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In *National Solid Wastes Managegment Association v. Meyer*[1], the Seventh Circuit recently held a Wisconsin waste management scheme invalid[2] under the dormant Commerce Clause.[3] While the case generally affirms precedent in this field,[4] it also expands the scope of the dormant Commerce Clause, and creates inconsistencies as to which level of scrutiny applies to environmental regulation. The case also calls into question the level of legitimacy environmental regulatory schemes are required to have in order to pass Constitutional muster.

This Comment examines the case, the scheme the court invalidated, and the ramifications the decision creates for state environ-

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[1] National Solid Wastes Management Ass'n v. Meyer, 63 F.3d 652 (7th Cir. 1995).

[2] *Id.* at 663.

[3] Art. I, § 8, cl. 3 of the U.S. Constitution provides Congress with the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Commerce Clause has long been held to have a "dormant" or "negative" aspect that significantly limits State regulatory powers. Fulton v. Faulkner, 116 S.Ct. 848, 853 (1996) (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)). *See also* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

[4] *See, e.g.*, C & A Carbone, Inc. v. Town of Clarkstown, 114 S.Ct. 1677 (1994) (holding a city ordinance requiring all foreign-generated waste to be treated at a waste transfer station discriminatory under the dormant Commerce Clause); Oregon Waste Systems, Inc. v. Dept. of Environmental Quality of Oregon, 114 S.Ct. 1345 (1994) (holding a discriminatory waste-flow surcharge facially invalid under the dormant Commerce Clause); National Solid Wastes Management Ass'n v. Alabama Dept. of Environmental Management, 910 F.2d 713 (11th Cir. 1990) (invalidating a law preventing in-state waste management facilities from accepting foreign, non-approved, non-pretreated hazardous wastes).

mental regulation. The Comment first describes the ambitious nature of Wisconsin's waste management scheme. Part II discusses the conflict that led to the successful Commerce Clause challenge to the statute. Part III then provides an analysis of how the decision relates to the existing body of Commerce Clause decisions. It concludes with a discussion of the case's effects on Commerce Clause precedent and future state environmental regulation.

I. THE WISCONSIN STATUTE: AN AMBITIOUS ATTEMPT AT CONTROL OF SOLID WASTE FLOW

The Wisconsin statute involved a comprehensive plan to reduce the flow of solid waste into Wisconsin landfills.[5] The statute expressly prohibited the deposit of eleven specific items in Wisconsin landfills, regardless of their origin.[6] The prohibited items included aluminum cans and containers, plastic containers, newsprint, magazine paper, glass containers and tires.[7] The statute did, however, provide an exception to this general prohibition. The ban did not apply to solid waste "generated in a region that has an effective recycling program . . . and, if the region is not in this state, the region is located in a state that has an effective siting program. . . ."[8] "Effective recycling program" and "effective siting program" were defined in other parts of the act, thereby providing specific criteria set up by the Wisconsin legislature.[9] The prohibited items are ones commonly found in municipal solid waste. Thus, any "region" that intended to dump solid waste in a Wisconsin landfill must have first fulfilled the standards set up in the Wisconsin statute. Regions outside of Wisconsin were required to implement effective recycling and siting programs to avoid the statutory ban.[10]

In order to fulfill the standards of the statute, a region (defined as a city, county, state, or municipality - referred to in the statute as a "responsible unit") was required to implement the specifics of WIS. STAT. § 159.11-12, whether or not it was located within the state.[11] The region would then have to send a copy of its recycling plan to the Wisconsin Department of Natural Resources (Depart-

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[5] WIS. STAT. §§ 159.07, 159.11-12 (1994).
[6] *Id.* § 159.07.
[7] *Id.* § 159.07(3).
[8] *Id.* § 159.07(7).
[9] *Id.* § 159.11-12.
[10] *Id.* § 159.07(7).
[11] *Id.* § 159.11.

ment) for approval or rejection.[12]

The Department, using criteria set out in the statute, determined whether a region had an "effective" recycling or siting program.[13] To be "effective" a region's program had to satisfy each item in a list of specific requirements set out in the statute.[14] Among the requirements for in-state regions were comprehensive recycling and post-consumer waste separation programs, as well as laws requiring land owners of single family residences, apartment buildings with five or more units, or industrial facilities to provide for separate containers and collection of the banned items.[15] Furthermore, a program would only be "effective" if it also implemented a recycling education program, provided for collection of the post consumer waste, and required separation of the banned items from waste that was not already separated.[16] Out-of-state regions were required to implement the above requirements in addition to complying with the recycling policies of their home state.[17]

The statute further required the Department to promulgate rules for comparing out-of-state regions with similar regions within the state to determine compliance with the statute.[18] Those rules were to be based on the level of governmental financing regionally available, the enforcement mechanisms in place, and the actual number of materials being separated and recycled in the region.[19]

Out-of-state regions intending to dump solid waste in Wisconsin landfills were also required to have an effective siting program in place.[20] "Siting" refers to the amount of landfill space available in a particular state. Wisconsin prohibited its landfills from accepting waste from any state in which the amount of waste generated in that state in the past four years exceeded the amount of new solid waste disposal capacity developed during the same period.[21]

Wisconsin's statutory scheme required its Department of Natu-

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[12] "Upon request of a responsible unit or an out-of-state unit, the department shall review documentation of the responsible unit's solid waste management program . . . or the out-of-state unit's solid waste management program and determine whether the program is an effective recycling program." *Id.* § 159.11(1).

[13] *Id.* §§ 159.11(1)-(3).

[14] *Id.*

[15] *Id.* § 159.11(2).

[16] *Id.*

[17] *Id.* § 159.11(2e).

[18] *Id.* § 159.11(2e)(b).

[19] *Id.*

[20] *Id.* § 159.12(3).

[21] *Id.*

ral Resources to make formal rulings as to whether a region's recycling program met the standards in the statute.[22] Programs that did not meet the standards were to be banned from utilizing solid waste landfills located within Wisconsin.[23] The scheme also gave the Department the power to subject regions to further requirements by promulgating additional rules.[24] Thus, any region, whether in Wisconsin or outside of its borders, without a comprehensive waste management program as stringent as Wisconsin's was effectively banned from dumping solid waste within the state.

II. THE CASE: A SUCCESSFUL COMMERCE CLAUSE CHALLENGE

Recognizing that the Wisconsin scheme presented significant obstacles to out-of-state waste-producing units, several sanitation companies and the National Solid Wastes Management Association (NSWMA) commenced an action in Federal district court, challenging the legislation on dormant Commerce Clause grounds.[25] The district court invalidated two parts of the scheme.[26] The court invalidated the effective siting requirement for out-of-state units, holding that the requirement facially discriminated against interstate commerce without any apparent justification.[27] It further invalidated the requirement that Wisconsin's Department approve non-Wisconsin units via formal ruling.[28] However, the district court upheld the remainder of the scheme, concluding that the administrative burden of compliance would be limited and that the local benefits (conservation of landfill capacity and protection of the environment) would be substantial.[29] The court held that those benefits outweighed the slight burdens presented to interstate commerce and that, therefore, the scheme did not violate the dormant Commerce Clause.[30]

On appeal to the Court of Appeals for the Seventh Circuit, the NSWMA argued that the lower court had erred in applying the

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[22] *See supra* note 12.

[23] WIS. STAT. § 159.07(7).

[24] *Id.* § 159.11(2)(f).

[25] National Solid Wastes Management Ass'n v. Meyer, 63 F.3d 652, 655 (7th Cir. 1995).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] National Solid Wastes Management Ass'n v. Meyer, 63 F.3d 652, 656 (7th Cir. 1995).

[30] *Id.*

balancing test to Wisconsin's statute and that the scheme facially discriminated against interstate commerce and should be invalidated without further inquiry.[31] The appellate court agreed, and held the entire scheme invalid under the dormant Commerce Clause.[32]

The Seventh Circuit first examined the tests used in other Commerce Clause litigation.[33] It concluded that the Supreme Court has developed a two-tiered approach with which to analyze these issues.[34] The court noted that under the first tier when a statute "directly regulates or discriminates against interstate commerce" it is generally "struck down without further inquiry." [35]The court then explained that under the second tier, a "state statute will be upheld 'unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'"[36] This "balancing" test, the court explained, would only be applied if the statute regulates evenhandedly and "has only indirect or incidental effects on interstate commerce. . . ."[37]

Focusing on what it determined to be direct "extraterritorial" effects,[38] the Seventh Circuit applied several levels of scrutiny to the statute and ultimately held it invalid.[39] The court explained its decision:

> all persons in [a] non-Wisconsin community must adhere to the Wisconsin standards whether or not they dump their waste in Wisconsin. If the out-of-state community does not conform to the Wisconsin way of doing things, no waste generator in that community may utilize a Wisconsin disposal site. . . . The *practical impact* of the Wisconsin statute on economic activity completely outside the state reveals its basic infirmity: It *essentially* controls the conduct of those engaged in commerce occurring wholly outside the State of Wisconsin and *therefore directly regulates* interstate commerce.[40]

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[31] *Id.*

[32] *Id.* at 662.

[33] *Id.* at 657.

[34] "The Supreme Court has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause." National Solid Wastes Management Ass'n v. Meyer, 63 F.3d 652, 657 (7th Cir. 1995).

[35] *Id.* at 657.

[36] *Id.* (quoting Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)).

[37] *Id.*

[38] The Court noted that it was "not the first circuit to be confronted with the problem of extraterritoriality in the context of waste regulation." *Id.* at 660.

[39] National Solid Wastes Management Ass'n v. Meyer, 63 F.3d 652, 661 (7th Cir. 1995).

[40] *Id.* at 658 (emphasis added).

Not only did the court consider extraterritorial effects to be a direct regulation under the commerce clause, it also considered laws which have the unintended effect of regulating extraterritorially to be both direct regulations and discrimination in interstate commerce. This analysis seems to extend the doctrine of extraterritoriality, expands the use of the dormant Commerce Clause[41], and reflects indifference to states' legitimate attempts to regulate environmental concerns. The validity of the holding is discussed in part III below. First, it is important to understand the scope of the case holdings in order to appreciate the discussion.

After making the sweeping statement above, the court explained several U.S. Supreme Court cases which held that state legislation with extraterritorial reach is unconstitutional.[42] The court analyzed extraterritorial reach in terms of a direct regulatory effect on interstate commerce. Holding that extraterritorial effect is essentially one example of how a state can directly regulate interstate commerce,[43] the court struck down the Wisconsin law. Clearly, once the court invalidated the statute under "direct effect" strict scrutiny, no further analysis was required. However, the court did not limit its holding to strict scrutiny.[44]

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[41] *See infra* note 81 and accompanying text.

[42] Healy v. Beer Institute, 491 U.S. 324 (1989) (holding a Connecticut liquor pricing scheme unconstitutional due to extraterritorial reach); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) (striking a New York milk pricing statute that eliminated competitive advantage of milk distributors in Vermont); Edgar v. MITE Corp., 457 U.S. 624 (1982) (invalidating an Illinois law allowing Secretary of State authority to hold hearings regarding fairness of takeover bids offered to partly-owned Illinois corporations).

[43] "We believe . . . the Wisconsin statute seeks to force Wisconsin's judgment with respect to solid waste recycling on communities in its sister states 'at the pain of an absolute ban on the flow of interstate commerce.'" National Solid Wastes Management Ass'n v. Meyer, 63 F.3d 652, 660-661 (7th Cir. 1995) (quoting Hardage v. Atkins, 619 F.2d 871, 873 (10th Cir. 1980)).

[44] It is unclear whether "strict scrutiny" is the proper terminology to use to identify the court's analysis in this instance. The U.S. Supreme Court avoids using the words "strict scrutiny" in dormant commerce clause cases, using instead the terminology "rigorous scrutiny" or "heightened scrutiny." *See, e.g.*, C & A Carbone, Inc., v. Town of Clarkstown, 114 S.Ct. 1677, 1683 (1994) ("Discrimination against interstate commerce . . . is *per se* invalid [unless the state] can demonstrate, under *rigorous scrutiny*, that it has no other means to advance a legitimate local interest") (emphasis added). However, it is clear that the Supreme Court employs a "virtually per se rule of invalidity" which looks very much like strict scrutiny when evaluating allegedly discriminatory state regulations. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981); Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). Many of the lower Circuit and District Courts use the words "strict scrutiny" when referring to the same rule. *See* Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788, 798 (3rd Cir. 1995) ("[T]he entire line of recent Supreme Court cases have clarified that either [dis-

The court went on to analyze the statute under the various alternative approaches, finding that even if it did not facially discriminate against interstate commerce, that it would still be subject to a heightened scrutiny standard.[45] The court reasoned that the statute, in practical application, had an effect on interstate commerce and "could also be analyzed as *working a discrimination* on interstate commerce."[46] The court noted that, under the heightened scrutiny standard, "the state is required to demonstrate that its concerns 'cannot be adequately served by nondiscriminatory alternatives.'"[47] The court concluded that Wisconsin could easily implement an alternative method of separating out the eleven banned items.[48] The court supported this finding by noting that the legislature had even provided waste producers with an alternative in the statute by allowing non-effective units an exemption if their waste was sorted at a waste recovery facility prior to being brought into the state.[49] Because the Court found that nondiscriminatory alternatives existed, it declared the statute unconstitutional.

Finally, the court analyzed the statute a third time[50], now under the *Pike* balancing test.[51] Relying on its own determination that

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criminatory] purpose or effect will trigger *strict scrutiny* analysis") (emphasis added); Cotto Waxo Co. v. Williams, 46 F.3d 790, 793 (8th Cir. 1994) (holding that a statute with discriminatory purpose or effect "is subject to strict scrutiny"); Barker Bros. Waste, Inc. v. Dyer County Legislative Body, No. 95-2942-GA, 1996 WL 163761 (W.D.Tenn.) (holding that discriminatory regulations are subject to the "strictest scrutiny"). It is also clear that the *Meyer* court employed three distinct tests in carrying out its analysis, and that the first of the tests was the "virtual per se rule of invalidity." *Meyer*, 63 F.3d 652, 657. Thus, for ease of reference, the first set of tests will be referred to hereinafter as "strict scrutiny."

[45] *Id.* at 661.

[46] "Although we have characterized the Wisconsin statute as impermissibly regulating directly interstate commerce, we note that the practical effect of the statute could also be analyzed as *working a discrimination* on interstate commerce." *Id.* (emphasis added).

[47] *Id.*

[48] *Id.* at 662.

[49]

> The solid waste legislation itself makes clear that there is an available, less discriminatory alternative that could serve the State's purpose just as well as the requirement that the entire community follow the dictates of Wisconsin's plan. Specifically . . . if the waste is processed by a materials recovery facility that separates the eleven listed materials, the waste will conform to the environmental needs of Wisconsin.

National Solid Wastes Management Ass'n v. Meyer, 63 F.3d 652, 662 (7th Cir. 1995).

[50] *Id.* at 663.

[51] "Where a statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the

Wisconsin could easily use other alternatives to pursue its environmental goals, the court held that Wisconsin's need for environmental regulation, though substantial, was not enough to overcome the burden that it placed on commerce with neighboring states.[52] Thus, the court invalidated the scheme under every Commerce Clause test available.

III. MEYER: A CONSISTENT HOLDING WITH TROUBLING RAMIFICATIONS

At first blush, the holding in *National Solid Wastes Management Association v. Meyer* seems to be consistent with a long line of Commerce Clause precedent.[53] However, upon closer examination, the decision yields some perplexing inconsistencies. First, it is unclear which level of scrutiny would apply to other similar legislation given the court's reliance on all three tests. Secondly, because the court analyzed Wisconsin's scheme under three different tests, it is unclear whether the court tried to limit the dormant Commerce Clause analysis in this arena to a "two-tiered" approach as it suggested,[54] and whether extraterritoriality has emerged as a separate and distinct test. Finally, the holding raises the issue of how much legitimacy courts are willing to afford environmental concerns under Commerce Clause analysis. For purposes of discussion, it is important to know the background of existing case law in this area in order to understand the nuances of *Meyer*.

A. Waste Management Control Legislation: Which level of Scrutiny Applies?

In *Meyer*, the Seventh Circuit Court of Appeals quoted the Supreme Court to support the proposition that the "'critical consideration' in determining the appropriate level of scrutiny is the 'overall effect of the statute on both local and interstate activity.'"[55]

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putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[52] *Meyer*, 63 F.3d at 663.

[53] *See, e.g.*, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935); Philadelphia v. New Jersey, 437 U.S. 617 (1978); C & A Carbone, Inc. v. Town of Clarkstown, 114 S.Ct. 1677 (1994).

[54] *See supra* note 34.

[55] National Wastes Management Ass'n v. Meyer, 63 F.3d 652, 657 (7th Cir. 1995) (quoting Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986)).

Clearly, courts are given a significant degree of leeway in deciding not only which Commerce Clause test will apply, but also whether, under the test selected, the state's activities are too burdensome.[56]

In a time where states are recognizing both an increasing need and desire to regulate flow of solid waste into their landfills, such an amorphous standard is disconcerting. How much regulation will be allowed? Will the court even consider the needs and desires of the state regarding its own environmental condition? In many cases, such as *Meyer*, these questions go unanswered until the court conducts its own *post hoc* examination of the statute in question. Unfortunately, the courts often conduct that examination with the assistance of plaintiffs who are opposed to environmental regulation because of their own economic interests.[57]

After examining past Supreme Court Commerce Clause decisions, one might come to the conclusion that a simple categorical answer could be given to the states when they express the above concerns: if the attempted regulation even retains a scent of interstate tampering or protectionism, the court will strike it down.[58] However, as with any question of law, categorical answers are unavoidably too simplistic. Thus, all categorical answers aside, for states intending to regulate the flow of solid waste into their landfills, the real issue boils down to which level of scrutiny a court might apply —or at least purport to apply— in carrying out its evaluation.[59]

Meyer confuses the scrutiny issue to some degree. In *Meyer*, the court did not simply examine the statute and then, based upon

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[56] This conclusion grows out of the fact that the *Meyer* court applied a variety of Commerce Clause tests in this case. Also, given the relative youth of the Wisconsin statute at the time of the case, it must follow that commercial burdens considered by the court were at least partly based on judicial conjecture.

[57] For example, the court pointed out in this case that the parties challenging Wisconsin's law were operators of landfills within the state. Obviously, those businesses rely heavily on waste coming in from outside of the state for both a source of revenues as well as competition to bid-up the price of disposing waste in their landfills. Thus, Wisconsin's law posed a significant economic threat to them in this situation.

[58] *See* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986) (arguing that the Court always focuses on protectionist purpose and effect, with the result often being the law is declared unconstitutional) [hereinafter Regan].

[59] Whatever "test" the Court decides to use may rarely even make a difference. Regan argues that the various tests, especially the "balancing test," do not properly characterize the analysis which the Court might carry out in a given case. For example, after explaining the supposed "balancing" undertaken in *Pike*, Regan submits that the opinion "is not a balancing opinion." *Id.* at 1220.

that examination, choose one level of scrutiny to apply. Rather, the court applied all three levels of scrutiny, presumably to protect itself from relitigation in the event of reversal.[60] Arguably, the court simply applied strict scrutiny after first holding that Wisconsin's statute "controls the conduct of those engaged in commerce occurring wholly outside the State of Wisconsin and therefore directly regulates interstate commerce."[61] That language suggests that because the statute "directly" regulated interstate commerce, the court struck it down via strict scrutiny "without further inquiry." However, that was not the end of the court's analysis.

The court first attempted to establish that a law that has any extraterritorial effect directly regulates interstate commerce.[62] Next, the court evaluated the statue in terms of its practical effect on interstate commerce. The court then inquired into the statute in terms of adequate state alternatives,[63] which shows that the court affirmatively made "further inquiry" before invalidating the law. The court then applied the *Pike* balancing test, an analysis that applies only if the statute either has no direct effect on interstate commerce, or has merely "incidental" effects.[64] Thus, the argument that the court simply applied strict scrutiny becomes unconvincing. Moreover, the assertion that a given law will fall to the Commerce Clause if it has even a hint of impact on interstate commerce becomes more believable. Wisconsin was simply left with no alternative means of regulation. Therefore, states intending to regulate the flow of solid waste into their landfills are left with little hope of success, no matter how clever or legitimate their attempts.

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[60] "[I]f it were necessary to reach the issue (or if our earlier characterizations of the Wisconsin scheme as discriminatory and a direct regulation of interstate commerce were found to be erroneous), the Wisconsin scheme still could not past muster under the test of Pike v. Bruce Church, Inc, . . . " *Meyer*, 63 F.3d at 663.

[61] *Id.* at 658.

[62] *Id.*

[63] *Id. See supra* note 49 and accompanying text.

[64] *Supra*, note 51.

B. Did the Court Apply a Two-Tiered Approach? Under Which Tier Does "Extraterritoriality" Fit?

In its decision in *Minnesota v. Clover Leaf Creamery Co.*,[65] the Supreme Court showed its propensity to subject regulation predicated on environmental concerns to a "two-tiered" analysis.[66] "If a state law purporting to promote environmental purposes is in reality 'simple economic protectionism,'" the Court explained, "we have applied a 'virtually per se rule of invalidity.'"[67] On the other hand, the Court stated that if a state law regulates "'evenhandedly,' and imposes only 'incidental' burdens on interstate commerce, the courts must nevertheless strike it down if 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'"[68] The latter balancing test originated in the Supreme Court case of *Pike v. Bruce Church, Inc.*[69]

In *Meyer*, the Seventh Circuit seemed to follow suit. It noted that "[t]he Supreme Court has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause."[70] *Meyer* is a perfect example of how that two-tiered analysis can become muddled and yield inconsistent results.

Presumably, if the court's characterization of a two-tiered analysis rings true, then courts in general would have the strict scrutiny and balancing tests described by the Court in *Clover Leaf Creamery* at their disposal. However, the analysis is not that simple. Other related tests and criteria often enter the analysis, which do not always fit under the rubrics of "strict scrutiny" or "balancing." Those other tests often are more appropriately deemed "heightened scrutiny."[71]

For example, the *Meyer* court used this heightened battery of tests to evaluate the Wisconsin statute after it had already declared it

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[65] 449 U.S. 456 (1981) (upholding a Minnesota law prohibiting the sale of milk in plastic nonrefillable, nonreturnable containers under the *Pike* balancing test).

[66] *Id.*

[67] *Id.* at 471.

[68] *Id.*

[69] In *Pike*, the Court dealt with an Arizona law forcing cantaloupe growers to package their cantaloupes uniformly for shipment to California. 397 U.S. 137 (1970). *See supra*, note 51.

[70] National Solid Wastes Management Ass'n v. Meyer, 63 F.3d 652, 657 (7th Cir. 1995).

[71] For example, in *Meyer* the court noted that "[b]ecause Wisconsin's effective recycling program legislation "discriminate[s] in practical effect against interstate commerce, [it is] subject to the *higher* level of scrutiny . . . " *Id.* at 661 (emphasis added).

invalid as a direct regulation of interstate commerce. This second step in its analysis seems to fall under a second prong of the first tier of strict scrutiny. In *Meyer*, the court stated that, "[b]ecause Wisconsin's effective recycling program legislation 'discriminate[s] in *practical effect* against interstate commerce, [it is] subject to the *higher* level of scrutiny,' and the State is required to demonstrate that its concerns 'cannot be adequately served by nondiscriminatory alternatives.'"[72]

One can assume that "the higher level of scrutiny" is one that is more difficult to satisfy relative to the balancing test, but that the court will at least conduct a further inquiry before summarily rejecting the statute. In other words, the court's second step was to apply something other than strict scrutiny. Thus, it appears that the court applied a three-tiered rather than a two-tiered type of analysis. In addition, the *Meyer* court's analysis is generally consistent with the way in which other courts, including the Supreme Court, analyze legislation of this type.[73] A long line of cases espouse this "two-tiered" test,[74] while bringing the various levels of scrutiny out of their respective hiding places whenever they are needed. The important thing to note about *Meyer* is that the analyses are very often inconsistent. That is, while the result is often consistent, the law is declared invalid, courts arrive at the results in very different ways. Courts will use the different tests and give the aspects of each different weight. In addition, *Meyer* does not focus on one test or its peripheral additions, but rather bends over backwards to insure that the statute fails every test under the Commerce Clause. Such a prospect can be daunting for a state that intends to obtain a reasonable hold on its environment.

Meyer also relied heavily on the extraterritorial aspects of the Wisconsin statute.[75] As the opinion makes clear, just exactly how extraterritoriality fits into the analysis is not settled. The Seventh Circuit went out of its way to establish that if a statute effects commerce taking place wholly outside the legislating state, then that alone is an example of a direct regulation of interstate commerce.[76]

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[72] *Id.* (emphasis added).

[73] *See supra* note 42.

[74] For an example of one of the most recent employments of the two-tiered test, *see* C & A Carbone, Inc. v. Town of Clarkstown, 114 S.Ct. 1677 (1994) (invalidating an ordinance requiring all solid waste brought into the city to be handled at a transfer station).

[75] *Meyer*, 63 F.3d at 659.

[76] *Id.*

The court cited several Supreme Court cases in which the Court struck down pricing control statutes,[77] as well as cases from other circuits to support its argument.[78] The court explained that those cases "establish that the Commerce Clause constrains a state from projecting its economic legislation onto commerce wholly occurring in its sister states."[79]

In addition to its direct effect reasoning, the court repeatedly stated that under its analysis, "[t]he practical effect of the Wisconsin legislation is to impose the requirements of Wisconsin law on numerous waste generators who neither reside, nor dispose of their waste in Wisconsin. . . ."[80] That practical extraterritorial effect, in the court's collective mind, was enough to make the law invalid under the heightened scrutiny analysis. The court held that because the law had extraterritorial effect it was *per se* invalid.[81] Additionally, the court held that, because the law had a practical extraterritorial effect, the law also had the practical effect of regulating interstate commerce. In order to come to that conclusion, the Seventh Circuit relied on the Court's language in *Healy v. Beer Institute*.[82]

The above duality is important because the Court created another powerful tool with which other courts can invalidate state legislation under the dormant Commerce Clause. Not only is it now possible for a court to strike down a law based on its sweeping

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[77] Healy v. Beer Institute, 491 U.S. 324 (1989) (holding a Connecticut liquor pricing scheme unconstitutional due to extraterritorial reach); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) (striking a New York milk pricing statute that eliminated competitive advantage of milk distributors in Vermont); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986) (invalidating a New York liquor pricing scheme).

[78] *E.g.*, Cotto Waxo v. Williams, 46 F.3d 790 (8th Cir. 1995) (holding genuine issues of material fact existed as to the burdens and benefits under the *Pike* balancing test).

[79] *Meyer*, 63 F.3d at 659.

[80] *Id.* at 661.

[81] Though some courts consider extraterritoriality in this analysis, whether the concept is properly considered a part of dormant Commerce Clause doctrine is in dispute. In his essay, Regan notes that:

> [T]he absence of a specific textual prohibition on extraterritorial legislation means that one may be tempted, when one is considering an extraterritorial law that is also a regulation of interstate commerce, to say that the commerce clause prohibits extraterritoriality. But this analysis would be mere window dressing, and misleading. The principle involved is not essentially a commerce clause principle at all.

Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1280 (1986).

[82] 491 U.S. 324 (1989).

extraterritorial effect under strict scrutiny,[83] courts can now look to the heightened level of scrutiny if the statute does not have patently extraterritorial attributes. A court can examine a statute, find that it merely has the "practical effect" of extraterritorial control, and strike it down after summarily finding that the state has adequate and less-restrictive alternatives.

In *Meyer*, the court noted that other circuit courts have interpreted the extraterritoriality concept differently.[84] In *Cotto Waxo Co. v. Williams*,[85] the Eighth Circuit considered the issue of extraterritoriality separately from the direct regulation and discrimination issues. It noted that a statute with extraterritorial effect would be *per se* invalid under the dormant Commerce Clause, without regard to any other inquiry.[86] The *Meyer* court did not use the concept in that manner. It instead tied it to the practical effect and discrimination issues to invalidate the statute.[87]

In a footnote, the *Meyer* court explained that since it found that Wisconsin "can proffer no sufficiently important reason for the statute," and that the extraterritorial nature of the statute gave it the practical effect of regulating interstate commerce, it did not have to reach the issue of whether extraterritoriality was a distinct issue.[88] Thus, the court recognized that other courts have used extraterritoriality as a basis for invalidating statutes under strict scrutiny.[89] It

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[83] Egdar v. MITE Corp., 457 U.S. 624 (1982).

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> The Eight Circuit treated the issue of whether a state statute had an "extraterritorial reach" as a separate issue from whether the statute discriminated against interstate commerce. . . . We have no need to determine whether the issue of extraterritorial reach ought to be analyzed distinctly from the issue of discrimination against interstate commerce . . .

National Solid Wastes Management Ass'n v. Meyer, 63 F.3d 652, 662 n. 10 (7th Cir. 1995).

[85] Cotto Waxo Co. v. Williams, 46 F.3d 790 (8th Cir. 1995). In *Cotto Waxo* the Eighth Circuit in fact held that the individual statute at issue in the case did not have extraterritorial reach such that it violated the dormant Commerce Clause. The court remanded the case for further findings of fact under the *Pike* balancing test.

[86] "It may also be correct to say that "extraterritorial reach" is a special example of "directly" regulating interstate commerce . . . we analyze the extraterritorial reach cases separately for purposes of simplicity . . . " *Id.* at 793.

[87] "The practical effect of the Wisconsin legislation is to impose the requirements of Wisconsin law on numerous waste generators who neither reside, nor dispose of their waste in Wisconsin . . . " *Meyer*, 63 F.3d at 661.

[88] *Id.* at 662.

[89] " . . . the Court will not hesitate to strike down a state law shown to have extraterritorial scope and an adverse impact on commerce occurring wholly outside the enacting state." *Id.* at 658.

nevertheless used the concept in a different way, evaluating it under heightened scrutiny, and while disavowing use of the concept as a "distinct issue," created another judicial weapon against state environmental regulation.

The implications of this new weapon are two-fold. First, it shows that courts often confuse language to create new obstacles to regulation for states under the Commerce Clause.[90] Even states with seemingly legitimate interests have regulations based on those interests dismissed by courts who use and develop those new weapons. The result is that new and often innovative attempts to regulate important issues such as the environment are summarily rejected or, as the Court would say, "struck down . . . without further inquiry."[91]

Secondly, the Seventh Circuit's interpretation of the extraterritoriality concept expands the scope of the dormant Commerce Clause. It seems that the concept was first introduced to prohibit states from legislating for other states.[92] The concept of extraterritoriality under *Meyer* is very different. It now says that any law which has any practical extraterritorial effect also has the practical effect of regulating interstate commerce. It is not difficult to imagine laws that will fall under such an analysis. Should a law that simply has a practical extraterritorial effect be deemed also to practically regulate interstate commerce? Putting the merits of Wisconsin's law aside, it seems that such a standard would be much too inclusive and subject a high number of regulatory schemes to Commerce Clause analysis. In an effort to be cautious[93], the Seventh Circuit seems to have taken the extraterritorial effects concept somewhat too far in *Meyer*.

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[90] *See* Regan, *supra* note 81.

[91] Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986).

[92] *See* Regan, *supra* note 81.

> States are forbidden to legislate extraterritorially whether or not the regulation is a regulation of commerce . . . the Court has located the prohibition on extraterritorial state action in the due process clause." Presumably then, extraterritoriality involves a much different analysis than that which courts afford it under the dormant Commerce Clause.

[93] *See supra* note 60.

C. Is Protecting the Environment Considered a Legitimate State Interest Under *Meyer*?

Many Commerce Clause inquiries focus on whether the state has a legitimate local interest in protecting and regulating a given area.[94] The U.S. Supreme Court has often guarded against state interference with interstate commerce, specifically regarding economic isolationism and protectionism.[95] Nevertheless, the Court has recognized that "burdens on interstate commerce may be unavoidable when a state legislates to safeguard the health and safety of its people."[96] Commerce Clause issues often turn on whether legislation actually serves legitimate local interests, or whether it is really economic protectionism in disguise.[97]

Meyer helps to point out that it is unclear whether environmental concerns are truly considered a legitimate local interest by courts who undertake Commerce Clause analyses. Arguably, environmental issues address health and safety concerns, especially regarding disposal of hazardous and medical wastes.[98] One can question whether courts, such as the Seventh Circuit in *Meyer*, actually afford other, less safety-oriented environmental concerns much weight in the analysis.

The U.S. Supreme Court has given lip service to the proposition that environmental protection is considered a legitimate state interest. In *Clover Leaf Creamery*, the Court noted that "[w]hen

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[94] *See supra*, note 51, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

[95] *See* Regan, *supra*.

[96] Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

[97] *See, e.g.*, West Lynn Creamery, Inc. v. Healy, 114 S.Ct. 2205, 2211 (1994) (holding that "[the] 'negative' aspect of the Commerce Clause prohibits economic protectionism— that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors . . . ") (quoting New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273-74 (1988); Fulton Corp. v. Faulkner, 116 S.Ct. 848, 853 (1996) (citing the same case for the same proposition); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981) (holding that "[i]f a state law purporting to promote environmental purposes is in reality 'simple economic protectionism,' we have applied a 'virtually per se rule of invalidity.'") (quoting Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); Oregon Waste Systems, Inc. v. Dept. of Environmental Quality of Oregon, 114 S.Ct. 1345, 1349 (1994) (noting that the framers' purpose for including the Commerce Clause in the Constitution was to prevent "economic Balkanization" among the states); Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788, 797 (3d Cir. 1995) (holding that regulations serving protectionist purposes are a fortiori illegitimate).

[98] *See* Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334, 340-41 (1992) (in which the Court stated that it would "assume New Jersey has every right to protect its residents' pocketbooks as well as their environment" when evaluating an ordinance intended to reduce the flow of hazardous wastes into that state).

legislating in areas of *legitimate local concern*, such as environmental protection and resource conservation, states are nonetheless limited by the Commerce Clause."[99] Therefore, it seems that the environment could be considered a legitimate state interest when courts consider its regulation under the balancing test. Theoretically, given the right "interest" and the right plan, the above hypothesis would be true even though the plan had some effect on interstate commerce.

Implicit in the entire *Meyer* opinion is the assumption that Wisconsin's plan was economic protectionism in disguise. In fact, from the outset of its opinion the court regarded this statute as "state economic regulation under the Commerce Clause."[100] Undoubtedly, courts often have difficultly divorcing legitimate topics of concern from the economy. Similarly, in this instance Wisconsin's scheme would have had an effect on commerce and business. But is Wisconsin's plan in this case really economic protectionism?

In *Meyer*, the court attempted to answer the above question itself. The court recognized Wisconsin's intention in enacting the statute when it noted that "[o]ver the last decade, fewer and fewer solid waste landfills have remained available in Wisconsin to dispose of a steadily increasing amount of waste. In response to this situation, Wisconsin enacted legislation designed to manage the flow of solid waste into its landfills."[101] Therefore, the court recognized that Wisconsin had environmental concerns in mind when it enacted the legislation. Given its willingness to invalidate the law on several Commerce Clause grounds, clearly the court did not consider those concerns to be legitimate.

Specifically, the Seventh Circuit relied heavily on various Commerce Clause cases that did not involve environmental concerns. In particular it relied on *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*[102], *Healy v. Beer Institute*[103], and *Edgar v. MITE Corp.*[104] As noted earlier, those cases involved two states' attempts to regulate liquor sales and another state's attempt

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[99] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981) (emphasis added).

[100] National Solid Wastes Management Ass'n v. Meyer, 63 F.3d 652, 657 (7th Cir. 1995).

[101] *Id.* at 654.

[102] 476 U.S. 573 (1986).

[103] 491 U.S. 324 (1989).

[104] 457 U.S. 624 (1982).

to regulate corporate takeover bidding, respectively.[105] Noting that those cases have little to do with Wisconsin's environmental scheme, the court argued that it did not matter: "Although cases like . . . Brown-Forman Distillers Corp. involved price affirmation statutes, the principles set forth in these decisions are not limited to that context."[106] Much of the court's decision was thus based on price control and other economic Commerce Clause precedent.

Arguably, the "context" the court referred to was that of commerce. There is little doubt that Wisconsin's scheme involves commerce[107], and that many of the same Commerce Clause principles should apply. But the court made clear in this case that environmental regulation stands on equal footing with simple economic price control schemes. At least in this court's opinion, the environment is not any more of a "legitimate" state interest than controlling liquor prices. Thus, although many courts speak to environmental issues as if states have a legitimate right to protect them[108], often they are not afforded much legitimacy.

CONCLUSION

In *National Solid Wastes Management Association v. Meyer*, we see Wisconsin's aggressive attempt to control the flow of solid waste over its borders fall to the dormant Commerce Clause. The statute banned trash containing eleven items from its landfills. The ban did not apply to any region, whether inside or outside of the state, deemed to have an "effective recycling program" by the Wisconsin Department of Natural Resources.

Although this case is generally consistent with a long line of Commerce Clause precedent, it is important for several reasons. Its consistency is not be to taken lightly; the only conclusion to be drawn is that case law about the Commerce Clause is amorphous at best. The Seventh Circuit followed the two-tiered approach espoused in many other cases, but also used the confusing third tier; and in doing so the court exemplified the tendency that many courts have, which is to use a battery of language to defeat states' attempts to

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[105] *See supra* notes 42, 77.

[106] National Solid Wastes Management Ass'n v. Meyer, 63 F.3d 652, 659 (7th Cir. 1995).

[107] Fort Gratoit Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 504 U.S. 353 (1992) (holding that although solid waste has no value *per se*, it is an article of interstate commerce).

[108] *See supra* notes 98, 99 and accompanying text.

regulate legitimate concerns. The court also took another step: it held that a practical extraterritorial effect equals practical regulation in interstate commerce. It did so by recognizing that other circuit courts have used extraterritoriality in relation to strict scrutiny, and essentially created another weapon under the rubric of heightened scrutiny. Now, courts will be able to use seemingly insignificant extraterritorial effects against states with legitimate local concerns.

Significantly, in *Meyer* the court did not stop with its strict and heightened scrutiny analyses; it went on and sealed the state's fate by conclusively deciding the issue under all of the tests available to it. Most importantly, in doing so the court made it clear that environmental regulation is no more legitimate than purely economic interests, and that the state has no more right to regulate in those matters than in any other.

In a day of growing concern for the environment and the need for states to rethink their waste disposal outlooks, courts should give deference to states with true environmental concerns. Various other areas of regulation are afforded special protection when subject to Commerce Clause analysis.[109] We must rethink our analysis of state attempts to gain control of their precious natural resources. The Government must be more lenient toward state environmental regulation, and the most plausible way to do so would be to apply the Pike balancing test to those schemes that are true attempts to protect the environment. Further, under *Pike*, courts should afford environmental concerns the proper amount of legitimacy and proper weight when balancing them against the burdens that they present to interstate commerce. If courts approached Commerce Clause issues with such an attitude, states would truly be able to strike a balance in this area.

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[109] For example, states are often allowed more leeway in regulating the importation and sale of liquor within their boundaries pursuant to the 21st amendment. Though that is true, the Court has begun to limit that ability with the extraterritoriality doctrine. *See* Healy v. Beer Institute, 491 U.S. 324, 342 (1989).