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Waste Management Holdings v. Gilmore: The Anything but Dormant Problem of Interstate Waste

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WASTE MANAGEMENT HOLDINGS v. GILMORE: THE ANYTHING BUT DORMANT PROBLEM OF INTERSTATE WASTE

I. INTRODUCTION

Disposing of municipal solid waste (MSW) has created a national problem that raises intricate technological and political issues.[1] The United States generates the largest amount of solid waste in the world and the amount increases every year.[2] At least eighty percent of the solid waste is distributed in landfills across the country.[3] Landfill space, however, is rapidly diminishing and the environmental repercussions of landfill use are quickly surfacing.[4] In fact, experts project that nearly eighty percent of existing solid waste landfills will close by the year 2009.[5] At that time, there will not be sufficient waste disposal sites available to meet the increased demands of MSW.[6] Consequently, many states have resorted to exporting their waste to other states, thus transforming a local problem into a national problem.[7]

In an attempt to protect themselves, states that receive waste from other states have enacted statutes to limit or restrict waste importation.[8] Recipient states are often concerned with preserving their available landfill space as well as protecting their citizens from

1. *See* Envtl. Tech. Council v. Sierra Club, 98 F.3d 774, 778 (4th Cir. 1996) (discussing unconstitutionality of South Carolina law regulating hazardous wastes).

2. *See* Robert R.M. Verchick, *The Commerce Clause, Environmental Justice, and the Interstate Garbage Wars*, 70 S. CAL. L. REV. 1239, 1246 (1997) (discussing rapid growth of MSW in United States).

3. *See id.* (discussing problem of garbage disposal in America).

4. *See id.* (discussing diminishing landfill capacity and environmental repercussions).

5. *See id.* As old landfills close, it is becoming more difficult to find adequate sites. *See id.* Finding new sites is especially difficult as environmental concerns, coupled with health hazards, surface with regard to the long-term repercussions of landfill use. *See id.*

6. *See* Jason Barocas, Note, Houlton Citizens' Coalition v. Town of Houlton: *Is An "Open and Competitive" Bidding Process Really the Solution to National Waste Disposal Problems?*, 11 VILL. ENVTL. L.J. 393, 394 (2000) (discussing problem of insufficient disposal sites and concept of open bidding process as solution to waste problems).

7. *See* James E. Breitenbucher, *Yakety Yak, Take Your Garbage Back: Do States Have Any Protection From Becoming the Dumping Grounds For Out-Of-State Municipal Solid Waste?*, 32 WASH. U.J. URB. & CONTEMP. L. 225, 227 (1997) (discussing state's lack of protection from out-of-state MSW).

8. *See* Barocas, *supra* note 6, at 394 (discussing actions taken by waste recipient states).

the environmental hazards of landfilling, which threatens the environment in various ways.[9] First, many landfills contain large quantities of toxic and hazardous materials.[10] Second, older landfills leak contaminants into adjacent land or aquifers.[11] Third, landfills can generate uncontrolled amounts of methane into the air, which can cause health and safety hazards.[12] Finally, landfills create a nuisance in neighboring communities due to the smell, increased traffic, and an ever-growing and unwelcome rat population.[13]

As states have tried to deal with the effects of large-scale waste importation, courts have continuously struck down waste restrictive statutes as violating the Dormant Commerce Clause of the United States Constitution.[14] The courts' interpretation of the Dormant Commerce Clause and their general reluctance to allow states to limit the importation of waste has led to a significant environmental problem where waste-export states are not held accountable for the waste they produce.[15]

This Note addresses the recent decision of the Fourth Circuit Court of Appeals in *Waste Management Holdings Inc. v. Gilmore*,[16] in which the court struck down most of a Virginia statute aimed at restricting the transport and disposal of out-of-state MSW in Virginia.[17] The District Court for the Eastern District of Virginia and Fourth Circuit Court of Appeals held that a majority of the statute's provisions were unconstitutional under the Dormant Commerce

9. *See generally* Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316 (4th Cir. 2001) (discussing Virginia's attempt to safeguard environment and its citizens from increased import of MSW).

10. *See* Verchick, *supra* note 2, at 1246-47 (discussing problems associated with landfilling).

11. *See id.* (discussing negative effects of landfilling).

12. *See id.* Uncontrolled amounts of methane gas can cause safety hazards and fire hazards as well. *See id.*

13. *See id.* (explaining detrimental consequences of landfilling and resident opposition).

14. *See* Lincoln L. Davies, *If You Give The Court A Commerce Clause: An Environmental Justice Critique of Supreme Court Interstate Waste Jurispridence*, 11 FORDHAM ENVTL. L.J. 207, 253 (1999) (discussing how recent federal and state court decisions have invalidated state restrictions on transportation and disposal of out-of-state MSW).

15. *See* Breitenbucher, *supra* note 7, at 229-31 (noting practical effect of judicial interpretation of Dormant Commerce Clause).

16. 252 F.3d 316 (4th Cir. 2001).

17. *See id.* at 349 (discussing Fourth Circuit's decision invalidating certain waste restrictive provisions).

Clause.[18] Part II presents the facts of *Waste Management.*[19] Part III outlines the background of the Dormant Commerce Clause and past judicial decisions concerning the doctrine with respect to interstate waste.[20] Part IV provides both a narrative and critical analysis of the Fourth Circuit's decision.[21] Finally, Part V discusses the overall impact of this decision.[22]

II. FACTS

In March and April of 1999, the state of Virginia enacted five statutory provisions to curtail the importation of MSW that may be accepted by landfills located in Virginia.[23] The first statutory provision, the Cap Provision, caps the amount of waste a Virginia landfill can accept.[24] The second statutory provision, the Stacking Provision, prohibits stacking containerized waste more than two containers high on a barge.[25] This provision also allows for other regulations associated with the shipment of waste via barge, ship or vessel.[26] The third statutory provision, the Three Rivers' Ban, prohibits "the commercial transportation of hazardous or nonhazardous solid waste . . . by ship, barge, or other vessel upon the

18. *See id.* (contemplating Fourth Circuit's holding); *see also* Waste Mgmt. Holdings, Inc. v. Gilmore, 87 F. Supp. 2d 536, 544-45 (E.D. Va. 2000) (setting forth district court's holding).

19. For a discussion of the facts of *Waste Mgmt.*, *see infra* notes 23-45 and accompanying text.

20. For a discussion of the background and an overview of the Dormant Commerce Clause, *see infra* notes 46-144 and accompanying text.

21. For the narrative and critical analysis, *see infra* notes 145-251 and accompanying text.

22. For a discussion of impact of *Waste Mgmt.*, *see infra* notes 252-59 and accompanying text.

23. *See Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 323 (4th Cir. 2001) (citing VA. CODE ANN. §§ 10.1-1408.1(q), 10.1-1408.3, 10.1-1454.1(A), 10.1-1454.2, 10.1-1454.3 (Michie Supp. 2000)) (discussing content of Virginia's statute concerning MSW).

24. *See id.* Under the Cap Provision a Virginia landfill may accept either 2,000 tons of MSW per day or the average amount accepted by the landfill in 1998, depending upon which is greater. *See* VA. CODE ANN. § 10.1-1408.3. The Cap Provision also allows Virginia's Waste Management Board to grant individual requests for exceptions contingent upon a set of factors as well as the discretion of the Board. *See id.*

25. *See Waste Mgmt.*, 252 F.3d at 323 (citing VA. CODE ANN. §10.1-1454.1(A) (2001)) (discussing parameters of Stacking Provision and its intent to prevent escape of waste in event of an accident).

26. *See id.* This provision calls for the creation of a Board to develop regulations governing the transport of MSW by barge or other vessel. *See* VA. CODE ANN. §10.1-1454.1 (2001). Some of the regulations to be considered by the Board include the issuance of permits and the design of watertight and secured transport containers. *See id.*

navigable waters of the Rappahanock, James and York Rivers, to the fullest extent consistent with limitations posed by the Constitution of the United States."[27] The fourth statutory provision, the Trucking Provision, prohibits vehicles with four or more axels from transporting MSW "unless the transporter of the waste provides certification, in a form prescribed by the Board, that the waste is free of substances not authorized for acceptance at the facility."[28] Finally, the fifth statutory provision, the Four or More Axel Provision, requires that the Board promulgate regulations governing the "commercial transport" of MSW by "any tractor truck semi trailer combination with four or more axels."[29]

At the time these statutory provisions were enacted, Fresh Kills landfill in Staten Island, New York, had recently announced that by December 2001 it would cease accepting waste.[30] The New York City Department of Sanitation negotiated interim disposal contracts to phase out dependency on Fresh Kills.[31] Landfills in Virginia were awarded two of these contracts and a third twenty-year contract was in the process of being negotiated.[32] The third contract contemplated the disposal of 12,000 tons of residential waste per day that emanated from four of the five New York boroughs.[33] If the third contract is awarded to Virginia, sixty percent of New York City's residential MSW would be deposited in Virginia landfills.[34]

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27. *Waste Mgmt.*, 252 F.3d at 323 (citing VA. CODE ANN. § 10.1-1454.2 (2001)) (discussing Three Rivers' Ban Provision).

28. *Id.* at 323-24 (citing VA. CODE ANN. § 10.1-1408.1(Q) (2001)) (discussing Trucking Provision and its attempt to limit mass importation of waste through large trucks). For statutory support for the creation of the monitoring board, *see supra* note 26.

29. *Id.* at 325 (citing VA. CODE ANN. § 10.1-1454.3(A),(D)). "Among other things, the Four or More Axel Provision provides that the new regulations require, as a condition of carrying MSW on Virginia roads, the owners of such trucks to make financial assurances that trucks having less than four axels or carrying other cargo need not make." *Id.*

30. *See id.* at 325-26 (noting relevant background to enactment of Virginia's statute).

31. *See id.* New York faced the challenge of exporting waste that had been disposed of in Fresh Kills landfill for nearly fifty years. *See id.*

32. *See Waste Mgmt. Holdings, Inc. v. Gilmore*, 87 F. Supp. 2d 536, 539 (E.D. Va. 2000) (discussing New York City's interim disposal contracts).

33. *See id.* The four boroughs include Manhattan, Queens, Brooklyn, and the Bronx. *See id.* "In addition to the residential waste covered by existing and pending contracts, Waste Management also removes significant quantities of commercial waste per day from New York City and surrounding communities." *Id.* (emphasis omitted).

34. *See id.* One Virginia landfill, the Charles City Landfill, would be particularly affected. *See id.* Furthermore, these contracts also require that the waste be containerized and transported by barge. *See Waste Mgmt.*, 252 F.3d at 326.

After Virginia enacted the five statutory provisions, several landfill operators and transporters of MSW and one Virginia County (Plaintiffs) commenced this action in the Eastern District of Virginia.[35] Plaintiffs brought this suit enjoining multiple individuals, including Virginia's Governor, James Gilmore, Virginia's Secretary of Natural Resources, John Paul Woodley, Virginia's Director of the Department of Environmental Control, Dennis Treacy (Defendants).[36] Plaintiffs challenged the Virginia statute arguing that the provisions violated the Dormant Commerce Clause, the Contract Clause, and the Equal Protection Clause of the United States Constitution.[37] Virginia asserted that these statutory provisions were adopted as a legitimate exercise of its police powers to protect the public health and to conserve Virginia's resources.[38]

Plaintiffs moved for Summary Judgment and on February 2, 2000, the District Court for the Eastern District of Virginia granted Plaintiffs' motion, determining that Virginia's statutory provisions violated the Dormant Commerce Clause of the Constitution.[39] The district court also held that the Three Rivers' Ban and the Stacking Provision violated the Supremacy Clause under the Constitution.[40] The Defendants appealed to the Fourth Circuit, challenging the propriety of the district court's decision.[41]

The Court of Appeals for the Fourth Circuit affirmed the district court's grant of summary judgment in Plaintiffs' favor with re-

35. *See Waste Mgmt.*, 252 F.3d at 324 n.2. Plaintiffs consist of: (1) Waste Management Holdings, Inc. which operates large landfills in Virginia; (2) Weanack Land Limited Partners which owns and operates a transfer facility on the James River; (3) Hale Intermodal Marine Company, a barging company; (4) Charles City County, which leases property to lease management for landfill use; and (5) Brunswick Waste Management Facility, L.L.C., which owns and operates a large landfill. *See id.* at 324.

36. *See id.*

37. *See Waste Mgmt.*, 87 F. Supp. 2d at 537 (discussing Plaintiffs' argument that all five statutory provisions are unconstitutional).

38. *See id.* at 538 (explaining Virginia's reasons for enacting statutory provisions).

39. *See Waste Mgmt.*, 252 F.3d at 324 (discussing district court's decision granting Plaintiffs' Motion for Summary Judgment). The district court held that the statutes discriminated facially against out-of-state interests thus justifying strict scrutiny review. *See Waste Mgmt.*, 87 F. Supp. 2d at 542. Furthermore, Virginia had not demonstrated that no adequate, non-discriminatory alternatives exist. *See id.*

40. *See Waste Mgmt.*, 252 F.3d at 324. The Supremacy Clause provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

41. *See Waste Mgmt.*, 252 F.3d at 324 (discussing Defendants' appeal to Fourth Circuit).

spect to their Dormant Commerce Clause challenges to the Cap Provision, the Trucking Provision, and the Four or More Axel Provision.[42] The Fourth Circuit also affirmed the district court's judgment in favor of Plaintiffs concerning the Supremacy Clause challenge to the Three Rivers' Ban.[43] The Fourth Circuit, however, vacated and remanded the district court's grant of Summary Judgment with respect to the Dormant Commerce Clause challenge to the Three Rivers' Ban and the Stacking Provision.[44] The Fourth Circuit also vacated and remanded the district court's grant of Summary Judgment with respect to the Supremacy Clause challenge to the Stacking Provision.[45]

III. BACKGROUND

A. The Commerce Clause

The United States Supreme Court's interpretation of the Commerce Clause is rich with internal contradictions.[46] The Commerce Clause states that "Congress shall have Power . . . To regulate Commerce . . . among the several States."[47] While the Commerce Clause is an affirmative grant to Congress, between the carefully crafted words, the Supreme Court has long recognized a corollary doctrine referred to as the negative or dormant aspect of the Commerce Clause.[48] The Dormant Commerce Clause is a judicially created limit on a state's ability to regulate interstate commerce absent congressional action.[49] The justification behind this doctrine is

42. *See id.* at 349 (reporting Fourth Circuit's concurrence with district court's holding that provisions violate Dormant Commerce Clause).

43. *See id.* (stating Fourth Circuit's decision to affirm district court's judgment with regards to Supremacy Clause challenge to Three Rivers' Ban).

44. *See id.* (revealing Fourth Circuit's decision to vacate and remand because genuine issue of material fact existed regarding health and environmental hazards associated with stacking sealed shipping containers more than two high on barges).

45. *See id.* (discussing decision to vacate and remand district court's grant of Summary Judgment with respect to Supremacy Clause challenge of Stacking Provision).

46. *See* Richard A. Epstein, *Waste & The Dormant Commerce Clause*, 3 GREEN BAG 2D 29, 29 (1999). "The most evident of these [contradictions] is the stark contrast between the intellectual precommitments to the affirmative use of the commerce power on the one hand and dormant, or negative, use of the commerce power on the other." *Id.*

47. U.S. CONST. art. I, § 8, cl. 3.

48. *See* Davies, *supra* note 14, at 230-31 (discussing concept of environmental justice in connection with Supreme Court interstate waste jurisprudence).

49. *See* Benjamin T. Kurten, National Solid Wastes Management Association v. Meyer: *Another Strike Against a State's Ability To Save its Landfill*, 3 WIS. ENVTL. L.J. 245, 250 (1996). The Dormant Commerce Clause prohibits states from promoting

that the nation is one common market "in which state lines cannot be made barriers to the free flow of both raw material and finished goods in response to the economic laws of supply and demand."[50] The Dormant Commerce Clause provides for an efficient and free interstate trade market and serves to protect residents from burdensome or discriminatory laws for which they cannot vote.[51]

The Dormant Commerce Clause is not without criticism.[52] Major criticisms of the Dormant Commerce Clause include its lack of textual and historical foundation and the absence of support in the Constitution for the negative inference.[53] While *The Federalist* papers are cited as historical support for the Framers' intent, the origin of the Dormant Commerce Clause is not overwhelmingly apparent.[54] Another criticism is that the Dormant Commerce Clause upsets the balance of power created by the Constitution by granting a power not delegated in the Constitution to the judiciary.[55] An additional but related criticism is that the Dormant Commerce Clause limits the power given to the states by the Constitution.[56] Despite unyielding criticism, the Dormant Commerce Clause continues to be recognized by courts as a living and

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their own internal economic interests by limiting the movement of out-of-state articles. *See id.*

50. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 803 (1976) (discussing justification behind Dormant Commerce Clause).

51. *See* Davies, *supra* note 14, at 231. Although these justifications may be based on sound policy and some historical reasoning, the Supreme Court still recognizes that the doctrine is entirely theoretical. *See id.* at 231-32.

52. *See id.* at 243-61 (illustrating traditional critiques of Dormant Commerce Clause such as lack of textual and historical foundation).

53. *See id.* at 245-47 (critiquing Dormant Commerce Clause).

54. *See id.* Both proponents and opponents of the Dormant Commerce Clause cite to James Madison's statement in an 1829 letter to a friend. *See id.* at 246. Madison stated that the Commerce Clause was "intended as a negative and preventive provision against injustice among the [s]tates themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged." *Id.* (quoting letter from James Madison to Joseph C. Cabell (Feb. 13, 1829), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 14, 15 (1867)). Depending upon whether the interpretation of "general government" means the judiciary or the legislature, the statement could be used to support either side. *See id.*

55. *See id.* at 248-50 (discussing how Dormant Commerce Clause grants power to judiciary by judiciary and not through Congress).

56. *See* Davies, *supra* note 14, at 249-52 (arguing that "[b]y giving the federal government a power not explicitly granted to it by the Constitution, the doctrine fundamentally betrays the compromise of federalism reached by the Framers.").

viable doctrine with almost limitless bounds.[57] Interstate waste disposal is one area in which the doctrine is alive and flourishing.[58]

B. Dormant Commerce Clause Analysis

The Supreme Court has adopted a two-tiered analysis to examine a statute challenged under the Dormant Commerce Clause.[59] The first tier applies when a state law is discriminatory facially, in its practical effect or purpose.[60] This tier is usually referred to as "a virtually per se rule of invalidity."[61] If it is determined that a statute is discriminatory either facially, in its practical effect or in its purpose, it will most likely be struck down.[62] The Fourth Circuit, in *Sylvia Development Corporation v. Maryland*,[63] enumerated several factors which were deemed probative of whether a decision-making body was motivated by discriminatory intent.[64] Those factors included: (1) evidence of a consistent pattern of disparate impact; (2) historical background; (3) the specific sequence of events leading to the decision; and (4) contemporaneous statements of the decision-makers.[65] In order for such a discriminatory

57. *See id.* at 253 (noting courts continue to use Dormant Commerce Clause but its application is unpredictable). The inconsistent application of the Dormant Commerce Clause has resulted in confusion among the courts as they struggle to form a coherent framework. *See id.*; *see also* Epstein, *supra* note 46, at 31 (discussing how court utilized Dormant Commerce Clause doctrine to limit exercise of state power).

58. *See, e.g., Waste Mgmt.*, 252 F.3d 316 (4th Cir. 2001) (exploring contours of Dormant Commerce Clause with respect to Virginia statute, limiting importation of out-of-state waste).

59. *See* Frank P. Grad, *RCRA, the Business of Waste Disposal and the Dormant Commerce Clause Now Wide Awake*, SC 56 ALI-ABA 629, 630 (1998) (discussing different tests applied under Dormant Commerce Clause analysis).

60. *See Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996); *see also* Wyoming v. Oklahoma, 502 U.S. 437, 454-55 (1992) (citing City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).

61. *See* Verchick, *supra* note 2, at 1272. This per se rule of invalidity is a strict scrutiny test. *See id. City of Philadelphia v. New Jersey* established this strict scrutiny test. *See id.* (citing *City of Philadelphia v. New Jersey*, 427 U.S. 617 (1978)).

62. *See* Barocas, *supra* note 6, at 400-01 (citing C & A Carbone v. Town of Clarkstown, 511 U.S. 383, 391 (1994)) (explaining if law is found to be discriminatory on its face, in its purpose, or in its effect then law is per se unconstitutional).

63. 48 F.3d 810 (4th Cir. 1995).

64. *See id.*

65. *See id.* at 819.

Several factors have been recognized as probative of whether a decision-making body was motivated by a discriminatory intent, including: (1) evidence of a "consistent pattern" of actions by the decision making body disparately impacting members of a particular class of persons; (2) historical background of the decision, which may take into account any history of discrimination by the decisionmaking body or the jurisdiction it represents; (3) the specific sequence of events leading up to the decision being

law or statute to survive, the state has the burden of demonstrating that the discriminatory law is justifiable by a valid factor unrelated to economic protectionism and that there are no other nondiscriminatory alternatives to preserve the local interests at stake.[66]

The second tier of the Dormant Commerce Clause analysis applies if the state law regulates evenhandedly, having only incidental effects on interstate commerce.[67] If the state law has an indirect or incidental effect on interstate commerce and regulates evenhandedly, the court usually applies a balancing test to determine the constitutionality of the state law.[68] This balancing test is derived from *Pike v. Bruce Church, Inc.*[69] The burden imposed on interstate commerce is weighed against the putative local benefits.[70] If there is a legitimate local interest, the test is one of degree.[71] It should be noted, however, that the distinction between the per se rule of invalidity and the *Pike* balancing test is not always clear.[72]

C. Judicial Application of Dormant Commerce Clause Analysis Concerning Waste Restrictive Statutes

In *City of Philadelphia v. New Jersey*,[73] the Supreme Court first addressed a state's limitation on interstate shipment and importation of waste under the Dormant Commerce Clause.[74] This case typifies the Supreme Court's position on interstate waste in both

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challenged, including any significant departures from normal procedures; and (4) contemporary statements by decisionmakers on the record or in minutes of their meetings.

Id.

66. *See* New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 274-75 (1998) (finding Ohio statute unconstitutional because it discriminated against interstate commerce); *see also* Chemical Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 342-45 (1992) (holding state did not meet its burden in proving other nondiscriminatory alternatives existed to alleviate its waste importation concern).

67. *See Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774 (4th Cir. 1996) (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)) (discussing second tier of Dormant Commerce Clause test).

68. *See id.* (commenting upon applicability of *Pike* balancing test).

69. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 137 (1970) (revealing balancing test used to weigh burden on interstate commerce against putative local benefits).

70. *See id.* at 142.

71. *See* Kurten, *supra* note 49, at 252 (characterizing *Pike* balancing test as test of degree).

72. *See Envtl. Tech. Council*, 98 F.3d at 785 (explaining uncertainty which exists between when to apply per se rule and when to apply *Pike* balancing test).

73. 437 U.S. 617 (1978).

74. *See id.* (holding statute that prohibited import of MSW violated Commerce Clause); *see also* Breintenbucher, *supra* note 7, at 234 (discussing *City of Philadelphia*).

result and analysis.[75] In *City of Philadelphia*, New Jersey enacted a statute prohibiting the importation of most "solid or liquid waste which originated or was collected outside the territorial limits of the State."[76] The Supreme Court began its analysis by determining that waste is an object of commerce.[77] The Court concluded that that the New Jersey law was discriminatory "on its face and in its plain effect" and was therefore invalid.[78]

The Supreme Court distinguished the New Jersey law from other "quarantine" cases where exceptions to the Commerce Clause had been made.[79] According to the majority, trash did not fit the quarantine exception because trash does not have to be disposed of immediately, while objects in other "quarantine" cases, as a result of their very movement, must be quickly discarded.[80] Because the Court determined that the New Jersey law was outside the scope of a quarantine law, the Supreme Court held that the New Jersey law violated the Dormant Commerce Clause.[81] The Supreme Court's main contention was that the law "falls squarely within the area that the Commerce Clause puts off limits to state regulation . . . [w]hat is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade."[82]

Justice Rehnquist, joined by Chief Justice Burger, dissented in *City of Philadelphia*, noting that solid waste has enormous negative environmental effects that states must be empowered to regulate.[83] The dissent argued that "New Jersey should be free under our past

75. *See* Davies, *supra* note 14, at 232 (explaining importance of *City of Philadelphia* to judicial landscape of interstate waste).

76. *City of Philadelphia*, 437 U.S. at 618 (quoting N.J. STAT. ANN. § 13:1I1 et seq. (1973)) (discussing parameters of New Jersey statute).

77. *See* Davies, *supra* note 14, at 233 (discussing Supreme Court's analysis in *City of Philadelphia*).

78. *City of Philadelphia*, 437 U.S. at 626-27 (explaining New Jersey's law was discriminatory and therefore invalid).

79. *See id.* at 628-29 (discussing quarantine exception to Commerce Clause and how it does not apply to New Jersey's law).

80. *See* Davies, *supra* note 14, at 234 (discussing Supreme Court's analysis of why New Jersey's law did not fit quarantine exception to Commerce Clause).

81. *See City of Philadelphia*, 437 U.S. at 628-29 (explaining New Jersey law falls outside quarantine exception and therefore violates Dormant Commerce Clause).

82. *Id.* at 628 (explaining why New Jersey's law violates Dormant Commerce Clause).

83. *See* Davies, *supra* note 14, at 234 (discussing Chief Justice Rehnquist's dissent in *City of Philadelphia*).

precedents to prohibit the importation of solid waste because of the health and safety problems that such waste poses to its citizens."[84]

In subsequent cases, the Supreme Court ignored the environmental concerns raised by the dissent in *City of Philadelphia* and expanded its holding that import restrictions of waste violate the Dormant Commerce Clause.[85] Fourteen years after *City of Philadelphia*, the Supreme Court struck down another waste restricting statute in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources.*[86] In *Fort Gratiot*, Michigan enacted a Solid Waste Management Act which stated that counties could not landfill waste generated outside their borders unless they received prior approval from their County Solid Waste Planning Committee.[87] In a 7-2 decision, the Supreme Court struck down Michigan's statute as discriminatory, because the statute authorized each county to refuse waste from the national economy and gave local waste producers protection from out-of-state competition seeking to use local disposal areas.[88] Striking down the Michigan law, the Court suggested that Michigan could "for example, limit the amount of waste that landfill operators may accept each year" as a method of avoiding discriminating between in-state and out-of-state waste.[89] This measure, however, was not in the Michigan statute and was not an issue.[90]

Chief Justice Rehnquist, joined by Justice Blackmun, dissented in *Fort Gratiot*, arguing that the Michigan statute advanced local en-

84. *City of Philadelphia*, 437 U.S. at 632 (Rehnquist, J., dissenting). The dissent argued, "The physical fact of life that New Jersey must somehow dispose of its own noxious items does not mean that it must serve as a depository for those of every other state . . . . The Court's effort to distinguish these prior [quarantine] cases is unconvincing." *Id.*

85. *See, e.g.*, Fort Gratiot Sanitary Landfill Inc. v. Michigan Dep't of Natural Res., 504 U.S. 353 (1992). This case demonstrates the Supreme Court's reluctance to address environmental concerns implicated by the interstate transport of waste. *See id.* at 354.

86. 504 U.S 353 (1992).

87. *See id.* at 357. The statute reads: "[a] person shall not accept for disposal solid waste . . . that is not generated in the county in which the disposal area is located unless the acceptance of solid waste . . . that is not generated in the county is explicitly authorized in the approved county solid waste management plan." *Id.*

88. *See id.* at 355 (holding Michigan statute discriminates against interstate commerce). The Court concluded that "the Waste Import Restrictions unambiguously discriminate against interstate commerce and are appropriately characterized as protectionist measures that cannot withstand scrutiny under the Commerce Clause." *Id.* at 367-68.

89. *See id.* at 367 (articulating less burdensome alternative to managing waste flow into Michigan).

90. *See id.* (discussing possible alternative for limiting flow of MSW into state).

vironmental concerns and not economic protectionism.[91] In fact, the statute worked to Michigan's economic disadvantage because of the limited disposal volumes.[92] The dissent suggested that the statute should be remanded for further consideration under the *Pike* balancing test.[93]

The Supreme Court, again ignoring the environmental concerns highlighted by the dissenting arguments, upheld the stringent application of the Dormant Commerce Clause to waste in *Chemical Waste Management, Inc. v. Hunt.*[94] The Alabama state legislature imposed an additional disposal fee on hazardous wastes generated outside of the state.[95] The fee, however, did not apply to hazardous waste originating from within the state.[96] Petitioner, an operator of a commercial hazardous waste land disposal facility in Alabama that received both in-state and out-of-state waste, challenged the statutory provision as violating the Dormant Commerce Clause.[97] In this case, ninety percent of the hazardous waste landfilled within Alabama came from other states.[98]

The Supreme Court followed the reasoning in *City of Philadelphia*, holding that the additional fee did not serve any local interest and Alabama could not isolate itself from a problem common to all states.[99] Furthermore, the state's additional fee discouraged the

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91. *See Fort Gratiot*, 504 U.S. at 368-69 (discussing practical effect of Michigan statute).

92. *See id.* at 370 (noting Michigan statute works to Michigan's economic disadvantage); *see also* Davies, *supra* note 14, at 236 (discussing Chief Justice Rehnquist's dissent in *Fort Gratiot*).

93. *See Fort Gratiot*, 504 U.S at 371. Chief Justice Rehnquist's interpretation of the Commerce Clause contemplates the substantial environmental concerns associated with landfilling. *See* Breintenbucher, *supra* note 7, at 251. A cost-benefit analysis lends strong support for this view. *See id.* While out-of-state waste must be treated the same as in-state waste, the practical cost is not at all equal. *See id.* There are numerous in-state costs and risks which are substantial. *See id.* There is the damage to the environment and the community as well as potential risk of clean-up cost if future problems arise. *See id.*

94. 504 U.S. 334 (1992) (holding additional fee imposed by Alabama on hazardous waste generated outside of Alabama and disposed of at commercial facility in Alabama discriminated against interstate commerce in violation of Commerce Clause).

95. *Id.* at 336. Surcharges on waste imported from other states can act as a substitute for an import restriction and it can also serve to compensate a state for the costs of importing and disposing of the waste. *See* Davies, *supra* note 14, at 237.

96. *See* Davies, *supra* note 14, at 237 (noting Alabama law does not apply fee to waste originating from within Alabama).

97. *See id.* at 237-38 (discussing Petitioners' argument).

98. *See id.* at 237 (discussing origin of waste being disposed of in Alabama).

99. *See Chemical Waste*, 504 U.S. at 344-45 (citing *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978)). "In sum, we find the additional fee to be 'an

full operation of the petitioner's facility.[100] In a similar case, *Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon,*[101] the Supreme Court extended its analysis of surcharge statutes and held that states may not charge different fees for in-state and out-of–state waste.[102]

To date, courts have been very reluctant to allow states to restrict or limit the flow of waste between states.[103] Courts seem unsympathetic to the fact that certain states bear the brunt of the nation's waste management and disposal crisis.[104]

D. Judicial Exceptions

1. Death or Disease

The Supreme Court has upheld discriminatory laws where the discrimination was justified by the threat of death or disease.[105] In *Maine v. Taylor,*[106] Taylor, an operator of a bait business, arranged to have live golden shiners delivered to him from outside the

obvious effort to saddle those outside the State' with most of the burden of slowing the flow of waste into the Emelle facility." *Id.* at 346.

100. *See id.* at 342. "Such burdensome taxed imposed on interstate commerce alone are generally forbidden: '[A] State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'" *Id.* (quoting Armco Inc. v. Hardesty, 467 U.S. 638, 642 (1984)).

101. 511 U.S. 93 (1994).

102. *See id.* at 108. Oregon imposed a $2.25 per ton surcharge on waste generated from other states and $0.85 per ton fee on waste generated within Oregon. *See id.* at 93. The Court determined that the disparate surcharge based on the origin of the garbage was discriminatory under the Dormant Commerce Clause. *See id.* at 108. Chief Justice Rehnquist and Justice Blackmun dissented, arguing that the surcharge was a fair compensation because "Oregon solid waste producers do not compete with out-of-state businesses in the sale of solid waste." *Id.* at 112.

103. *See, e.g., City of Philadelphia,* 437 U.S. 617 (1978); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res.,* 504 U.S. 334 (1992); *Chemical Waste v. Chemical Waste Mgmt., Inc.,* 504 U.S. 334 (1992); *Oregon Waste Systems, Inc.,* 511 U.S. 93 (1994). These cases demonstrate the judiciary's reluctance to allow states to control the flow of waste amongst the states. *See id.*

104. *See generally Waste Mgmt.,* 252 F.3d 316 (4th Cir. 2001). Virginia is the second largest importer of MSW, however, this fact was incidental to the Fourth Circuit as it struck down provisions of Virginia's statute enacted to deal with this incredible influx of MSW. *See id.*; *see also* Verchick, *supra* note 2, at 1294. Current evidence suggests that poorer states are the ones forced to accept a disproportionate responsibility for waste disposal. *See* Verchick, *supra* note 2, at 1294. When the net import of waste is more than a disposal site can adequately maintain and manage, it is the poorer area that must deal with the subsequent nuisances and environmental hazards. *See id.*

105. *See, e.g., Maine v. Taylor,* 477 U.S. 131 (1986) (demonstrating one instance when Court upheld discriminatory state law under Dormant Commerce Clause).

106. 477 U.S. 131 (1986).

state.[107] The shipment was intercepted because Maine had a provision making the import of wildlife illegal, specifically the import of live baitfish.[108] Taylor contended that Maine's import ban unconstitutionally burdened interstate commerce.[109] The Court held the statute constitutional because importation of live baitfish into Maine posed two significant threats to the unique and fragile Maine fisheries.[110] First, Maine's own golden shiners would be at risk of attack by three types of parasites prevalent only in out-of-state baitfish.[111] Second, nonnative species inadvertently placed in the shipments could disturb Maine's aquatic ecology.[112] The Court held that "[a]s long as a State does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources."[113] *Maine v. Taylor* is often characterized as a "modern" quarantine case, and many states facing a Dormant Commerce Clause challenge have attempted to invoke this exception especially with respect to waste.[114] Nevertheless, courts have been unwilling to recognize any significant correlation.[115]

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107. *See id.* at 132 (discussing facts of case).

108. *See id.* A federal grand jury in the District of Maine indicted Taylor for violating the Lacey Act Amendments. *See id.* These amendments make it a federal crime "to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce . . . any fish or wildlife taken, possessed, transported or sold in violation of any law or regulation of any State or in violation of any foreign law." *Id.* at 132-33 (citing 16 U.S.C. §§ 3371-3378 (2002)).

109. *See id.* at 133 (noting Taylor's argument that Maine's import ban unconstitutionally burdens interstate commerce).

110. *See id.* at 140-41 (discussing Supreme Court's holding where statute withstood strict scrutiny).

111. *See Maine v. Taylor*, 477 U.S. at 141 (discussing unique threat importation of live baitfish would have on fragile Maine fisheries).

112. *See id.* at 141 (discussing second unique threat importation of live baitfish would have on Maine's fragile fisheries).

113. *Id.* at 151 (explaining Court's reasoning for upholding ban on importation of live baitfish).

114. *See* Verchick, *supra* note 2, at 1278 (discussing exception Supreme Court carved out in *Maine v. Taylor*). The Supreme Court's exception in *Maine v. Taylor* remains a mystery for many. *See id.* Maine indeed had a means to test imported fish, however, it would have been costly. *See id.* Furthermore, the Court failed to consider why Maine has not already enacted protectionist provisions. *See id.* For example, the same fish that were banned from Maine could swim into Maine from New Hampshire. *See id.*

115. *See, e.g., Waste Mgmt. Holding, Inc. v. Gilmore*, 252 F.3d 316 (4th Cir. 2001). In *Waste Management*, the Fourth Circuit disregarded any application of the analysis in *Maine v. Taylor* by distinguishing the two cases based on their facts. *See id.* at 344 n.10.

2. Market Participant Doctrine

In *Hughes v. Alexandria Scrap Corp.*,[116] the Supreme Court determined that a state government can overcome the restrictions of the Dormant Commerce Clause when it acts as a "market participant," as opposed to a "market regulator."[117] A state is a "market participant" when its role in the market is analogous to that of a private company.[118] For example, the Commerce Clause does not allow a state to regulate the market in favor of its own citizens, however, it does not restrict a state when participating in the market to favor its own citizens.[119]

The market participant doctrine has been limited in application by the Supreme Court.[120] The Court has indicated that the exception may not apply when a state attempts to hoard its natural resources.[121] The Supreme Court has also attempted to define the

116. 426 U.S. 794 (1976) (holding statutory scheme did not constitute impermissible burden on interstate commerce).

117. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. at 807-10. The Supreme Court recognized the market participant exception for the first time in *Hughes*. *See id.* In *Hughes*, the Court upheld Maryland's preferential treatment of state residents with respect to the purchase of abandoned cars. *See id.* The Court's reasoning for upholding Maryland's preferential treatment was that Maryland was acting as a market participant. *See id.* The Court noted, "[n]othing in the purpose animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 810. Subsequent cases affirmed the market participant exception. *See New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 277 (1988) (declining to apply market participant doctrine to facts but endorsing validity of doctrine); *see also* Reeves, Inc. v. Stake, 447 U.S. 429, 440 (1980) (holding South Dakota's preferential treatment of state residents with respect to sale of cement produced by state-owned cement plant fell under market participant exception).

118. *See* Kurten, *supra* note 49, at 278 (explaining market participant exception).

119. *See* Verchick, *supra* note 2, at 1280. "The doctrine . . . encourages states to give up their traditional regulatory roles in the area of waste transportation and to enter the fray of the market as one of many economic actors." *Id.* at 1281.

120. *See* Kurten, *supra* note 49, at 280-81 (discussing how Supreme Court has limited market participant doctrine).

121. *See id.* There is a distinction between natural resources and state-created resources. *See id.* States can be considered market participants when the landfill is more than just land and requires state expenditure and human capital to facilitate. *See id.* In Maryland, Rhode Island, and Washington, D.C. statutes were enacted banning the disposal of MSW from out-of-state in publicly owned landfills. *See id.* The Court upheld these statutes, reasoning that the involved governments were participating in "landfill services" as opposed to "pure natural resource market." *See* Lefrancois v. Rhode Island, 669 F. Supp. 1204, 1218-19 (D.R.I. 1987) (determining validity of market participant exception with respect to state's ban on importation of out-of-state MSW); Shayne Bros. v. District of Columbia, 592 F. Supp. 1128, 1134 (D.D.C. 1984) (holding ban on MSW from out-of-state valid under market participant exception); County Comm'rs of Charles County v. Stevens, 473 A.2d 12, 21-22 (Md. 1984) (holding ban on importation of MSW from out-of-state valid under market participant exception).

contours of state involvement, stating that if there is no "direct state involvement in the market," the Commerce Clause applies.[122]

E. Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act of 1976 (RCRA), administered by the Environmental Protection Agency (EPA), establishes minimum federal standards for dealing with hazardous waste.[123] Most notably, RCRA allows states to implement their own hazardous waste program instead of adhering to federal requirements.[124] In order to qualify, the state's program must be "equivalent to" and "consistent with" the federal program and provide for "adequate enforcement of compliance."[125] Congress delegated to EPA the task of overseeing and authorizing state programs.[126] Some have argued that since RCRA authorizes the creation of state programs, Congress intended to authorize state discrimination against MSW generated out-of-state.[127] The justification behind this view is derived from the fact that EPA must approve each state program.[128] The issue of whether RCRA trumps the Dormant Commerce Clause, though raised before the Supreme Court, has never been decided.[129]

Additionally, the issue has come before different circuit courts without success.[130] For example, the Fourth Circuit reasoned that

122. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 592-93 (1997) (citing White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204, 208 (1983)) (noting in order to have protection of market participant doctrine, state must directly participate in market).

123. *See* Resource Conservation and Recovery Act, 42 U.S.C. § 6926(b) (2000) [hereinafter RCRA] (setting minimal federal standards).

124. *See id.* (allowing states to implement their own programs upon EPA approval).

125. *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 779 (4th Cir. 1996) (quoting 42 U.S.C. § 6926(b)) (discussing parameters of RCRA).

126. *See id.* at 779 (noting EPA has authority over state-implemented programs pursuant to RCRA).

127. *See id.* at 782 (assessing argument that authorization of such state discrimination would displace Dormant Commerce Clause).

128. *See id.* at 782-83 (discussing necessary Congressional intent to displace Dormant Commerce Clause implications).

129. *See id.* at 783 n.13. Specifically, the Supreme Court has not addressed the issue of Congressional intent under RCRA. *See id.* In *Chemical Waste*, the issue was raised by the amici curiae, but the Court declined to decide the issue because it was not raised or considered by the lower court. *See id.*

130. *See, e.g., Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 317 (4th Cir. 2001); *Envtl. Tech. Council*, 98 F.3d 774, 775 (4th Cir. 1996). In both cases Plaintiffs attempted to argue that Congress intended RCRA to trump the Dormant Commerce Clause. *See Envtl. Tech. Council*, 98 F.3d at 775; *see also Waste Mgmt.*, 252 F.3d at 317. The Court of Appeals disagreed in both cases. *See id.*

without "unmistakably clear congressional intent to permit states to burden interstate commerce" or "any further persuasive evidence indicating that Congress intended to permit the states to directly or by EPA authorization, to engage in actions otherwise violative of the Commerce Clause," the argument lacks merit.[131] It is unlikely that circuit courts will carve out an exception to the Dormant Commerce Clause analysis under RCRA in light of the Supreme Court's decisions in *City of Philadelphia* and *Fort Gratiot*.[132]

F. Virginia and Waste

Virginia is the nation's second highest waste importing state.[133] In 1992, Virginia was the fifth largest importer of waste in the United States.[134] Virginia moved up three ranks by 1995, becoming second only to Pennsylvania.[135] In 1992, Virginia imported 1.5 million tons of MSW.[136] By the end of 1998, this figure increased to 4.6 million tons of MSW.[137] In just six years, the figure increased by 300 percent.[138] Figures for 1999 determined that Virginia took in 4.8 million tons of total waste.[139]

One reason Virginia's MSW intake is so high is due to exports from New York.[140] Since 1997, Fresh Kills, a New York landfill, has slowly been decreasing its intake in anticipation of its closure by the end of 2001.[141] Fresh Kills is located in Richmond County and is a

131. *Envtl. Tech. Council*, 98 F.3d at 783 (quoting Hazardous Waste Treatment Council v. State of South Carolina, 945 F.2d 781, 792 (4th Cir. 1991)) (noting unmistakably clear Congressional intent is paramount in order to make justified argument).

132. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978) (holding that a state cannot restrict the flow of interstate waste); *see also Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res.*, 504 U.S. 353 (1992) (reiterating holding in *City of Philadelphia*).

133. *See* Davies, *supra* note 14, at 280-81 (noting Virginia's waste intake in 1992 compared to 1998).

134. *See id.* (discussing Virginia's rapid growth of waste intake).

135. *See id.* (commenting that such increase would lead to need for political action).

136. *See id.* at 281 (noting Virginia's waste intake in 1992).

137. *See id.* (examining increase of waste in Virginia throughout 1990).

138. *See* Davies, *supra* note 14, at 281 (demonstrating percentile increase of waste transported and deposited in Virginia).

139. *See* 6 WASTE NEWS 35, (Jan. 29, 2001), *available at* 2001 WL 8865916 (discussing Virginia's waste intake).

140. *See* Patrick Golden, *New York State's Recycling Exports Continue to Increase*, 41 WORLD WASTES 10 (Oct. 1, 1998), *available at* 1998 WL 14436611. New York's Fresh Kills landfill operated for a long period of time and was exceptionally large. *See id.*

141. *See Waste Mgmt. Holdings, Inc. v. Gilmore*, 87 F. Supp. 2d 536, 539 (E.D. Va. 2000) (discussing disposal of MSW generated in New York City).

3,000-acre landfill that has operated for nearly 50 years.[142] As a result, nearly 3.5 million tons of MSW generated in New York has to be exported elsewhere.[143] Virginia was awarded two contracts with New York for the export of MSW and is in the process of negotiating a third contract.[144]

IV. ANALYSIS

A. Narrative Analysis

The Fourth Circuit, in *Waste Management*, considered whether the district court erred in granting Plaintiffs' Motion for Summary Judgment.[145] The district court found that the 1999 Virginia statute, restricting the importation of MSW into Virginia landfills, was unconstitutional under the Dormant Commerce Clause and the Supremacy Clause.[146] The Fourth Circuit applied the two-tier test to determine the constitutionality of the statute challenged under the Dormant Commerce Clause.[147] The court analyzed the statute under the first tier, contemplating whether the state law discriminates facially, in practical effect, or in its purpose.[148] Because the parties agreed that the statutory provisions were not facially discriminatory against MSW generated outside Virginia, the court considered whether the statutory provisions discriminated in their practical effect or in their purpose.[149]

With respect to practical effect, the Fourth Circuit determined that a genuine issue of material fact existed concerning the Cap Provision, Stacking Provision, Three Rivers' Ban, Trucking Certification Provision, and the Four or More Axel Provision.[150] With re-

142. *See* Golden, *supra* note 140, at 10 (discussing size and location of Fresh Kills landfill).

143. *See id.* (discussing impact of closing Fresh Kills landfill).

144. *See Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 326 (4th Cir. 2001) (discussing Virginia's contracts to import waste from New York). This third contract considered the disposal of 12,000 tons of residential waste per day from Manhattan, Queens, Brooklyn and the Bronx for a period of twenty years. *See id.*

145. *See id.* at 324 (discussing lower court's holding and issue facing Fourth Circuit).

146. *See id.* (discussing district court's holding).

147. *See id.* at 333 (analyzing two-tier approach utilized in determining constitutionality of statutory provision challenged under Dormant Commerce Clause).

148. *See id.* (citing *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996)) (discussing approach taken in determining constitutionality of statutory provision challenged under Dormant Commerce Clause).

149. *See Waste Mgmt.*, 252 F.3d at 334 (examining elements involved in part one of two-tiered test).

150. *See id.* at 335. The Fourth Circuit found that it was unclear whether the particular statute discriminated in practical effect, thus raising a genuine issue of material fact. *See id.*

spect to discriminatory purpose, however, the Fourth Circuit determined the evidence clearly demonstrated that Virginia wanted to protect itself from further increases in the level of MSW generated outside the state being dumped within the state's borders.[151] In fact, the court stated that, "[n]o reasonable juror could find the statutory provisions at issue had a purpose other than to reduce the flow of MSW from states with less strict limitations upon the content of MSW than Virginia."[152]

Once the Fourth Circuit concluded that the Virginia statute was discriminatory in its purpose, the court shifted its focus to the second tier, determining whether Virginia had a constitutionally valid reason for its discrimination.[153] Defendants bore the burden of proffering sufficient evidence for each provision of the statute so that a reasonable juror could determine that a valid reason existed.[154] Defendants' main argument was that the importation of MSW from other states into Virginia raised significant health and safety concerns not presented by Virginia waste.[155] Specifically, Defendants stressed that state laws concerning hazardous waste that were not as encompassing or as strict as the Virginia statute create a particularly acute problem.[156] Defendants cited *Maine v. Taylor* to

151. *See id.* at 340-41. In order to determine whether there was a discriminatory purpose, the Fourth Circuit analyzed the four factors set forth in *Sylvia Dev. Corp. v. Maryland. See id.* at 336. These four factors include (1) evidence of a consistent pattern; (2) the historical background of the decision; (3) the specific consequence of events leading up to decision; and (4) decision-makers contemporary statements. *See Sylvia Dev. Corp. v. Maryland,* 48 F.3d 810, 819 (4th Cir. 1995). As part of the analysis, the Fourth Circuit examined press releases which clearly illustrated a marked tension between Governor Gilmore and Rudolf Giuliani concerning the export of New York waste to Virginia. *See Waste Mgmt.*, 252 F.3d at 336-40.

152. *Waste Mgmt.*, 252 F.3d at 340 (noting tension between Virginia and New York Governors concerning New York's plan to export waste).

153. *See id.* at 341. Since the Fourth Circuit found a discriminatory purpose, it applied strict scrutiny. *See id.* at 334.

154. *See id.* at 341 (citing *Envtl. Tech. Council v. Sierra Club,* 98 F.3d 774, 785 (4th Cir. 1996)). To justify a provision, its supporters must show that it is "unrelated to economic protectionism, and that no non discriminatory alternatives existed." *Id.*

155. *See id.* at 341 (focusing upon environmental and health hazards associated with exporting municipal solid waste).

156. *See id.* at 341. The Fourth Circuit stated:

> Defendants . . . offered evidence demonstrating . . . : (1) that certain materials in MSW can be hazardous to human health; (2) that each state has its own definition of MSW; (3) that "[w]hile one state may find it appropriate to regulate strictly a certain type of solid waste, another state may not be as aware of or concerned about the risks posed by that type of item into the MSW stream"; (4) that Virginia law completely prohibits potentially infectious items such as blood and urine from being disposed of as MSW, while Maryland and North Carolina allow disposal of blood and urine as MSW under limited circumstances; (5) that Virginia law pro-

support Virginia's environmental and health concerns.[157] In *Taylor*, the Supreme Court made an exception to the Dormant Commerce Clause doctrine stating that the law at issue was justified by the threat of death or disease.[158]

The Fourth Circuit found that the Defendants met their burden of establishing a reason other than economic protectionism to justify the statutory provisions.[159] However, the Fourth Circuit stated that Defendants not only had the burden of demonstrating that valid factors existed for the discriminatory statute, but also bore the burden of establishing that the statutory provisions were the least discriminatory means of addressing Virginia's MSW concern.[160] In this regard, the Fourth Circuit addressed each statutory provision independently.[161] With respect to the Cap Provision, Defendants argued that, in order to deal with the increased level of MSW, the import volume must be limited.[162] Only then could Virginia adequately employ its police powers and effectively screen and treat the waste for potential hazards.[163] The Fourth Circuit, like Plaintiffs, disagreed with Defendants, noting that the "Cap Provi-

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hibits urine from being disposed of as MSW while New York allows its disposal as MSW without limitation; (6) that Maryland and New York allow hazardous waste generated at less than 100 kilograms per month to be disposed of as MSW while Virginia does not; and (7) that unlike Virginia, Maryland and New York do not impose manifesting or tracking requirements on hazardous waste from small quantity generators.

Id. at 341-42 (internal citations omitted).

157. *See Waste Mgmt.*, 252 F.3d at 341.

158. *See id.* The Defendants argued that the health and environmental hazards associated with transporting large quantities of MSW should warrant the Supreme Court's exception to discriminatory laws found in *Maine v. Taylor*. *See id.* at 341-42; *see also Maine v. Taylor*, 477 U.S. 131, 140 (1986).

159. *See Waste Mgmt.*, 252 F.3d at 342 (noting Defendants provided sufficient evidence demonstrating genuine issue of material fact existed as to justification of statute).

160. *See id.* (discussing another important element under two-tier strict scrutiny test for determining constitutionality of statute challenged under Dormant Commerce Clause).

161. *See id.* at 343-45 (examining whether each statutory provision was least discriminatory alternative).

162. *See id.* at 342 (discussing Plaintiffs' argument with respect to Cap Provision).

163. *See id.* at 342. The Defendants argued that adding inspectors was only one component to the waste-screening process. *See id.* In fact, "high volumes of waste make inspecting waste even more difficult and exacerbate an ongoing problem." *Id.* Screening waste not only includes visual inspection but also chemical testing to determine whether other hazards exist which the human eye cannot detect. *See id.* at 343. If unauthorized waste is found it must be removed and processed. *See id.* With increased volumes of waste, Virginia argued that it would have to develop specific treatment facilities and this process would slow operations, lowering the daily intake to lower than 2,000-tons a day. *See id.*

sion makes no effort to distinguish between the MSW of states according to an individual state's level of MSW regulation."[164] Therefore, because other alternatives existed, the exception noted in *Taylor* did not apply.[165]

With respect to the Stacking Provisions and the Three Rivers' Ban, the Fourth Circuit determined that these were the least discriminatory alternatives.[166] The Fourth Circuit relied on sworn statements from the Virginia Department of Environmental Quality (DEQ) that outlined serious and unique health threats as a result of waste transportation via water to determine that a genuine issue of material fact existed to deny Summary Judgment.[167] However, as to the Trucking Certification Provision and the Four or More Axel Provision, the Fourth Circuit concluded that Defendants failed to prove that these were the least burdensome alternatives.[168] Defendants argued that the court should give the same deference to these provisions as is given to state legislatures in the area of highway safety.[169] The Fourth Circuit found this argument weak in light of the discriminatory purpose of the Provisions.[170] The court thus upheld the Plaintiffs' grant of Summary Judgment.[171]

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164. *Waste Mgmt.*, 252 F.3d at 343. The Fourth Circuit reasoned that interstate commerce would be burdened less if the Cap Provision only applied to states with standards lower than Virginia's standard or the Cap Provision should vary according to the standards of other states. *See id.* The Fourth Circuit stated that because Virginia did not present evidence why it would not work, Virginia did not meet its burden under the second prong of the strict scrutiny test. *See id.*

165. *See id.* at 344 n.10 (noting that *Maine v. Taylor* does not apply to this situation because issue here is materially distinguishable).

166. *See id.* at 344 (holding that genuine issue of material fact existed as to whether Stacking Provision and Three Rivers' Ban were least discriminatory alternatives).

167. *See id.* The Fourth Circuit cited interrogatories from the record which indicated that, in 1993, thirty-three containers fell overboard due to improper lashing and, in 1994, a fire partially destroyed cargo on board a ship. *See id.*

168. *See id.* The Fourth Circuit stated that Defendants failed to show affirmative evidence and instead relied on deference normally given to state legislation regarding highway safety. *See id.*

169. *See Waste Mgmt.*, 252 F.3d at 344-45 (discussing Plaintiffs' argument that deference should be given to legislative judgments regarding highway safety).

170. *See id.* at 344-45 (citing Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 675-76 (1981)). The Fourth Circuit relied on *Kassel*, which stands for the proposition that less deference should be given to legislative judgments that bear disproportionately on out-of-state residents and businesses. *See id.* at 344. The Fourth Circuit also noted that because the statute was found to be discriminatory in its purpose, Virginia's political process would not serve as a check against unduly burdensome regulations. *See id.* at 345.

171. *See id.* at 345 (finding that Trucking Provision and Four or More Axel Provision were not least burdensome alternatives).

Defendants sought to avoid confrontation with the Dormant Commerce Clause altogether by asserting two separate grounds that the Fourth Circuit should consider.[172] First, Defendants sought protection under the market participant doctrine.[173] The Fourth Circuit dismissed the application of this doctrine in three sentences.[174] Specifically, the court determined that the Dormant Commerce Clause applied in full force in this instance because the state was acting as a market regulator and not a private participant.[175]

Second, the Defendants argued that, under RCRA, Congress intended to authorize state implementation programs that discriminate against MSW, thus overriding the Dormant Commerce Clause.[176] The Fourth Circuit relied on *Environmental Technology Council v. Sierra Club*[177] to support its contention that, in order to allow a state law to be removed from the reach of the Dormant Commerce Clause, Congressional intent must be expressly stated or unmistakably clear.[178] The court noted that Defendants had the burden of identifying congressional intent.[179] Here, Defendants pointed to a RCRA provision, encouraging the states to consider certain factors in assessing and addressing their solid waste problems to argue that Congress gave the states the authority to protect local interests.[180] Defendants also asserted that certain legislative history demonstrated that Congress intended state pro-

172. *See id.*

173. *See id.* (discussing market participant doctrine as exception to Dormant Commerce Clause).

174. *See Waste Mgmt.*, 252 F.3d at 345 (noting court only briefly considered market participant doctrine).

175. *See id.* (citing *Waste Mgmt. Holdings Inc. v. Gilmore*, 64 F. Supp. 2d 537, 544 (E.D. Va. 1999)). The district court noted:

> The Commonwealth's argument that the market participant exception applies to this case requires little discussion. Virginia is not acting like a private participant in the waste disposal market. It is attempting to regulate the conduct of others in that market as only a state, as state, can do. The market participant doctrine therefore offers it no protection.

Waste Mgmt. Holdings, Inc. v. Gilmore, 64 F. Supp. 2d at 544.

176. *See Waste Mgmt.*, 252 F.3d at 245.

177. 98 F.3d 774 (4th Cir. 1996)

178. *See Waste Mgmt.*, 252 F.3d at 346 (discussing requirements for state law to be removed from reach of federal law).

179. *See id.* at 346-47 (discussing standard for unmistakable Congressional intent).

180. *See id.* at 346; *see also* 42 U.S.C. § 6942(c) (2000). The factors Defendants referred to included population density, population growth, geographical and hydrolic characteristics as well as political, financial and management problems affecting waste management. *See id.*

grams to override the Dormant Commerce Clause.[181] The Fourth Circuit simply stated that the language Defendants cited was broad and did not "come close to expressing an 'unmistakably clear' intent on the part of Congress."[182]

Lastly, the Fourth Circuit addressed Plaintiffs' argument that the Three Rivers' Ban and the Stacking Provision violated the Supremacy Clause under the Constitution.[183] The first question the Court addressed was whether state law conflicted with federal law.[184] The Fourth Circuit noted that states are permitted to exercise their police powers as long as the state law does not prohibit the accomplishment of the full purpose and objective of the federal law.[185] Under the Supremacy Clause, vessels having appropriate documentation may engage in coastwide trade.[186] Here, the Virginia statute completely excluded federally licensed commerce on three waterways.[187] Nevertheless, the Fourth Circuit held that a genuine issue of material fact existed as to whether federal law should preempt state law in light of the health and environmental risks associated with stacking containers more than two barges high.[188]

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181. *See Waste Mgmt.*, 252 F.3d at 346-47. Defendants cited numerous "snippets" of legislative history. *See id.* One clip included, "[I]n formulating a state plan it is the Committee's intention to permit wide flexibility on the part of the state developing such plan so that each state can plan for its particular problems." *See id.* at 346 (citing H.R. REP. No. 94-1491 at 35 (1976), *reprinted in* 1976 U.S.C.C.A.N 6238, 6273).

182. *Id.* at 347 (internal citation omitted) (holding that language Defendants cited does not demonstrate Congress' unmistakable intent).

183. *See id.* at 347-48. The real issue revolved around the federal documentation provisions governing vessels in coastwide trade and whether states could encroach on this regulation. *See id.* at 348.

184. *See id.* at 348. "The Supreme Court has held that a federal license confers upon the licensee a right to operate freely in each state's waters, subject only to legitimate exercises of the state's police power." *Id.* (citing Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 281 (1977).

185. *See id.* at 348 (noting that, in light of state police powers, states may regulate federal licensees in reasonable, non discriminatory manner).

186. *See Waste Mgmt.*, 252 F.3d at 348 (citing 46 U.S.C. §§ 12103, 12106 (2000)) (discussing parameters of Supremacy Clause).

187. *See id.* at 348 (discussing provision of Virginia statute and reasonableness of state encroachment upon federal provision).

188. *See id.* (holding genuine issue of material fact existed with respect to whether state law preempts federal law under Supremacy Clause).

B. Critical Analysis

The Fourth Circuit's decision, in *Waste Management*, is consistent with previous Supreme Court interstate waste decisions.[189] However, the Fourth Circuit's analysis demonstrates the difficulty lower courts have in applying the Dormant Commerce Clause to independent facts.[190] Yet, the court's analysis in some areas provides a new approach for considering environmental and health concerns, mirroring some of Chief Justice Rehnquist's arguments in his dissenting opinions.[191]

1. Discriminatory Purpose is Not Unmistakably Clear

The Fourth Circuit examined the first tier of the two-tier statutory test for statutes challenged under the Dormant Commerce Clause to determine whether the law discriminates facially, in its practical effect or purpose.[192] The Fourth Circuit determined that the evidence "unmistakably" demonstrated that the statute was enacted with a discriminatory purpose.[193] The court followed the factors set forth in *Sylvia Development Corporation v. Maryland* and held that "the record in this case established that no reasonable juror could find that in enacting the statutory provision at issue Virginia's General Assembly acted without a discriminatory purpose."[194] The evidence the court relied upon were press releases and statements from Senator Bolling, Mayor Giuliani, and Governor Gilmore.[195]

Yet, loathing for imported garbage by a few does not mean it is despised by an entire General Assembly.[196] Furthermore, discerning legislative intent is a very hazy endeavor over which the Su-

189. *See* Davies, *supra* note 14, at 290-91 (discussing how holding of *Waste Management* is consistent with Supreme Court's view of interstate waste).

190. *See id.* at 247-53 (discussing difficulty lower courts have in applying Dormant Commerce Clause).

191. For a discussion of Justice Rehnquist's dissenting opinions in previous interstate waste cases, *see supra* notes 83-84 and 92-93 and accompanying text.

192. *See Waste Mgmt.*, 252 F.3d at 333-34 (discussing Dormant Commerce Clause test).

193. *See id.* at 340 (noting that Virginia statute had an unmistakable discriminatory purpose).

194. *Id.* at 336 (citing *Sylvia Dev. Corp. v. Maryland*, 48 F.3d 810, 819 (4th Cir. 1995)) (noting four factors worthy of consideration when determining whether statute discriminates on its purpose). For a discussion of the four factors discussed in *Sylvia*, *see supra* note 65.

195. *See Waste Mgmt.*, 252 F.3d at 336-41 (discussing evidence Court relied upon to find discriminatory purpose).

196. *See* Davies, *supra* note 14, at 290 (noting that thoughts of few legislators cannot be determinative of every legislator's view).

preme Court has often struggled.[197] Despite Defendants' attempt to demonstrate the statute's neutrality, the Fourth Circuit did not consider factors other than the political feud between New York and Virginia in its analysis.[198]

In order to determine whether the Virginia statute discriminated in its purpose, the court could have looked at the legislative history and the increased amount of MSW being disposed of in Virginia before the beginning of the feud with New York. The Virginia statute created an evenhanded restriction on how MSW could enter Virginia and be disposed of once in the state.[199] The same restrictions were placed on in-state and out-of-state MSW.[200] The Virginia statute did not seek to cease importing waste from out-of-state, but to reduce the amount of waste coming to the state per day.[201] Moreover, Virginia argued that, despite the political fervor between New York's Mayor Giuliani and Virginia's Governor Gilmore, the statute was enacted for neutral reasons stemming from the concern of the rapid growth of MSW being deposited in Virginia.[202] The court dismissed this contention, finding the evidence of discrimination clear.[203]

In light of the Supreme Court's previous holdings striking down state statutes that sought to limit or restrict the amount of MSW being imported into a state, it is not surprising that the

197. *See id.* (citing Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1 (1998)) (exploring difficulty determining legislative intent).

198. *See Waste Mgmt.*, 252 F.3d at 341. Defendants attempted to argue that the statute was implemented for neutral reasons seeking to protect the health, safety and welfare of Virginia residents. *See id.*

199. *See id.* at 323-24 (discussing five statutory provisions).

200. *See id.* For example, both in-state and out-of-state waste was subject to the 2,000-ton Cap Provision as well as the Trucking Provision. *See id.* at 324.

201. *See id.* at 342-43. Defendants relied on statements by Virginia's director of DEQ who asserted that the cap statute was enacted to allow the Commonwealth to better protect health and safety. *See id.* at 342.

202. *See id.* at 340. Defendants contended that a genuine issue of material fact existed with respect to whether the statute was enacted with a discriminatory intent. *See id.* Defendants suggested that a post-enactment statement from Senator Bolling demonstrated that the statute was enacted for neutral reasons. *See id.* Senator Bolling stated that he sponsored the statute because of his concern over the rapid growth of the volume of MSW being deposited in Virginia landfills "regardless of the source." *Id.* The court, however, dismissed Defendants' contention that a genuine issue of material fact existed and stated "[d]efendants cannot create a genuine issue of material fact by presenting conflicting sworn statements as they have done with respect to the issue of discriminatory intent." *Id.* at 341. (citing Barwick v. Celotex Corp., 736 F.2d 946, 960 (4th Cir. 1984)).

203. *See Waste Mgmt.*, 252 F.3d at 341 (holding discriminatory purpose was clear).

Fourth Circuit found the Virginia statute to have a discriminatory purpose.[204] However, one of the most critical aspects of the Dormant Commerce Clause analysis is determining whether a statute should be analyzed under the first or second tier of the test.[205] If discrimination is found, the Court's standard of review is strict scrutiny.[206] Strict scrutiny is a powerful tool that has been used to invalidate almost all waste restrictions.[207]

2. *Reasons Other than Economic Protectionism*

The Fourth Circuit correctly applied the second prong of the first tier test under a Dormant Commerce Clause challenge.[208] Once a court determines that the statute is discriminatory on its face, purpose, or effect, the two-tier test requires the court to ask whether Virginia has a constitutionally valid reason for engaging in such discrimination.[209] Defendants presented evidence outlining numerous environmental, health, and safety hazards that result from MSW and the transport of MSW.[210] Furthermore, Defendants

204. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *see also Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res.*, 504 U.S. 353 (1992). In both of the above-cited cases the Supreme Court struck down statutes in which the state tried to mitigate the effects of imported waste. *See id.*

205. *See Waste Mgmt.*, 252 F.3d at 340 (demonstrating that if statute is found to be discriminatory on its face, practical effect or purpose, then strict scrutiny will be applied).

206. *See id.*

207. *See* Verchick, *supra* note 2, at 1272. "The Court's rigidity in applying the [Dormant] Commerce Clause is inconsistent with other areas of constitutional analysis and is much harder to justify on traditional constitutional grounds." *Id.* at 1283.

208. *See Waste Mgmt.*, 252 F.3d at 342 (agreeing that safety risks justified statute on grounds other than economic protectionism).

209. *See Envtl. Tech. Council*, 98 F.3d 774, 785 (4th Cir. 1996) (setting forth two-tier approach for determining constitutionality of statutory provision challenged under Dormant Commerce Clause).

210. *See Waste Mgmt.*, 252 F.3d at 341-42. Defendants offered evidence: 1) that certain materials in MSW can be hazardous to human health; 2) that each state has its own definition of MSW; 3) that while one state may find it appropriate to regulate strictly a certain type of solid waste, another state may not be as aware of or concerned about the risks posed by that type of item into the MSW stream; 4) that Virginia law completely prohibits potentially infectious items such as blood and urine from being disposed of as MSW, while Maryland and North Carolina allow disposal of blood and urine as MSW under limited circumstances; 5) that Virginia law prohibits urine from being disposed of as MSW while New York allows its disposal as MSW without limitation; 6) that Maryland and New York allow hazardous waste generated at less than 100 kilograms per month to be disposed of as MSW while Virginia does not; and 7) that unlike Virginia, Maryland and New York do not impose manifesting or tracking requirements on hazardous waste from small quantity generators.
Id. (internal citations and quotations omitted).

demonstrated that MSW generated outside of Virginia is different from that which is generated inside Virginia and, therefore, poses more serious health and safety risks.[211] The court correctly noted that Defendants satisfied their burden of establishing that the statutory provisions were justified by a reason other than economic protectionism.[212]

The Fourth Circuit's finding that there was sufficient evidence that the Virginia statute was enacted for a justified reason steps away from the Supreme Court's original analysis of the nature of interstate waste in *City of Philadelphia* and *Fort Gratiot*.[213] In both cases, the Supreme Court found undisputed economic protectionism.[214] In *City of Philadelphia*, the Court stated, "whatever [New Jersey's] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."[215] The Supreme Court, however, rejected the notion that environmental concerns and hazards posed by landfilling satisfied burdening commerce.[216]

The Fourth Circuit acknowledged that the Virginia statute could be construed as a health and safety regulation, adopting some of the ideas scattered throughout Chief Justice Rehnquist's dissent in both *City of Philadelphia* and *Fort Gratiot*.[217] Chief Justice Rehnquist's dissenting opinions largely addressed environmental hazards connected with interstate waste and noted that states should be free to prohibit the importation of solid waste because of the potential health and safety problems that it poses to re-

211. *See id.* at 342 (noting that "MSW generated outside Virginia poses health and safety risks not posed by MSW generated inside Virginia.").

212. *See id.* (noting statutory provisions did not advance economic protectionism).

213. *See id.* (finding health and safety risks Defendant presented sufficient to establish reasons for enactment outside economic protectionism).

214. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978) (holding New Jersey law is protectionist in nature); *see also Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res.*, 504 U.S. 334, 366 (1992) (holding portion of Michigan law as protectionist measure that cannot withstand scrutiny under Commerce Clause).

215. *City of Philadelphia*, 437 U.S. at 626-27 (discussing possibility of finding evil of protectionism in both legislative means and legislative ends).

216. *See id.* at 628 (noting that one state cannot isolate itself from problems common to many states by erecting barrier). The Court rejected Defendants' contention that this statute fits within the quarantine exception, thus validating the protectionist nature of the statute. *See id.* at 628-29.

217. *See Waste Mgmt.*, 252 F.3d at 343 (stating health and safety risks presented by importation of MSW with less strict regulatory standards could establish justified reason for statute).

sidents.[218] The Fourth Circuit's willingness to consider environmental hazards as a sufficient reason for the statute is an affirmative acknowledgement that waste disposal is an important issue which must be reevaluated.[219]

3. Least Discriminatory Means

While the Fourth Circuit acknowledged that the statutory provisions were justified by a reason other than economic protectionism, the court's analysis of the last part of the Dormant Commerce Clause requires evaluation.[220]

a. Cap Provision – The Wrong Outcome

Concerning the Cap Provision, the Fourth Circuit found that less discriminatory means of regulation existed.[221] Defendants contended that the Cap Provision was a necessary and appropriate response to the MSW volume crisis.[222] Defendants stated that the Cap Provision allowed Virginia to better protect the health and safety of its citizens because a 2,000-ton cap of MSW can be reasonably managed and policed.[223] In response, Plaintiffs argued if Defendants worried about the composition of MSW generated outside of Virginia, then Virginia should only cap the amount of waste imported from states with MSW regulatory schemes less restrictive than Virginia.[224] Additionally, the closer a state's MSW regulatory scheme mirrors that of Virginia, the higher the cap should be.[225]

218. *See, e.g., City of Philadelphia*, 437 U.S. at 632 (Rehnquist, J., dissenting). Chief Justice Rehnquist's dissent focused on the environmental concerns associated with landfilling and suggested that states should be able to protect their citizens from these potential health and safety hazards. *See id.* Chief Justice Rehnquist's interpretation of the Dormant Commerce Clause test suggests that courts should give substantial weight to the local health and environmental benefits of landfill reduction provisions. *See* Breitenbucher, *supra* note 7, at 251-53.

219. *See Waste Mgmt.*, 252 F.3d at 341-42 (evaluating environmental hazards Defendants presented).

220. *See id.* at 342 (discussing least discriminatory prong of test under Dormant Commerce Clause challenge).

221. *See id.* at 343-44 (finding less discriminatory means existed).

222. *See id.* at 342-43 (arguing Cap Provision was necessary to police out-of-state MSW).

223. *See id.* at 342 (contending more inspections can take place to adequately screen and process waste with less MSW being imported each day).

224. *See Waste Mgmt.*, 252 F.3d at 343 (noting Plaintiffs' contention that less discriminatory means outside universal cap provision existed). Plaintiffs also noted that the Cap Provision could be less restrictive by making the cap correspond to Virginia's regulatory scheme. *See id.* For example, the more closely a state's MSW regulatory scheme is to Virginia's, the higher the cap should be. *See id.*

225. *See id.* (discussing Plaintiffs' example of less burdensome alternative).

The Fourth Circuit agreed with Plaintiffs, noting that Defendants showed no evidence as to why a more narrow capping provision would not adequately address the health and safety concerns the Virginia statute was enacted to protect.[226]

While Plaintiffs' contention that a tailored Cap Provision is less discriminatory, practically, a scheme like this poses significant challenges of its own. A narrower capping provision based on each state's MSW regulatory scheme contravenes the principles of uniformity, an issue important to interstate commerce.[227] Such a provision would require Virginia to analyze each state's regulatory scheme for MSW and create different caps based on their findings.[228] With new technology, Virginia would have to continuously change, update and revise the Cap Provision, inevitably causing confusion and perceptions of disproportionate discrimination.

A uniform Cap Provision is a more evenhanded restriction which would allow all states the same access to the landfills but would allow Virginia a greater opportunity to manage its waste.[229] In fact, the Supreme Court condoned such a statutory scheme in both *City of Philadelphia* and *Fort Gratiot*.[230] The Supreme Court noted that one plausible method of dealing with the influx of out-of-state waste would be to limit or slow the flow of all waste into the state's landfills, even though interstate commerce may be incidentally affected.[231] The Fourth Circuit, however, disagreed and

226. *See id.* (demonstrating less restrictive alternative to Cap Provision).

227. *See id.* at 333. The Fourth Circuit noted that if a statute regulates evenhandedly, the second tier of the Dormant Commerce Clause test applies instead of the strict scrutiny, per se invalid tier of the test. *See id.* If a statute regulates evenhandedly, the *Pike* balancing test is applied. *See id.* (citing *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996)).

228. *See id.* at 343 (discussing Fourth Circuit's opinion regarding less discriminatory alternative). The Fourth Circuit stated, "rather than discriminating against MSW from every state other than Virginia, Virginia's cap should only target the MSW from states that have lesser health and safety standards regarding MSW than Virginia." *Id.*

229. *See Waste Mgmt.*, 252 F.3d at 342-43 (discussing Virginia's argument that Cap Provision is necessary precaution).

230. *See City of Philadelphia v. New Jersey*, 437 U.S 617, 626 (1978); *see also Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res.*, 504 U.S. 353, 367 (1992). In both *City of Philadelphia* and *Fort Gratiot*, the Supreme Court suggested that an evenhanded overall limitation on the amount of waste being imported into a state would be a reasonable provision. *See id.*

231. *See City of Philadelphia*, 437 U.S at 626; *see also Fort Gratiot*, 504 U.S. at 367. In both *City of Philadelphia* and *Fort Gratiot*, the Court stated that a feasible alternative would be to create a uniform flow restriction affecting all waste coming into the state. *See id.* The Court seemed to reason that a provision like this would be less discriminatory against out-of-state waste and would regulate more evenhandedly. *See id.* The Fourth Circuit did not agree with this determination. *See Waste Mgmt.*, 252 F.3d at 343.

thought that a variant Cap Provision would be less discriminatory towards interstate commerce.[232]

The Virginia statute followed the limited guidance provided by the most analogous Supreme Court cases and still failed to overcome a Dormant Commerce Clause challenge.[233] Here, a uniform Cap Provision as well as a state tailored Cap Provision are better options than a complete ban on interstate waste or a surcharge to deal with processing the more contaminated MSW.[234] The Fourth Circuit agreed with the alternative Plaintiffs devised; however, because the court only had to determine whether a genuine issue of material fact existed, it seems that a trier-of-fact should have been used in this case to determine whether Plaintiffs' suggested alternative, if feasible, was indeed less discriminatory.[235]

Furthermore, it is unclear whether the Fourth Circuit, in agreeing with Plaintiffs that a less discriminatory means existed, suggested that a Cap Provision would be acceptable as long as it was tailored to the individual states or whether a Cap Provision could only be applied to those states whose regulatory schemes were less stringent than Virginia.[236] The Fourth Circuit's analysis of the Cap Provision is confusing and demonstrates how the Supreme Court's analysis of the Dormant Commerce Clause has resulted in lower courts issuing incoherent and inconsistent decisions.[237] Dormant Commerce Clause cases are so disparate that no state legislators, lawyers, law students, academic authorities or the courts themselves know clearly the analysis or rules concerning the Dormant Commerce Clause.[238] Overall, the Fourth Circuit's analysis of the Cap Provision lacks structure, but, more importantly, leaves Virginia

232. *See Waste Mgmt.*, 252 F.3d at 343 (stating other less discriminatory alternatives were available).

233. *See id.* at 349 (indicating complexity of Dormant Commerce Clause analysis).

234. *See, e.g., City of Philadelphia*, 437 U.S. at 629 (holding prohibition of importation of interstate waste was violation of Commerce Clause).

235. *See Waste Mgmt.*, 252 F.3d at 329 (describing court's limited scope of review when reviewing grant of summary judgment).

236. *See id.* at 343-44. The Fourth Circuit agreed with Plaintiffs' contention that capping those states with less stringent regulatory schemes would be a less discriminatory method. *See id.* Plaintiffs, however, also noted that "the more closely a state's MSW regulatory scheme tracks that of Virginia, the higher the cap should be." *Id.* The Fourth Circuit did not clarify whether it agreed with this analysis as well. *See id.*

237. *See* Davies, *supra* note 14, at 252-54 (discussing how Dormant Commerce Clause doctrine has caused havoc for lower courts).

238. *See id.* at 254 (discussing disparate and unpredictable results of Dormant Commerce Clause cases).

without a clear understanding of what options it has for redesigning the provision should it choose to do so.

b. Stacking Provision and the Three Rivers' Ban

The Fourth Circuit determined that Defendants submitted sufficient evidence to create a genuine issue of material fact regarding whether the Stacking Provision and the Three Rivers' Ban were the least discriminatory alternatives available.[239] The Fourth Circuit strayed from the Supreme Court's traditional Dormant Commerce Clause analysis demonstrated in *City of Philadelphia* and *Fort Gratiot* by focusing on the environmental concerns of Virginians with respect to the Stacking Provision and the Three Rivers' Ban.[240] The Fourth Circuit determined that Defendants' evidence showed that the transport of waste through the waterways presented serious and unique health and safety threats to Virginia residents.[241] While this conclusion is not determinative, the Fourth Circuit's approach demonstrates the recognition and importance of health concerns involved with waste management.[242] In fact, the Fourth Circuit's argument correlates to Chief Justice Rehnquist's dissenting opinions in *City of Philadelphia* and *Fort Gratiot*.[243] Chief Justice Rehnquist's dissents imply that the Dormant Commerce Clause, as interpreted by the majority, produces potential environmental and health problems of its own because it increases the distance waste has to travel.[244] Increased distance inevitably creates increased risks of spills, contamination and other environmental concerns.[245] The

239. *See Waste Mgmt.*, 252 F.3d at 344 (noting Defendants offer various pieces of evidence to create genuine issues of material fact with regard to Stacking Provision and Three Rivers' Ban, requiring resolution by trier-of-fact).

240. *See id.* The Fourth Circuit seriously considered reports from DEQ suggesting that these provisions were necessary to protect the health and safety of Virginia citizens. *See id.* The court stated that Defendants submitted sufficient evidence to create genuine issues of material fact that should be resolved by a trier-of-fact. *See id.*

241. *See id.* (noting health and safety concerns involved with transport of waste via waterway).

242. *See id.*

243. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 629-33 (1978) (Rehnquist, J., dissenting) (discussing disagreement with majority holding based on environmental, health, and safety concerns); *see also Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res.*, 504 U.S. 353, 368-73 (1992) (Rehnquist, C.J., dissenting) (illustrating basis of disagreement with majority holding based on state's legitimate local concerns rather than improper economic protectionism).

244. *See, e.g., City of Philadelphia*, 437 U.S. at 629-33; *For Gratiot*, 504 U.S. at 368-73.

245. *See* Davies, *supra* note 14, at 259 (discussing Chief Justice Rehnquist's dissenting opinions). An additional environmental criticism of the Dormant Commerce Clause, important to the doctrine's practical effect but omitted from Chief

Fourth Circuit seemed to be heeding these warnings as it evaluated Virginia's concerns in enacting these provisions.[246]

c. Trucking Provision and the Four or More Axel Provision

The Fourth Circuit correctly determined that the Trucking Provision and the Four or More Axel Provision were not the least discriminatory alternatives.[247] Defendants argued that state legislation should be given deference because it was analogous to highway safety.[248] The Fourth Circuit properly noted that these regulations disproportionately pressed upon out-of-state residents and businesses and therefore less deference was due.[249] Furthermore, the Fourth Circuit stated that because the provisions were determined to be discriminatory in their purpose, less deference should be given to state legislative judgment because the presence of a discriminatory purpose undercuts the notion that Virginia's political process would serve as a check against burdensome legislation.[250] The court assumed that the entire legislature was acting with a discriminatory purpose when they enacted the statutory provisions.[251] The court's assumption demonstrates how critical an accurate and thorough analysis of the first tier of the Dormant Commerce Clause test is to the final outcome.

V. IMPACT

The Fourth Circuit's decision, in *Waste Management*, is likely to have little effect upon the judicial landscape of interstate waste. This is partially due to the fact that the Fourth Circuit's holding was based on a Summary Judgment determination. The fact that the

Justice Rehnquist's dissenting opinions, is the idea of risk multiplication. *See id.* Allowing an unlimited amount of trash to be deposited in one state increases that state's risk of being harmed. *See id.* at 259-60. For example, Virginia's waste importation has increased dramatically as a result Fresh Kills' closing. *See id.* Without any restriction or limit on the amount of waste Virginia will accept, Virginia residents' exposure to harmful contaminants is increased proportionately to the increased amount of trash. *See id.*

246. *See Waste Mgmt.*, 252 F.3d at 344 (discussing environmental hazards).

247. *See id.* at 345 (striking down Trucking Provision and Four or More Axel Provision).

248. *See id.* at 344-45 (discussing Defendants' argument with respect to Trucking Provision and Four or More Axel Provision).

249. *See id.* (citing *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675-76 (1981)) (explaining less deference should be given to legislative judgment where local regulation bears disproportionately on out-of-state residents and businesses).

250. *See id.* at 345 (noting discriminatory purpose of Trucking Provision and Four of More Axel Provision and commenting Virginia's political process would not serve as check against potentially burdensome legislation).

251. *See Waste Mgmt.*, 252 F.3d at 344-45.

Fourth Circuit determined that Defendants had met their burden, does not mean that the provision is constitutional. Furthermore, *Waste Management* is not overwhelmingly significant because it is a circuit court decision and the Supreme Court has already addressed the issue of interstate waste. The Supreme Court's interpretation of the Dormant Commerce Clause with respect to interstate waste may not be completely logical in light of environmental hazards connected with landfilling, but the Supreme Court's protection of interstate commerce might as well be set in stone.[252]

On the other hand, "[o]ne generation's dissents have often become the rule of law years later."[253] The Fourth Circuit strayed from the traditional Supreme Court analysis which focused on economic protectionism and ignored environmental concerns.[254] Instead, the Fourth Circuit adopted a subtle but modern approach to considering state statutes challenged under the Dormant Commerce Clause.[255] The court's recognition and discussion of the environmental, safety, and health hazards that the importation of MSW poses demonstrates the nature of the MSW disposal crises in the United States. The Fourth Circuit seemed to acknowledge Chief Justice Rehnquist's interpretation of the Dormant Commerce Clause, understanding that the importation of waste is a multi-faceted operation in which states should be able to protect their citizens and resources.[256] However, while this approach projects a more humanitarian view toward waste disposal and may be emulated in subsequent cases, it is unlikely that health, safety, or environmental concerns will be enough to overcome the Supreme Court's protection of interstate commerce.

While the Supreme Court as currently constituted seems unlikely to overrule itself on this issue, small acknowledgements of the environmental and health implications of interstate waste by the lower courts and Congress may lend a helping hand. Congress has the authority to regulate interstate commerce; waste control is in-

252. *See* Davies, *supra* note 14, at 232 (discussing unlikelihood that Supreme Court will ever overrule Dormant Commerce Clause doctrine).

253. Breitenbucher, *supra* note 7, at 249 (noting possibility of subsequent changes in Supreme Court's views).

254. For a discussion of the Fourth Circuit's analysis, *see supra* notes 202-239 and accompanying text.

255. For a discussion of the Fourth Circuit's analysis concerning environmental, safety, and health hazards, *see supra* notes 201-211, 227-36 and accompanying text.

256. *See id.* (discussing Fourth Circuit's consideration of environmental factors).

cluded under the Commerce Clause.[257] Since Fresh Kills in Staten Island has closed its doors, the issue has a greater certainty of reaching Congressional debate.[258] In fact, several bills are pending in the House of Representatives that would give states authority to regulate solid waste imports.[259] Nevertheless, until Congress embraces this national problem, states face a continual uphill battle to save their landfill space and protect the health and safety of their citizens.

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257. *See* U.S. CONST. art. I, § 8, cl. 3.

258. *See* Patrick Golden, *supra* note 140, at 10. In light of the September 11, 2001 terrorist attacks Fresh kills has reopened temporarily to deal with the massive disposal of debris as a result of the two fallen towers. *See* Jim Johnson, *Cleaning Up a Horror: Crews Work to Remove Mountains of Debris After Terrorist Attack*, 7 WASTE NEWS 10 (Sept. 17, 2001) *available at* 2001 WL 8866742.

259. *See Solid Waste: State Officials Urge House Passage of Bill Allowing Restrictions on Shipments*, STATE ENVIRONMENT DAILY, August 3, 2001 (discussing need for congressional action in order for states to have degree of control over type and amount of waste brought into local communities).