the Low-Level Radioactive Waste Policy Act with other southeastern states including South Carolina. See Richard S. Hodes, *Waste Compact Will Benefit North Carolina*, CHARLOTTE

RCRA or SARA, lending further support to the notion that discriminatory state actions were not authorized by Congress under those statutes.

After holding that Congress had not authorized the discriminatory statutes, the court in *ETC* moved to a procedural problem challenging the court's right to hear the case.<sup>192</sup> The Fourth Circuit held that the trial court did not err in refusing to defer to the EPA under the doctrine of primary jurisdiction.<sup>193</sup> This jurisdictional issue was not addressed in the earlier Fourth Circuit case granting the preliminary injunction<sup>194</sup> and had not been addressed in any early Commerce Clause challenge to waste management statutes. The doctrine of primary jurisdiction generally provides that the agency with expertise in a specialized area should have authority to decide a controversy.<sup>195</sup> RCRA and SARA require states to submit waste management plans to the EPA.<sup>196</sup> The EPA reviews the plans to make sure they are "consistent" with federal law and other state plans.<sup>197</sup> After *City of Philadelphia v. New Jersey*, the EPA required

OBSERVER, July 6, 1992, at A7; *Nuclear Storage Sought*, CHARLOTTE OBSERVER, June 24, 1995, at C1. When North Carolina refused to meet its obligations under this act, South Carolina banned all importation of low-level radioactive waste from North Carolina. See Hodes, *supra*, at A7. Unlike the hazardous waste ban, the radioactive waste ban was specifically authorized by Congress, and North Carolina was left to fend for itself. See *id.*; see also *Radioactive Waste: Southeast Compact Agrees in Principle with Generators' Offer to Provide Funds*, 28 ENV'T REP. 782 (1997) (noting that since South Carolina barred importation of radioactive waste, "low-level waste from power generation, industrial processes, and medical research and treatment is stored at approximately 40 sites in North Carolina").

192. See *ETC*, 98 F.3d at 789.

193. See *id.*

194. See *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 789 n.11 (4th Cir. 1991).

195. See *ETC*, 98 F.3d at 789. See *supra* note 60 for a brief discussion of primary jurisdiction.

196. See *supra* notes 12-18 and accompanying text (describing the requirements of RCRA and SARA).

197. See 40 C.F.R. § 271.4 (1996). This regulation requires that state plans not restrict interstate trade, but the EPA has altered its definition over time to allow plans that would not be allowed under the Supreme Court's Commerce Clause analysis. See *Hazardous Waste Treatment Council*, 945 F.2d at 793-94. The regulation provides:

To obtain approval, a State program must be consistent with the Federal program and State programs applicable in other States and in particular must comply with the provisions below . . .

(a) Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.

40 C.F.R. § 271.4.



that the state plans fall within the constraints of the dormant Commerce Clause.<sup>198</sup> State plans that improperly burdened interstate commerce were deemed “not consistent” with federal law.<sup>199</sup> However, this EPA definition changed over time, and the EPA approved South Carolina’s waste plan as “consistent” with federal law despite the limitations on waste import and the burden on interstate commerce.<sup>200</sup>

The trial court chose not to defer to the EPA and held that the Commerce Clause issues were legal rather than factual.<sup>201</sup> The trial court found that it was in a better position than the EPA to determine the constitutionality of the waste statutes because it was an Article III court and thus more familiar with constitutional issues.<sup>202</sup> The Fourth Circuit reviewed this decision for abuse of discretion but agreed that the trial court did not need to defer to the EPA under the doctrine of primary jurisdiction.<sup>203</sup> The Fourth Circuit agreed that the EPA was in no better position than the federal courts to determine the constitutionality of the provision and agreed that the court need not defer to the EPA on legal issues when the facts were not really contested.<sup>204</sup> The Fourth Circuit’s holding divests state and local governments of the ability to get a plan approved by the EPA under its definition of what is “consistent” with federal law. Like other recent precedent, the Fourth Circuit’s holding further limits the power of state and local governments to enact these sorts of provisions, even with EPA approval.

*ETC* has important practical ramifications because it allows North Carolina to continue sending its hazardous waste to South Carolina even though North Carolina refused to meet its obligations under the interregional agreement.<sup>205</sup> After *ETC*, North Carolina at least has a place to send its waste while it determines the appropriate

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198. See *Hazardous Waste Treatment Council*, 945 F.2d at 793-94.

199. See *id.*

200. See *id.* The EPA raised a concern about the constitutionality of this provision, and the South Carolina Attorney General responded and argued that the provisions were constitutional. See *id.*

201. See *Environmental Tech. Council v. South Carolina*, 901 F. Supp. 1026, 1029 (D.S.C. 1995), *aff’d sub nom. Environmental Tech. Council v. Sierra Club*, 98 F.3d 774 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2478 (1997).

202. See *id.*

203. See *ETC*, 98 F.3d at 789.

204. See *id.*

205. Cf. Lee Bandy, *EPA: States Mustn’t Erect Walls Against Shipments of Waste*, CHARLOTTE OBSERVER (S.C. Edition), May 1, 1991, at B1 (discussing South Carolina’s attempts to prohibit the importation of North Carolina’s waste); *Judge Blocks S.C. Ban on N.C. Waste Disposal*, *supra* note 22, at B1 (same).

solution to the hazardous waste problem. However, the hazardous waste problems remain and the "wars" are likely to continue. Like the Eleventh Circuit had done in *National Solid Wastes Management*, the Fourth Circuit disclaimed responsibility for its decision, noting at the outset that it had to apply the Constitution despite the effect on hazardous waste policy.<sup>206</sup>

The Constitution itself thus "interferes" with hazardous waste management.<sup>207</sup> The cases show that the Supreme Court and the lower courts have consistently applied the dormant Commerce Clause to invalidate state legislation that attempts to limit the import of waste from other states.<sup>208</sup> Absent congressional authorization to burden interstate commerce, the dormant Commerce Clause bars these "import bans."<sup>209</sup> The Fourth Circuit and the Eleventh Circuit both have held that RCRA and SARA do not constitute explicit congressional authorization to burden interstate commerce, so the dormant Commerce Clause operates to invalidate discriminatory hazardous waste regulation.<sup>210</sup> However, although Congress has not acted to authorize "import bans," Congress has created a scheme under SARA to force states to take responsibility for hazardous waste planning.<sup>211</sup>

Under SARA, the EPA is authorized to withhold Superfund money from any state that is unable to demonstrate long-term disposal capacity for waste generated in-state.<sup>212</sup> To demonstrate long-term disposal capacity, states must show adequate in-state

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206. See *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 783 (4th Cir. 1991). The court disclaimed responsibility for the implications of its decision by stating:

"[O]ur job is not to make policy, but to interpret the federal legislation and regulations to determine Congress's intent . . . . We recognize that serious problems associated with hazardous waste management plague our nation; but whatever our own views may be about the effectiveness of what Congress or Alabama has done, we can only apply the law."

*Id.* (second alteration in original) (quoting *National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management*, 910 F.2d 713, 715-16 (11th Cir. 1990), *as modified upon denial of reh'g*, 924 F.2d 1001 (11th Cir. 1991)).

207. See *id.*

208. See *supra* notes 85-162 and accompanying text (discussing cases involving dormant Commerce Clause challenges to state waste management statutes).

209. See *ETC*, 98 F.3d at 782; see also *supra* note 66 (discussing the rule that Congress may act to authorize state action that would otherwise interfere with the dormant Commerce Clause).

210. See *ETC*, 98 F.3d at 782-85; *National Solid Wastes Management*, 910 F.2d at 721, 723.

211. See 42 U.S.C. § 9604(c)(9) (1994).

212. See *id.*

capacity or must enter into interstate agreements assuring long-term disposal capacity.<sup>213</sup> After failing to meet its obligations, North Carolina was eliminated from its interstate agreement.<sup>214</sup> South Carolina's governor pushed the EPA to impose the statutory sanctions and withhold Superfund money.<sup>215</sup> The EPA Administrator agreed that the EPA should withhold \$12 million in Superfund money if North Carolina failed to demonstrate disposal capacity.<sup>216</sup> This was the appropriate sanction provided by Congress for states that failed to meet their hazardous waste management obligations.<sup>217</sup>

However, in 1992 the EPA changed its interpretation of this statutory requirement.<sup>218</sup> States were facing difficulty meeting the capacity assurance requirements of SARA.<sup>219</sup> In response to this difficulty and the lack of precise data, the EPA decided to consider the availability of disposal capacity on a national basis, rather than state-by-state.<sup>220</sup> Under this interpretation, the EPA considers all of the disposal capacity available throughout the country.<sup>221</sup> The EPA then considers each state's estimate of its expected waste.<sup>222</sup> The

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213. See *id.*; see also *supra* note 39 (quoting the relevant portion of SARA).

214. See Campbell Letter, *supra* note 1.

215. See *County Torn over Hazardous Waste Facility as North Carolina Searches State for Location*, *supra* note 9, at 1840.

216. See *North Carolina Amends Capacity Plan; EPA to Decide on Yanking Superfund Money*, 22 ENV'T REP. 113, 113 (1991); *North Carolina Given 60 Days to Site Hazardous Waste Facility*, 21 ENV'T REP. 2028, 2028 (1991).

217. See 42 U.S.C. § 9604(c)(9).

218. See *Draft Guidance Bases State Waste Capacity on Treatment, Disposal Availability Nationwide*, 23 ENV'T REP. 1466, 1466 (1992).

219. See *Capacity Assurance Plans for States Termed 'Paper Exercise' by Illinois Official*, 20 ENV'T REP. 1267, 1267-68 (1989) (arguing that the plans were particularly unreliable because states have no control over management decisions by private commercial hazardous waste facilities). The EPA also faced criticism when it approved state capacity assurance plans that relied on capacity at a New York facility without New York's approval. See *Capacity Assurance Plans Inadequate, New York Says in Filing Suit Against EPA*, 22 ENV'T REP. 2099, 2099 (1992).

220. See *Draft Guidance Bases State Waste Capacity on Treatment, Disposal Availability Nationwide*, *supra* note 218, at 1466; see also *Availability of the Draft 1993 Guidance for Capacity Assurance Planning*, 57 Fed. Reg. 41,496, at 41,496 (1992) (noting that the new guidance "presents a national approach that focuses on sufficient capacity to treat and dispose of the projected demand of hazardous wastes").

221. See U.S. ENVTL. PROTECTION AGENCY, NATIONAL CAPACITY ASSESSMENT REPORT: CAPACITY PLANNING PURSUANT TO CERCLA SECTION 104(c)(9), at 5 (1997) (noting that the CAP process focused on national capacity and that "[i]n evaluating capacity nationwide, the Agency assumes private agreements for the interstate treatment or disposal of hazardous waste have been or will be executed if adequate capacity otherwise exists").

222. See *id.* at 4 (noting that the EPA "calculated the total national maximum demand . . . by aggregating the States' projected demand and commercial capacity").

EPA then compares the total available capacity with the total projected waste generated on a national basis.<sup>223</sup> The EPA recently made this comparison and found that there was sufficient national capacity through the year 2013.<sup>224</sup> Based on this determination, the EPA found that no Superfund money would be withheld.<sup>225</sup>

This interpretation removes any incentive for states to enter into agreements or build facilities as part of long-term hazardous waste management plans. Congress enacted sanctions to prevent states like North Carolina from shirking their obligations.<sup>226</sup> However, the EPA has adopted a strained interpretation that removes any real bite from the statute.<sup>227</sup> The result is that states without facilities get a free ride at the expense of the states with facilities. States without facilities are spared the economic and political costs of trying to construct a waste facility to deal with the waste they generate. Instead, they have used the courts to force other states to accept their waste, and the EPA has refused to impose the statutory sanctions. Less-populated states have become the "dumping grounds" for the nation's hazardous waste, and states without facilities are given no incentives or requirements to build their own facilities.

Given the position of the courts and of the EPA, states are limited in their ability to force other states to take care of their own waste. However, states with facilities can try to solve the problem through a few methods that have not yet been challenged. If the state owns the facility, it is exempt from the application of the dormant Commerce Clause under the "market participant doctrine,"<sup>228</sup> and it may decide what waste can be disposed there.

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223. *See id.*

224. *See id.*; *see also* CERCLA 104(c)(9) Capacity Assurance Planning: National Capacity Assessment Report, 62 Fed. Reg. 2156, 2156 (1997) (concluding that "there exists adequate national capacity in all CAP management categories").

225. *See* CERCLA 104(c)(9) Capacity Assurance Planning: National Capacity Assessment Report, 62 Fed. Reg. at 2156 (noting that as a result of the determination, "all States continue to be eligible to receive Superfund Trust funds").

226. *See* 42 U.S.C. § 9604(c)(9) (1994).

227. *See supra* notes 218-25 and accompanying text.

228. For additional discussion and analysis of the "market participant doctrine," *see White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 206-08 (1983). *See also* David Pomper, Comment, *Recycling Philadelphia v. New Jersey: The Dormant Commerce Clause, Postindustrial "Natural" Resources, and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309, 1312-28, 1331-48 (1989) (examining the contours of the market participant doctrine and the ways state and local governments could use this doctrine to control waste disposal). *See generally* Michael J. Polelle, *A Critique of the Market Participation Exception*, 15 WHITTIER L. REV. 647 (1994) (criticizing the justifications of and exceptions to the market participation doctrine, and discussing the significance of the Privileges and Immunities Clause).

States also may contract with local private facilities to guarantee a certain capacity for in-state waste each year.<sup>229</sup> This option places the burden on the state to spend tax dollars to regulate, inspect, and support the facility. In addition, the state must spend additional money to contract space for in-state waste at a premium. However, this option at least provides some certainty that the state will be able to assure long-term disposal capacity.

In order to provide a solution to this problem, Congress could enact a statute modeled after the Low-Level Radioactive Waste Policy Act. This statute could encourage states to enter into regional compacts for the disposal of hazardous waste and could explicitly authorize states to ban the import of hazardous waste from states that did not enter into a compact or did not meet federal deadlines for establishing their own facilities.<sup>230</sup> Such a statute would give states power to control waste flow and would provide greater incentives to states to enter regional agreements and live up to their obligations. However, there are problems with such an approach. First, states might close their borders, instigating a hazardous waste crisis in which states without facilities would be left with no immediate disposal options. This would undermine Congress's goal of ensuring safe disposal of hazardous waste. Second, such an arrangement would lead to state isolation and would run contrary to the notion that as a union, the states must "sink or swim together."<sup>231</sup> Finally, some states might still fail to comply with their hazardous waste obligations.<sup>232</sup>

As a better alternative, the EPA should change its loose interpretation of the capacity assurance program under SARA. Congress has provided stringent sanctions for states that fail to meet their hazardous waste planning obligations.<sup>233</sup> Under the current requirements of SARA, states that fail to demonstrate long-term

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229. Cf. *National Solid Wastes Management v. Alabama Dep't of Env'tl. Management*, 910 F.2d 713, 720 (11th Cir. 1990) (noting that Alabama could meet the requirements of the capacity assurance plan by contracting with a private facility for capacity), *as modified upon denial of reh'g*, 924 F.2d 1001 (11th Cir. 1991).

230. Cf. 42 U.S.C. §§ 2021b - 2021j (setting out the requirements and authority under the Low-Level Radioactive Waste Policy Act).

231. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) ("[The Constitution] was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.").

232. For example, North Carolina has failed to comply with its obligations under the Low-Level Radioactive Waste Policy Act. See *supra* note 191.

233. See 42 U.S.C. § 9604(c)(9).

disposal capacity should lose Superfund money.<sup>234</sup> However, under the EPA's interpretation of this statute, states are not individually accountable and every state has continued to receive Superfund money.<sup>235</sup> The EPA should use its statutory authority to impose sanctions against states like North Carolina that fail to meet their obligations under a regional agreement and fail to demonstrate long-term hazardous waste disposal capacity. This alternative would prevent states from isolating themselves, and would force recalcitrant states to live up to their obligations.

States will have to work together to solve the national hazardous waste problem. As long as some states are free to burden other states with their waste at no additional cost, it is unlikely that states will join together or create a compromise. Congress has created statutory sanctions to prevent this situation, but the hazardous waste wars will continue to escalate as long as the EPA refuses to use the statutory tools that Congress has provided. The EPA has the power to force states to build necessary hazardous waste facilities despite local opposition. By refusing to use this power, the EPA just contributes to the problem. Despite the EPA's position, North Carolina must take responsibility and cooperate in establishing solutions to the hazardous waste problem rather than shirking obligations at South Carolina's expense.

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234. *See id.*; *see also supra* note 39 (quoting the relevant portion of SARA).

235. *See supra* notes 218-25 and accompanying text (discussing the EPA's interpretation of the capacity assurance plan requirements).