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Comments


I. INTRODUCTION

An increasing number of states are enacting legislation\(^1\) that effectively reduces the volume of hazardous waste\(^2\) imported from out-of-state sources. Ultimately, these states hope to equitably distribute the nation’s hazardous waste problem among all the states.\(^3\) Since Congress has not authorized states to enact such


\(^{2}\) Congress has defined “hazardous waste” as:

- a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—
  - (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
  - (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.


parochial measures, federal courts have overwhelmingly struck down, as a violation of the Commerce Clause, initial state attempts to protect themselves from the dangers of hazardous waste by limiting its importation.

Management’s Petition for Writ of Certiorari at 6-7, Hunt v. Chemical Waste Management, Inc., 584 So. 2d 1367 (Ala. 1991), cert. granted, 112 S. Ct. 964 (1992) (No. 91-471) (Alabama’s Governor Hunt stating that no more environmental bargains will be found in Alabama after signing into law a statute that raised dumping fees from $6 per ton to $112 per ton on out-of-state hazardous waste); State Battles Brew Over Burden-Sharing Waste Management ’90 Special Report, CHEMICAL MARKETING REP., Dec. 10, 1990, at SR12 (noting that California, since the mid-1980s, has discouraged hazardous waste imports by imposing a disposal fee of over $100 on all hazardous waste and establishing stringent treatment regulations) [hereinafter Battles Brew].

4 See infra part V.B.

5 U.S. CONST. art. I, § 8. For a discussion of the Commerce Clause’s limitation on state regulatory power, see infra part III.


Federal courts have also consistently struck down facially discriminatory state statutes that limit the importation of solid waste. See, e.g., City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); National Solid Waste Management Ass’n v. Voinovich, 763 F. Supp. 244 (S.D. Ohio 1991) (differential fee on solid waste that taxed out-of-state solid waste three times more than in-state waste dumped in Ohio’s landfills invalidated on summary judgement), rev’d, No. 91-3466, 1992 WL 38147 (6th Cir. March 4, 1992) (returned to lower court for evidentiary hearing to determine whether inspection costs serve as a compelling state interest); Government Suppliers Consolidating Servs., Inc. v. Bayh, 753 F. Supp. 739 (S.D. Ind. 1990) (differential fee designed to prolong life of Indiana’s landfills and reduce volume of hazardous waste dumped in sanitary landfills violated Commerce Clause because other nondiscriminatory means were available). But see Bill Kettlewell Excavating, Inc. v. Michigan Dep’t of Natural Resources, 931 F.2d 413 (6th Cir. 1991) (upholding Michigan law granting each county the discretion to accept or deny importation of solid waste generated outside the county; out-of-state and out-of-county waste treated similarly), cert. granted sub. nom., Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep’t of Natural Resources, 112 S. Ct. 857 (1992); Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist., 820 F.2d 1482 (9th Cir. 1987) (ban upheld because of compelling interest in preserving life of near-exhausted landfill life until new site located); Harvey & Harvey, Inc. v. Delaware Solid Waste Auth., 600 F. Supp. 1369 (D. Del. 1985) (state waste management plan requiring waste generated in Delaware to be disposed within State); Al Turi Landfill, Inc. v. Town of Goshen, 556 F. Supp. 231 (S.D.N.Y. 1982) (surcharge on out-of-state waste upheld because bears a reasonable relationship to State’s cost of administering program),
The State of Alabama, in an effort to avoid becoming the nation’s dumping ground, recently instituted a hazardous waste tax system that imposes a higher disposal tax on out-of-state hazardous waste.\textsuperscript{7} In 1989, before the enactment of the additional disposal tax, 40,000 truckloads of hazardous waste entered Chemical Waste Management’s\textsuperscript{8} hazardous waste land disposal facility in Emelle, Alabama (Emelle); 36,000 to 38,000 truckloads originated outside the State.\textsuperscript{9} Alabama’s disposal tax scheme has cost Chemical Waste Management over $34 million since its enactment, resulting in a battle between the State and the waste disposal facility.\textsuperscript{10} This battle typifies the hazardous waste issue at the forefront of America’s environmental debate.\textsuperscript{11}


\textsuperscript{8} Chemical Waste Management owns and operates Alabama’s only commercial hazardous waste disposal facility. This facility is located in Emelle, Alabama.


\textsuperscript{10} Chemical Waste Management’s Petition for Writ of Certiorari at 29, Chemical Waste (No. 91-471).

\textsuperscript{11} The hazardous waste controversy has been characterized as a “civil war.” Jonathon R. Stone, Supremacy and Commerce Clause Issues Regarding State Hazardous Waste Import Bans, 15 COLUM. J. ENVTL. L. 1, 1-5 (1990). The battle focuses on the approximately 3.1 million tons of hazardous waste shipped in interstate commerce each year. W. VICTORIA BECKER, NATIONAL GOVERNORS’ ASS’N, LEGAL ISSUES AFFECTING INTERSTATE DISPOSAL 3 (1989). In total, the United States generates approximately 271,000,000 tons of hazardous waste each year. Id. (figures from 1985 EPA report) (citation omitted). The average state sends its waste to 19 other states for waste management services. Solid Waste: Governors’ Panel Reject Management Policy; Controversy Continues Over Interstate Shipping, 22 Env’t Rep. (BNA) 2382 (Feb. 7, 1992) (quoting Pat Payne, President of Chemical Waste Management, Inc.) [hereinafter Controversy Continued]. In 1989, 13 states were net importers of hazardous waste and 37 states were net exporters. 22 Env’t Rep. (BNA) 2356 (Feb. 7, 1992) (listing the hazardous waste import/export status from each state based on National Governors’ Association data from 1989). Alabama, Louisiana, Ohio, Indiana, and South Carolina were the top five net importers, importing a combined total of over 800,000 net tons. Id. Washington, Kentucky, and Pennsylvania were the top three net exporters, exporting a combined total of over 350,000 net tons. Id.

Only twenty commercial hazardous waste land disposal facilities currently operate in the United States. See Andrew Loesel, Border Battles: States Are Hoping to Gain Greater Control of Waste Crossing Their Borders, and Congress May Be Willing to Let Them; Waste Management ’91, CHEMICAL MARKETING REP., Nov. 18, 1991, at SR7; Jeffrey D. Smith, Hazardous
Hunt v. Chemical Waste Management, Inc.\textsuperscript{12} demonstrates the growing hazardous waste conflict between the free trade ideal espoused by the Commerce Clause\textsuperscript{13} and the states' power to protect its citizens and environment. In Chemical Waste, the Alabama Supreme Court analyzed a differential fee statute that requires commercial hazardous waste land disposal operators to pay the State a greater fee, than that imposed on in-state hazardous waste, for disposing out-of-state generated hazardous waste in Alabama.\textsuperscript{14} Chemical Waste Management, Alabama's only commercial hazardous waste facility operator, filed for declaratory relief arguing that the higher disposal tax on out-of-state hazardous waste (Additional Fee) violated the Commerce Clause.\textsuperscript{15} The State, in opposition, claimed that the fee was necessary to equalize

\begin{itemize}
\item 12 584 So. 2d 1367 (Ala. 1991), cert. granted, 112 S. Ct. 964 (1992).
\item 13 For a discussion of the Commerce Clause, see infra part III.
\item 14 Chemical Waste, So. 2d at 1386-90. For a discussion of Alabama's statute, see infra notes 116-27 and accompanying text.
\item 15 Chemical Waste, So. 2d at 1369-70.
\end{itemize}
the burden this waste was placing on Alabama.\textsuperscript{16} The Alabama trial court, ruling in favor of Chemical Waste Management, held that the Additional Fee violated the Commerce Clause because the provision discriminated against out-of-state hazardous waste based solely on the waste's state of origin.\textsuperscript{17} On appeal, the Alabama Supreme Court reversed and upheld the Additional Fee because it served a legitimate local purpose which could not be served by any alternative nondiscriminatory means.\textsuperscript{18} Chemical Waste Management then petitioned the United States Supreme Court for a writ of certiorari to review the Alabama Supreme Court's decision. The Court granted certiorari to decide whether the Additional Fee disposal tax violates the Commerce Clause because it only applies to waste generated outside Alabama.\textsuperscript{19}

Part II of this Comment explains the regulatory framework designed to minimize the risks of hazardous waste. Part III provides an overview of Commerce Clause doctrine and its limit on state regulatory measures which interfere with interstate commerce. Part IV discusses the factual framework in which the Alabama Supreme Court analyzed Alabama's Additional Fee and, also, outlines the Alabama court's analysis in upholding the Additional Fee. Part V initially determines that hazardous waste is an article of commerce subject to Commerce Clause protection. This Part examines the Additional Fee in light of the federal regulatory

\textsuperscript{16} Id. at 1388-90; see Ala. Code § 22-30B-1.1(8) (1990).

\textsuperscript{17} Chemical Waste Management's Petition for Writ of Certiorari at 7-8, Chemical Waste (No. 91-471).


Chemical Waste Management also challenged two other provisions enacted with the Additional Fee. Alabama imposed a uniform tax and a cap on all hazardous waste disposed in Alabama. See infra notes 118-24 and accompanying text. Chemical Waste Management argued that the uniform tax violated the Commerce, Equal Protection, and Due Process Clauses. Chemical Waste, 584 So. 2d at 1376-80. The Alabama Supreme Court upheld the uniform tax against these challenges. For a brief discussion of the court's Commerce Clause analysis, see infra note 129. They also argued that placing a cap on the volume of hazardous waste permitted to be disposed in commercial landfills in Alabama violated the Commerce, Supremacy, Takings, and Due Process Clauses, but the Alabama Supreme Court upheld the Alabama law against these challenges. Chemical Waste, 584 So. 2d at 1380-85. For a brief discussion of the court's Commerce Clause analysis, see infra note 255.

The Supreme Court of the United States granted certiorari only to review the constitutionality of Alabama's Additional Fee provision. This Comment, therefore, will only address the Commerce Clause issues surrounding this law.

framework and concludes that Congress does not authorize states to impede the interstate flow of hazardous waste by imposing an additional disposal tax on out-of-state waste. Part V also analyzes the Additional Fee to determine whether it complies with the Commerce Clause limitation on state regulatory power. After applying a strict scrutiny review to Alabama's facially discriminatory law, Part V concludes that Alabama's higher disposal tax on out-of-state hazardous waste violates the Commerce Clause. Because states housing hazardous waste land disposal facilities cannot rely on additional disposal taxes to equalize the financial burden among all the states, Part VI advocates congressional action. After analyzing the federal and state interests involved, this Part proposes a uniform tax on all hazardous waste generators disposing waste in land disposal facilities.

II. REGULATORY FRAMEWORK FOR HAZARDOUS WASTE

In an exercise of cooperative federalism, federal and state regulations establish a comprehensive, "cradle-to-grave" regulatory scheme designed to ensure that hazardous wastes are handled and disposed in a safe and environmentally sound manner. In 1976, Congress entered the field of hazardous waste regulation by enacting the Resource Conservation and Recovery Act (RCRA). RCRA set standards for hazardous waste generators and hazardous waste treatment, storage, and disposal (TSD) facilities.

The primary objectives of RCRA include:

[(1)] assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment; [(2)] requiring that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date; [(3)] minimizing the generation of hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and

20 Brief for the United States as Amicus Curiae at 2, Chemical Waste (No. 91-471).
23 Chemical Waste, 584 So. 2d at 1381.
To achieve these objectives, RCRA authorizes the administrator of the Environmental Protection Agency (EPA) to “promulgate regulations establishing performance standards . . . as may be necessary to protect human health and the environment.”25 Under this authority, the EPA has established numerous regulations for generators and transporters of hazardous waste and owners/operators of TSD facilities.26

In 1984, Congress amended RCRA primarily to establish its policy that landfilling is the least desirable method of disposing hazardous waste.27 In the legislative history of the RCRA amendment, Congress clearly expressed this policy by stating that “land disposal should be used only as a last resort and only under conditions which are fully protective of human health and the environment.”28 In establishing a comprehensive regulatory scheme for land disposal of hazardous waste, Congress recognized that simply upgrading management standards would not solve the problem.29 Instead, Congress advocated reducing and eliminating the hazard by decreasing hazardous waste generation30 and treating the waste with the best available technology to minimize its toxicity.31

24 § 6902(a)(4)-(6).
25 § 6924(a). Under RCRA, the EPA’s role is to prompt creation of well-managed facilities to replace the unsafe facilities and practices of the past. BECKER, supra note 11, at 8.
26 See generally Wynne & Hamby, supra note 1, at 603-10.
27 Hazardous & Solid Waste Amendments of 1984, Pub. L. No. 98-616, 1984 U.S.C.C.A.N. (98 Stat.) 5576, 5578. “[T]here is a growing body of evidence that land disposal of hazardous waste is not providing, and in some cases cannot provide, protection against groundwater contamination and in many cases poses grave threats to public health and the environment.” Id.
29 Id. at 5589. Fearing that continued reliance on land disposal of hazardous waste threatens the health of Americans, members of Congress advocated placing a direct economic disincentive on land disposal of hazardous waste in RCRA. Hunt v. Chemical Waste Management, Inc., 584 So. 2d 1367, 1382 (Ala. 1991), cert. granted, 112 S. Ct. 964 (1992) (citations omitted).
30 Fearing that failure to act would create future Superfund sites, 1984 U.S.C.C.A.N. at 5579, Congress refocuses its efforts on reducing and eliminating hazardous waste generation and using land disposal only for wastes which will not harm human health and the environment. Id. at 5589.
31 42 U.S.C. § 6924 (1988). This statute authorizes the EPA to promulgate regula-
In addition to establishing an effective hazardous waste management system, RCRA promotes protection of public health and the environment by "establishing a viable Federal-State partnership." Under RCRA, the EPA administrator may authorize states to administer and enforce their own hazardous waste program in place of a program run by the federal government. Within RCRA's partnership scheme, the EPA has the task of establishing minimal national standards for state hazardous waste management plans. RCRA expressly allows a state to impose more stringent requirements than those imposed by federal regulations, but it also constrains the state's power by requiring state regulations to be consistent with federal regulations and those of its sister states.

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33 § 6926. States obtain authorization from the EPA administrator in a three step process: (1) pending authorization: the state assists the EPA in the administration of RCRA's requirements; (2) interim authorization: the state, in lieu of the EPA, has authority to administer and enforce a hazardous waste program pursuant to RCRA for a period specified by the EPA; (3) final authorization: the state has authority to run its own program indefinitely. Id. See generally 42 C.F.R. pt. 271 (1991) (listing EPA's requirements for states to obtain authorization).

As of March 1989, the EPA has authorized 45 states to run their own RCRA programs. See BECKER, supra note 11, at 8.

35 42 U.S.C. § 6926 (1988). "Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations." Id.; see 42 C.F.R. § 271.4 (1991). But see Enesco, Inc. v. Dumas, 807 F.2d 743, 745 (8th Cir. 1986) (acknowledging that state and local governments have authority only to make good-faith adaptations of federal policy to local conditions); Ogden Envtl.Servs. v. City of San Diego, 687 F. Supp. 1436, 1446 (S.D. Cal. 1988) (striking down absolute ban on hazardous waste imports because possible cumulative effect of similar state bans would frustrate federal programs); Stone, supra note 11, at 8-14 (analyzing federal court rulings striking down state waste bans on basis that those bans conflict with special provisions of RCRA and CERCLA); Wynne & Hamby, supra note 1, at 611-16 (same).

36 42 U.S.C. § 6926(b) (1988). In order to receive and maintain authority to manage its own hazardous waste program, the state must meet three "consistency" requirements. The EPA administrator can deny authorization for a state's hazardous waste program if he finds that: "(1) such State program is not equivalent to the Federal program . . . , (2) such program is not consistent with the Federal and State programs applicable in other States, or (3) such program does not provide adequate enforcement of compliance with the requirements of [RCRA]." Id. The EPA has promulgated consistency requirements pursuant to § 6926(b), see 42 C.F.R. § 271.4 (1991), under which a state program may be deemed inconsistent if it unreasonably restricts the free movement of waste across state borders to authorized waste management facilities; prohibits the treatment, storage, or disposal of hazardous waste in that state without proper health and
While Congress created RCRA to regulate hazardous waste from its generation to ultimate disposal, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) to cleanup current hazardous waste sites. To achieve this objective, Congress provides financial responsibility standards for improper hazardous waste disposal. This trust fund, commonly referred to as "Superfund," ensures proper cleanup of hazardous waste sites when responsible parties fail to do so. Federal law gives hazardous waste disposal facility environmental justifications; or fails to comply with the federally mandated system for tracking hazardous waste movement. BECKER, supra note 11, at 8. If the state fails to properly administer its own hazardous waste program, the EPA Administrator may withdraw its authorization of the nonconforming state program and replace it with a federally administered program. § 6926(e).

CERCLA is designed to ensure the cleanup of hazardous waste sites around the nation. CERCLA provides two types of cleanup actions: remedial actions, which are long-term or permanent containment and disposal programs, § 9601(24), and removal efforts, which are usually immediate or short-term actions, § 9601(23).

"CERCLA empowered the executive branch, in consultation with the states, to determine and implement appropriate responses to the public health threat posed by the presence of hazardous wastes in the environment." James R. Buckley, Note, The Political Economy of Superfund Implementation, 59 S. CAL. L. REV. 875, 875 (1986) (exploring history of CERCLA's implementation and analyzing political context of its enforcement).


Congress also enacted SARA to encourage states to overcome internal political pressures and address hazardous waste capacity issues within their own borders. Wynne & Hamby, supra note 1, at 627. SARA requires each state to submit a proposal to the EPA showing that the state has adequate capacity to cover its hazardous waste disposal requirements for the next twenty years. 42 U.S.C. § 9604(c)(9) (1988).
operators responsibility for ensuring containment of the waste within its landfill site. The operators must also provide financial assurance that sufficient funds exist to cover closure costs and post-closure care for thirty years. In addition, CERCLA subjects owners/operators of a hazardous waste land disposal facility, transporters, and generators of waste disposed at that facility to strict, joint and several liability for “all costs of removal or remedial action incurred by a state” in the event of a release from that facility. Also, CERCLA requires hazardous waste transporters to demonstrate sufficient financial responsibility, up to $5 million, to cover the costs associated with remedial efforts for any spills which may occur in transit.

III. COMMERCE CLAUSE/DORMANT COMMERCE CLAUSE FRAMEWORK LIMITS STATES’ ABILITY TO REGULATE INTERSTATE TRADE

The Constitution explicitly grants Congress the power to regulate commerce. However, the Supreme Court has “long recog-

This discussion is only meant to serve as an overview of CERCLA and its objectives. For a more intensive discussion of this topic, see generally National Solid Wastes, 910 F.2d at 716-17; Curry et al., supra, at 366-82; Stone, supra note 11; Wynne & Hamby, supra note 1, at 626-29; Buckley, supra note 38, at 875-88; Carter, supra note 38, at 1152-60.

CERCLA, however, limits liability for generators and hazardous waste land disposal operators to $50 million plus the total cost of the remedial effort. § 9607(c)(1)(D). However, if the release results from willful misconduct, willful negligence, or a violation of applicable safety, construction, or operating standards, the person causing the release is responsible for the total cost of response damages. § 9607(c)(2). The Act also provides defenses to liability including acts of God, war, and exercise of due care (demonstrated by a preponderance of the evidence). § 9607(b).

Furthermore, CERCLA empowers the government to choose which hazardous waste sites it will cleanup and limits the government's financial assistance for these efforts to $2 million, § 9604(c)(1), unless immediate health and environmental risks are present. § 9604(c)(1)(A). Also, the State, in these remedial actions, must pay at least 10% of the cleanup costs and future maintenance. § 9604(c)(3)(C)(i). For a more complete discussion of this system, see Curry et al., supra note 40, at 370-82.


The objective of the Commerce Clause is to promote cooperation among the states in the area of interstate commerce. See H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949) (producers enjoy free access to all markets; free competition protects consumers from exploitation). Otherwise, the Framers feared that the states would continue to compete among themselves as they had under the Articles of the Confederation and as Colonies. See, e.g., Hughes v. Oklahoma, 441 U.S. 322,
nized that it also limits the power of the States to erect barriers against interstate trade. This Court-interpreted doctrine—limiting state regulatory power over interstate commerce is commonly known as the "negative" or "dormant" Commerce Clause. In reviewing state acts that interfere with interstate commerce, courts first determine whether the item affected by the state's action is an article of commerce protected by the Commerce Clause. If the item is an article of commerce, the court must then determine whether Congress has authorized the state to regulate interstate commerce. In the absence of congressional authorization, the court must analyze the regulation under Commerce Clause doctrine. Courts recognize, though, that the Commerce Clause does not present an absolute bar to state regulations. Rather,


47 The dormant Commerce Clause cannot be found in the Constitution's text. Instead, it has gradually emerged through judicial interpretation. See City of Philadelphia v. New Jersey, 437 U.S. 617, 623 (1978) ("The bounds of [the dormant Commerce Clause's] restraint[] appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court giving effect to its basic purpose."); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851) (firmly establishing doctrine in Court's commerce jurisprudence); see also Richard C. Collins, Economic Union As a Constitutional Value, 63 N.Y.U. L. Rev. 43, 47-60 (1988); Regan, supra note 45; Robert A. Sedler, The Negative Commerce Clause As a Restriction on State Regulation and Taxation: An Analysis In Terms of Constitutional Structure, 31 WAYNE L. REV. 885 (1985).

Commentators and Supreme Court Justices alike have criticized the constitutional foundation of the doctrine. See CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 95 (1987) (Scalia, J., concurring) (Court not suited to perform balancing analysis); Martin H. Redish & Shane V. Nugent, The Dormant Commerce Clause and the Constitutional Balance of Federalism, 1987 Duke L.J. 569 (advocating elimination of dormant Commerce Clause doctrine because Constitution does not support it textually and it upsets Constitution's structure for allocating power between federal and state governments).

The doctrine has also been applied in a chaotic and confused fashion since its inception. Jenkins, supra note 39, at 1009 nn.57-58; see Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting) (negative side of Commerce Clause remains hopelessly confused).

48 For a discussion of this analysis as it pertains to hazardous waste, see infra part V.A.

49 For a discussion of this analysis as it pertains to hazardous waste, see infra part V.B.

50 See, e.g., Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 349
courts balance the competing state and federal interests. Using this balancing approach, courts will allow state regulations, legitimately enacted under the state’s inherent police power, to stand as long as the acts remain within the constraints of the Commerce Clause.\(^{51}\)

As noted, initially, the court must determine whether the item affected by the state measure is an article of commerce within the meaning of the Commerce Clause. In *City of Philadelphia v. New Jersey*,\(^{52}\) the Supreme Court established a broad scope of Commerce Clause protection by stating that “[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset.”\(^{53}\) In concluding that solid and liquid waste disposal merits protection,\(^{54}\) the Court rejected the New Jersey Supreme Court’s reliance\(^{55}\) on an earlier opinion, *Bowman v. Chicago & Northwestern Railway*,\(^{56}\) in which the Court concluded that innately harmful articles “are not legitimate subjects of trade or commerce.”\(^{57}\) The *Bowman* Court included in this category items “which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other..."
substances infected with the germs of yellow fever . . . or cattle or meat or other provisions that are diseased or decayed . . . or otherwise . . . unfit for human use or consumption.\textsuperscript{58} However, according to \textit{City of Philadelphia}, \textit{Bowman} simply holds that "because the articles' worth in interstate commerce was far outweighed by the dangers inhering in their very movement, States could prohibit their transportation across state lines."\textsuperscript{59} Therefore, the Court broadly defined the category of "articles" that the Commerce Clause protects,\textsuperscript{60} yet recognized an exception in which states can regulate commerce when the article's potential harm outweighs its value in interstate trade.\textsuperscript{61}

If the item is an article of commerce, Congress has the power, under the Commerce Clause, to authorize state action which would otherwise violate the Clause's underlying ideal of economic unity.\textsuperscript{62} However, removing a state law from Commerce Clause scrutiny requires a clear and manifest intent by Congress to authorize the state's act.\textsuperscript{63} In reviewing state laws that interfere with

\textsuperscript{58} \textit{Id.} (quoting \textit{Bowman}, 125 U.S. at 489); \textit{see also} Baldwin v. C.A.F. Seelig, Inc., 294 U.S. 511, 525 (1935).

\textsuperscript{59} \textit{City of Philadelphia}, 437 U.S. at 622; \textit{see Illinois v. General Elec. Co.}, 683 F.2d 206, 214 (7th Cir. 1982) (state ban on importation of diseased cattle not enacted for affection to local diseased cattle, but hostility is to thing itself regardless of its origin), \textit{cert. denied}, 461 U.S. 913 (1983).


\textsuperscript{61} \textit{See, e.g.}, Maine v. Taylor, 477 U.S. 131 (1986) (upholding state import ban on live baitfish because of its potential environmental threat to Maine's ecological system); Clason v. Indiana, 306 U.S. 439, 442 (1939) (ban on interstate transportation of large dead animals for sanitary purposes with only incidental impact on interstate commerce); Bowman v. Chicago & Nw. Ry., 125 U.S. 465 (1888) (dangerous and noxious subjects do not fall within Commerce Clause's protection).

\textsuperscript{62} \textit{See South-Central Timber Dev., Inc. v. Wunnice}, 467 U.S. 82, 87-88 (1984) (Congress may redefine the distribution of power over interstate commerce by permitting the states to regulate commerce in a manner which would not otherwise be permissible) (citations omitted); White v. Massachusetts Council of Constr. Employers, Inc. 460 U.S. 204, 213 (1983) ("Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce.") (citations omitted); \textit{see also} National Solid Wastes Management Ass'n v. Alabama Dep't of Env'l. Management, 910 F.2d 718, 721 (11th Cir. 1990), \textit{modified}, 924 F.2d 1001 (11th Cir.), \textit{cert. denied}, 111 S. Ct. 2800 (1991).

\textsuperscript{63} The policies underlying the Commerce Clause require Congress to affirmatively contemplate otherwise invalid legislation. \textit{South-Central Timber}, 467 U.S. at 91-92. The Commerce Clause protects unrepresented interests that bear the brunt of a state's regulations. A rule requiring clear expression by Congress ensures that a collective decision has been made that significantly reduces the risks that unrepresented interests will be adversely
interstate commerce, the Court requires congressional authorization to be "expressly stated" or "unmistakably clear" before it will allow the state action to stand.\textsuperscript{4} The Court also recognizes implied congressional authority for state acts that discriminate against interstate trade. In order for the Court to find implied authority, it requires that federal policy be "so clearly delineated that a state may enact a parallel policy without congressional approval, even if the purpose and effect of the state law is to favor local interests."\textsuperscript{6}\textsuperscript{5}

In the absence of congressional authorization, the Court has articulated a balancing approach to analyzing state regulatory measures that interfere with the free interstate trade of articles of commerce.\textsuperscript{6}\textsuperscript{6} Recognizing that the Commerce Clause does not bar all state regulatory measures, the Court weighs the federal interest in maintaining a national common market against the

\begin{itemize}
  \item \textsuperscript{46} See South-Central Timber, 467 U.S. at 91; White, 460 U.S. at 212-13; see also Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781, 792 (4th Cir. 1991); National Solid Wastes, 910 F.2d at 721.

Commentators argue that the Court, in practice, is not following its articulated balancing approach. See Regan, supra note 45, at 1092; Sedler, supra note 47, at 964-68. Instead, the Court focuses on whether or not the state act discriminates against interstate commerce. Regan, supra, at 1092 (court is primarily concerned with purposeful economic protectionism); Sedler, supra, at 965 (Court follows nondiscrimination principle).

state’s local interests. The Court’s opinions suggest that it applies a different level of scrutiny depending on the nature of the act.

67 The Court’s dormant Commerce Clause opinions have consistently “reflected an alertness to the evils of ‘economic isolation’ and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people.” City of Philadelphia, 437 U.S. at 623-24.

68 See Kalen, supra note 51, at 417; Bruce H. Aber, Note, State Regulation of Out-of-State Garbage Subject To Dormant Commerce Clause Review and the Market Participant Exception, 1 FORDHAM ENVTL. L. REP. 99, 105-08 (1989); Jenkins, supra note 99, at 1009-10.

A state may remove its actions from Commerce Clause scrutiny if the state acts as a market participant and not as a market regulator. The Court initially developed this “market-participant” doctrine in Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), when it upheld a Maryland program designed to encourage the recycling of Maryland-titled abandoned cars. Id. at 815-17. When the State modified the program so that it benefitted in-state processors, Alexandria Scrap filed suit claiming that Maryland’s law violated the Commerce Clause. Id. at 800-01. Concluding that Maryland was acting as a market participant, the Court held that the Commerce Clause did not prohibit a state from participating in the market and, in this role, favoring its own citizens over others. Id. at 810.

The Court expanded the doctrine in Reeves, Inc. v. Stake, 447 U.S. 429 (1980). In Reeves, the Court addressed the question of whether South Dakota could limit, during times of shortage, the sale of cement produced at a State-owned facility to South Dakota residents. Id. at 492-33. The Court upheld the State’s selective sale program because South Dakota was acting as a market participant. Id. at 446-47.

However, the Supreme Court, in South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984), demonstrated that the extent of a state’s regulatory power is limited under this doctrine. The Court, in South-Central Timber, invalidated an Alaskan law requiring buyers of state-owned timber to process that timber in Alaska. Id. at 84. The Court found that Alaska was a participant in the “timber” market, but not in the “timber-processing” market. Id. at 95. The market-participant doctrine, according to the Court, only allows a state “to impose burdens on commerce within the market in which it is a participant, but allows it to go no further.” Id. at 97.

With respect to waste disposal, the Supreme Court has not recognized the market-participant doctrine as a method of limiting out-of-state waste. In City of Philadelphia, the Court declined to express an opinion about “New Jersey’s power, consistent with the Commerce Clause, to restrict state residents access to state-owned resources; or New Jersey’s power to spend state funds solely on behalf of state residents and businesses.” City of Philadelphia, 437 U.S. at 627 n.6 (citations omitted).

In response, several federal and state courts, using the market-participant doctrine, have upheld state regulations limiting the disposal of solid waste at state-owned facilities. See Lefrancois v. Rhode Island, 669 F. Supp. 1204 (D.R.I. 1987) (upholding state ban on out-of-state solid waste at state-subsidized facility); Shayne Bros. v. District of Columbia, 592 F. Supp. 1128 (D.D.C. 1984) (upholding health regulation prohibiting disposal of solid waste generated outside of the city at District operated disposal facilities); County Comm’rs of Charles County v. Stevens, 475 A.2d 12 (Md. 1984) (upholding county ban on out-of-state solid waste at county-owned landfill); see also, Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist., 820 F.2d 1482 (9th Cir. 1987) (ban on solid waste originating outside 3-county area did not violate Commerce Clause because it regulated evenhandedly and served legitimate local purpose with only incidental burden on interstate commerce).

For a more detailed discussion of the market-participant doctrine as it pertains to solid waste disposal, see Aber, supra; Jonathon P. Meyers, Note, Confronting the Garbage
If the statute regulates evenhandedly, the Court has adopted a more flexible approach to analyzing the competing interests. The Court will uphold a state regulation "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental." However, the burden imposed on commerce must not be "clearly excessive" in relation to the regulation's putative local benefits.

In contrast to the flexible review given nondiscriminatory state regulatory measures, the Court strictly scrutinizes state measures that discriminate against interstate trade on its face, in purpose, or in effect. For the court to uphold the discriminatory measure, the state must show that (1) the measure serves a legitimate local purpose that (2) cannot be adequately served by reasonable nondiscriminatory alternatives. However, the Court has set a "high" standard that a state must overcome in justifying its action. Effectively, this standard demonstrates the Court's attempt to balance the nondiscriminatory ideal embodied in the Commerce Clause.


70 Pike, 397 U.S. at 142.

71 Id. The Pike Court also noted that once a legitimate local interest has been found, the "clearly excessive" standard becomes one of degree which depends on the type of interest involved and whether the state could promote the local interest with a less discriminatory measure. Id. In Pike, the Court struck down, as a violation of the Commerce Clause, an Arizona law which required Arizona-grown cantaloupes to be packaged and labeled within the state. Id. at 146.


74 Collins, supra note 47, at 109 (primary purpose of Commerce Clause is to promote economic integration and interstate harmony); Sedler, supra note 47, at 893 (Commerce Clause embodies nondiscrimination principle).
against the legitimate, local interests of the state, with the scales weighted heavily against the state.\textsuperscript{75}

In \textit{City of Philadelphia}, the Court demonstrated its position that state measures which discriminate unnecessarily against interstate trade are virtually \textit{per se} unconstitutional.\textsuperscript{76} In this case, the Court struck down a New Jersey law prohibiting the importation of solid or liquid wastes generated outside New Jersey.\textsuperscript{77} The State argued that it designed the ban to protect its citizens and environment from the dangers inherent in solid waste\textsuperscript{78} and rejected the appellants contention that it instituted the ban for economic and financial reasons.\textsuperscript{79} The Court assumed that New Jersey had legitimate interests in protecting "its residents’ pocketbooks as well as their environment,"\textsuperscript{80} but stated that the "evil of protectionism can reside in legislative means as well as legislative ends."\textsuperscript{81}

In analyzing New Jersey’s ban, the \textit{City of Philadelphia} Court stated that the nondiscrimination principle does not permit a state to accomplish its legitimate objectives "by discriminating against

\textsuperscript{75} In \textit{New Energy}, the Court noted that the state must overcome a "high" standard in order to justify its action. \textit{New Energy}, 486 U.S. at 278; cf. \textit{City of Philadelphia}, 437 U.S. at 624 ("[W]here simple economic protectionism is effected by state legislation, a virtually \textit{per se} rule of invalidity has been erected."); \textit{Hughes}, 441 U.S. at 337 ("[F]acial discrimination by itself may be a fatal defect" and "[a]t a minimum . . . invokes the strictest scrutiny."). In \textit{New Energy}, the Court struck down an Ohio statute that provided a tax credit against the Ohio motor vehicle fuel sales tax for each gallon of ethanol sold by fuel dealers, but only if the ethanol was produced in Ohio or in a state granting similar tax advantages for Ohio-produced ethanol. \textit{New Energy}, 486 U.S. at 271. The Court noted that subsidies of domestic industry do not normally violate the Commerce Clause, but subsidies, like this one, designed to give in-state industry an advantage in the marketplace "in connection with the State's regulation of interstate commerce" fall under Commerce Clause scrutiny. \textit{Id.} at 278.

\textsuperscript{76} The Court stated that "where simple economic protectionism is effected by state legislation, a virtually \textit{per se} rule of invalidity has been erected." \textit{City of Philadelphia}, 437 U.S. at 624; see, e.g., \textit{Bacchus Imports, Ltd.} v. \textit{Dias}, 468 U.S. 265, 270 (1984) (stricter rule of invalidity for state legislation that affects simple economic protectionism); \textit{Minnesota v. Clover Leaf Creamery, Co.}, 449 U.S. 456, 471 (1981); \textit{H.P. Hood & Sons, Inc.} v. \textit{Du Mond}, 336 U.S. 525 (1949). According to the Court, the clearest example of economic protectionism occurs when a state law "overly blocks the flow of interstate commerce at a State’s borders." \textit{City of Philadelphia}, 437 U.S. at 624.

\textsuperscript{77} \textit{City of Philadelphia}, 437 U.S. at 629. Before analyzing the State's ban on out-of-state waste, the Court determined that solid waste enjoys Commerce Clause protection. \textit{Id.} at 621-23.

\textsuperscript{78} \textit{Id.} at 626.

\textsuperscript{79} \textit{Id.} at 625-26. The appellants argued that the ban would effectively extend the life of New Jersey's landfill sites and, thus, delay the time when New Jersey would have to transport its own solid waste outside its State. \textit{Id.}

\textsuperscript{80} \textit{Id.} at 626.

\textsuperscript{81} \textit{Id.}
articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.\(^8\)

The Court determined that New Jersey did not have a legitimate reason for treating solid waste generated outside New Jersey differently than in-state generated waste.\(^9\) Because New Jersey had attempted to burden out-of-state solid waste generators with the duty of conserving New Jersey's remaining landfill space,\(^8\) the Court concluded that the State had unconstitutionally "isolate[d] itself from a problem common to many [states] by erecting a barrier against the movement of interstate [solid waste]."\(^8\)

In contrast, the Court in *Maine v. Taylor*\(^6\) allowed Maine to isolate itself from out-of-state baitfish because of its uncertain ecological impact on the State.\(^7\) Accepting the lower court's strict scrutiny analysis,\(^8\) the Supreme Court held that Maine had legitimate reasons, "apart from their origin, to treat [out-of-state baitfish] differently."\(^6\) The lower court determined that Maine's objective was to prevent potential environmental threats to its unique and fragile fisheries posed by out-of-state baitfish.\(^6\) The lower court's findings indicated that out-of-state wild fish contained parasites not natural to Maine's wild fish population and that nonnative fish included in the baitfish shipments could upset Maine's ecological system.\(^9\) However, the lower court did not require Maine to demonstrate to any level of certainty that these

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82 *Id.* at 626-27. In *New Energy*, the Court endorsed this rule by stating that "state statutes that clearly discriminate against interstate commerce are routinely struck down, unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (citations omitted). The *New Energy* Court also noted that if the state regulation discriminates against interstate commerce, the extent of its impact is irrelevant for Commerce Clause purposes. *Id.* at 275-77.

83 The Court found that the harmful health and environmental effects of the two solid waste streams became indistinguishable after being intermixed in the landfill. *City of Philadelphia*, 437 U.S. at 628-29. The Court also rejected the application of the quarantine doctrine because no claim had been made that the very movement of the waste endangers the health of New Jersey's citizens. *Id.*

84 *Id.* at 628. According to the Court, New Jersey may not "accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." *Id.* at 627.

85 *Id.* at 628.

86 477 U.S. 131 (1986).

87 *Id.* at 151-52.

88 The Supreme Court applied a "clearly erroneous" standard to the district court's ruling and factual findings. *Id.* at 145.


90 *Id.* at 140-43.

91 *Id.* at 140-41.
out-of-state elements would actually harm the environment.\textsuperscript{92} Thus, by accepting the lower court's conclusion that legitimate interests exist despite lack of concrete proof, the Court's ruling suggests that it will more readily find a legitimate state interest when that interest relates to environmental or health concerns. In regard to the "nondiscriminatory alternative" prong, the Court recognized that acceptable testing procedures could be developed eventually, but rejected this "abstract possibility" as an available, nondiscriminatory alternative.\textsuperscript{93} A State, according to the Court, "is not required to develop new and unproven means of protection at an uncertain cost."\textsuperscript{94} Thus, the Court accepted the district court's factual finding that satisfactory inspection methods did not presently exist as a less discriminatory alternative to Maine's total ban. Once a discriminatory state measure withstands strict scrutiny, the Commerce Clause's free trade ideal falls to the state's "broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources."\textsuperscript{95}

IV. \textit{Hunt v. Chemical Waste Management, Inc.:} Alabama's Supreme Court Upholds Additional Disposal Fee on Out-of-State Hazardous Waste

A. Factual Framework of Chemical Waste Management, Inc.

The small town of Emelle, Alabama\textsuperscript{96} houses one of the nation's largest hazardous waste landfill facilities.\textsuperscript{97} During the 1980s, the

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\item \textsuperscript{92} \textit{Id.} at 152 (Stevens, J., dissenting) (possibility of ecological effects insufficient to meet state's burden of proof; arguing that "[a]mbiguity about dangers and alternatives should actually defeat, rather than sustain, the discriminatory measure").
\item \textsuperscript{93} \textit{Id.} at 147. Present inspection techniques required destruction of the fish in order to determine whether unwanted parasites were present. \textit{Id.} at 141-42. Removing unwanted species was also determined to be "physically impossible" because of the small size of the baitfish and shipment quantities of approximately 158,000 fish. \textit{Id.} at 141 & n.12.
\item \textsuperscript{94} \textit{Id.} at 147.
\item \textsuperscript{95} \textit{Id.} at 151.
\item \textsuperscript{96} Emelle is located in west-central Alabama and has a population of approximately 66 people. \textit{Rand McNally Commercial Atlas & Marketing Guide} 248 (119th ed. 1988).
\end{itemize}
\end{footnotesize}
yearly volume of hazardous waste disposed at Emelle doubled to 788,000 tons of waste.\textsuperscript{98} Because 85\% to 90\% of the waste permanently disposed at Emelle originated outside Alabama,\textsuperscript{99} Alabama’s executive and legislative branches expressed concern that its State was quickly becoming the nation’s dumping ground for hazardous waste.\textsuperscript{100} Alabama’s Legislature responded by establishing a differential fee structure under which large, commercial hazardous waste land disposal operators paid a substantially higher fee for disposing out-of-state generated waste at their facilities.\textsuperscript{101} Alabama’s Legislature enacted this fee structure in order to equitably offset the permanent risks and costs to Alabama and its citizens from the disposal of out-of-state generated hazardous waste within Alabama and encourage generators to develop methods of eliminating hazardous waste.\textsuperscript{102}

The Emelle facility\textsuperscript{103} is one of only twenty commercial hazardous waste landfills currently operating in the United States.\textsuperscript{104} In 1989, the Emelle facility received approximately 17\% of all the

\textsuperscript{98} Chemical Waste, 584 So. 2d at 1372.

\textsuperscript{99} Id.

\textsuperscript{100} See Ala. Code § 22-30B-1.1(1) (1990); see also National Solid Wastes, 910 F.2d at 717 n.6 (Alabama’s Governor Hunt expressed concern that Alabama was becoming the hazardous waste dump of the nation).

\textsuperscript{101} § 22-30B-2. See infra notes 116-27 and accompanying text for a discussion of Alabama’s hazardous waste fee structure.

Alabama law defines a “commercial” hazardous waste disposal facility as a “site or facility receiving hazardous waste or hazardous substances . . . not generated on site, for disposal and to which a fee is paid or other consideration given for such disposal.” § 22-30B-1(1).

\textsuperscript{102} § 22-30B-1.1(7)-(8).


Chemical Waste Management, Inc. also operates under Alabama state law pursuant to interim status authority granted under Ala. Code § 22-30-12(i) (1990).

\textsuperscript{104} See Smith, supra note 11, at 4-5 (listing states where hazardous waste land disposal facilities are located).
United States’ commercially landfilled hazardous waste. The facility also serves as the ultimate burial ground for over one-third of the waste shipped offsite from Superfund cleanup sites. Only 8.6%, or 69,000, of the 788,000 tons of waste landfilled at Emelle in 1989 were generated in-state. Without any import restrictions, Chemical Waste Management expected Emelle’s yearly hazardous waste disposal tonnage to continue increasing.

The increasing volume of hazardous waste disposed at Emelle creates potential dangers to Alabama’s citizens and environment. The main concern is preventing leachate, a poisonous

106 Chemical Waste Management Petition for Writ of Certiorari at 29, Chemical Waste (No. 91-471) (citing Brief for the United States at 9, National Solid Wastes Management Ass’n v. Alabama Dep’t of Envl. Management, 910 F.2d 713 (11th Cir. 1990), modified, 924 F.2d 1001 (11th Cir.), cert. denied, 111 S. Ct. 2800 (1991)).
107 Chemical Waste, 584 So. 2d at 1375.
108 Id. at 1373. Chemical Waste Management estimates that Emelle has capacity for another 100 years of operation. Id.

Hazardous waste disposed at Emelle includes both hazardous and nonhazardous waste. Generators who send nonhazardous waste to Emelle do so as a precautionary measure to avoid potential future cleanup costs if the EPA expands its definition of hazardous waste. Id. At the present time, the EPA “does not know whether it has identified 10% or 90% of the existing hazardous wastes.” Id. Recently, the EPA expanded its definition of hazardous waste, 40 C.F.R. §§ 261, 264, 265, 271, 302 (1991), increasing the number of materials that must be treated as hazardous waste by four fold. See Wynne & Hamby, supra note 1, at 602-03 n.3 (noting that Texas Water Commission expects new regulations to increase the volume of annually generated hazardous waste from 60,000,000 tons to 180,000,000 to 240,000,000 tons).

Regardless of how the EPA defines hazardous waste, both Chemical Waste Management and the State must treat all buried waste as hazardous when determining the costs of Emelle’s continued monitoring and potential cleanup and the risks to Alabama’s citizens and environment.

109 Chemical Waste, 584 So. 2d at 1373. The court noted that hazardous waste contains materials that are ignitable, corrosive, toxic, and reactive. Id. The court also stated that landfilling is the least desirable method of disposing hazardous waste. See 42 U.S.C. § 6901(b)(7) (1988) (stating the federal policy that land disposal of hazardous waste is the least favored method for managing hazardous waste and should be minimized or eliminated); see also supra notes 27-31 and accompanying text. Landfilling remains popular because it is a relatively inexpensive method of hazardous waste disposal. See Jenkins, supra note 39, at 1001 n.4. Five modern methods of treating hazardous waste are typically used: (1) thermal treatment (using incinerators); (2) immobilization (mixing the waste, either physically or chemically, to prevent the waste from migrating into the groundwater); (3) physical treatment (separating the waste into component waste streams); (4) chemical treatment (altering the chemical composition of the waste so that it is no longer hazardous, or pretreating the waste to make it easier to handle); and (5) biological treatment (using microorganisms to render potentially toxic materials harmless). Id. (citation omitted). Today, 72% of the hazardous waste generated undergoes some type of treatment; 26% is disposed in land facilities; 1% is incinerated; and 1% is recycled. Insti-
liquid, from exfiltrating and poisoning the groundwater and underlying earth. Because scientists have not yet developed an effective scheme for preventing the exfiltration of leachate, landfilling hazardous waste at Emelle creates permanent risks to Alabama’s citizens and environment. In addition, the transportation of increasing volumes of hazardous waste into, or through, Alabama for disposal creates a greater probability of “spills, accidents and explosions that could release toxic fumes and contaminate the groundwater and/or surface water.” Despite elaborate federal and local precautions, transportation of hazardous waste on Alabama’s roads and the operation of Emelle “creates unquantifiable risk or uncertainty to the public health and to the environment” of Alabama.

Alabama’s Legislature also expressed concern about unknown potential dangers related to hazardous waste landfill facilities in its State. In 1975, it established a statewide program to provide safe management of hazardous waste. In the late 1980s, the Legislature became concerned that its State was quickly becoming the nation’s hazardous waste burial ground and responded by enacting Act No. 90-326. The Act imposes a “Base Fee” of $25.60 per ton on operators of commercial hazardous waste landfill sites for

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110 Chemical Waste, 584 So. 2d at 1373-74. Leachate is created by the seepage of groundwater or surface water into the landfill trenches and its mixture with the hazardous waste. Id. The leachate creates a driving force behind the exfiltration of waste from the landfill. Id. The testimony at trial indicated that leakage has already occurred and that annually 10 to 15 million gallons of leachate and surface water are gathered, stored, and transported from Emelle at an annual cost of $2 to $3 million. Id. at 1374.

111 Id. The EPA recognizes that the current method of impeding the migration of hazardous waste, synthetic trench liners, does not absolutely prevent waste from exfiltrating and will only retard migration in the tens of years time range. Id.

Emelle is situated over the Selma Group Chalk Foundation. This Foundation extends across the states of Alabama, Mississippi, Texas, and Arkansas. Id. The chalk has low permeability making it potentially suitable for geological containment of hazardous waste. Id. Leachate is already seeping through the Selma Formation, but the rate of its travel to the uppermost aquifer is uncertain. Estimates range from 330 to 10,000 years. Id.

112 Id. at 1375.

113 Id.


115 Chemical Waste, 584 So. 2d at 1375.

116 Id. at 1372.

all waste disposed at their site. The Act also requires these operators to pay an “Additional Fee” of $72.00 per ton on all out-of-state waste disposed at their site. In conjunction with this differential tax scheme, the Act set a “Cap” on the amount of waste “that can be disposed of at any affected facility in any one-year period.” The benchmark period used by the Legislature coincides with the first year of the new fee system. The Legislature enacted Act No. 90-326 primarily to (1) “encourage business and industry to develop technology that will eliminate the generation of hazardous waste;” (2) protect the health and safety of Alabama’s citizens and its environment; and (3) equitably apportion the financial burden, caused by the presence of commercial hazardous waste facilities in Alabama, between in-state and out-of-state waste generators who dispose their waste at these facilities.

Act No. 90-326 also allocates the funds generated by this tax system. It allocates a maximum of $4.2 million to the county commission in the county where the commercial hazardous waste facility is located. In addition, the Act provides a maximum of $4.5 million for Alabama’s public health finance authority. Finally, the Act gives the remaining proceeds to the State’s general fund for use in general operations.
B. Alabama Supreme Court's Analysis of the Additional Fee

In *Hunt v. Chemical Waste Management, Inc.*,128 Chemical Waste Management filed suit for declaratory relief, challenging the constitutionality of Alabama's differential fee structure.129 The Alabama Supreme Court held that the Additional Fee was "a responsible exercise . . . of [Alabama's] broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources."130 This ruling reversed the trial court's decision which held that Alabama's additional disposal tax on out-of-state hazardous waste violated the Commerce Clause.131

The trial court concluded that *City of Philadelphia* and *National Solid Wastes Management Association v. Alabama Department of Environmental Management*132 compelled the conclusion that the Additional Fee violates the Commerce Clause.133 First, the trial court rejected the State's environmental and safety justifications for treating hazardous waste generated outside of Alabama differently than in-state generated hazardous waste.134 The court stated:

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129 Id. at 1369-70. In addition to challenging Alabama's Additional Fee on out-of-state hazardous waste, Chemical Waste Management also challenged the constitutionality of the State's Base Fee. This fee applied equally to all waste disposed at commercial land disposal facilities in Alabama. Chemical Waste Management argued that the Base Fee violated the Commerce Clause. However, the court applied the *Pike* balancing test and concluded that the Base Fee regulates evenhandedly, without regard to the waste's state of origin. Id. at 1376-78. The court determined that the burden placed on interstate commerce by the Base Fee was not clearly excessive in light of its financial, safety, and environmental objectives. Id. at 1377.
130 Id. at 1389.
131 Id. at 1387.
132 910 F.2d 713 (11th Cir. 1990), modified, 924 F.2d 1001 (11th Cir.), cert. denied, 111 S. Ct. 2800 (1991). In this case, the Eleventh Circuit struck down, as a violation of the Commerce Clause, an Alabama statute that banned the importation of hazardous waste from certain "blacklisted" states. Id. at 725. Relying heavily on *City of Philadelphia*, the Eleventh Circuit found that Alabama's selective ban "distinguishes[d] among wastes based on their origin, with no other basis for the distinction." Id. at 720. For an in-depth analysis of *National Solid Wastes*, see Jenkins, *supra* note 39 (arguing that Alabama's selective ban did not violate Commerce Clause).
133 Id. at 1387.
134 Chemical Waste Management's Petition for Writ of Certiorari at 7, *Chemical Waste
COMMENT—HAZARDOUS WASTE DISPOSAL TAX

[Hazardous waste generated in Alabama is just as dangerous as such waste generated in other states. All of the safety and environmental concerns set forth at trial . . . apply with equal force to hazardous waste generated in and out of the State of Alabama . . . . This Court finds that the record contains no evidence of any difference between in-state waste and out-of-state waste other than the waste's state of origin.135

Second, the court rejected the State's proffered cost justification for the measure.136 The State argued that the Additional Fee fairly apportions the costs associated with commercial hazardous waste disposal facilities located within Alabama between in-state and out-of-state generators. According to the court, the State failed to demonstrate that the Additional Fee equalized the financial burden between these two classes of waste generators or that in-state generators bore a disproportionate share of these costs.137 Thus, the trial court concluded that the Additional Fee unconstitutionally discriminated against out-of-state hazardous waste generators.138

At the beginning of its opinion, the Alabama Supreme Court distinguished City of Philadelphia by stating that it "does not hold that a state may not limit importation of wastes to protect health and the environment; it holds that a state may not do so for 'simple economic protectionism.'"139 According to the Alabama Supreme Court, both City of Philadelphia and National Solid Wastes involved state measures enacted for the purpose of economic protectionism.140 In contrast, the state supreme court concluded that Alabama's enactment of the Additional Fee served a noneconomic objective.141 Thus, Alabama's Supreme Court ruled

(No. 91-471).

135 Id. (quoting lower court's opinion).
136 Id. at 8.
137 Id.
138 Id. at 7.
139 Hunt v. Chemical Waste Management, Inc., 584 So. 2d 1367, 1387 (Ala. 1991), cert. granted, 112 S. Ct. 964 (1992). The Alabama court cited Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981), as support for its interpretation of City of Philadelphia. Id. at 1387-88. In fact, Clover Leaf does not support the Alabama Supreme Court's interpretation. Clover Leaf states that "a state law constitutes 'economic protectionism' on proof of either discriminatory effect or of discriminatory purpose." Clover Leaf, 449 U.S. at 471 n.15 (citations omitted). Therefore, according to Clover Leaf, even if Alabama had a legitimate purpose in enacting the Additional Fee, the fee may still constitute protectionism if its effect is discriminatory.
140 Chemical Waste, 584 So. 2d at 1387.
141 Id. The Legislature's objective, according to the Alabama Supreme Court, was to
that City of Philadelphia did not compel a finding that the fee provision violated the Commerce Clause.\textsuperscript{142}

Instead, the Alabama Supreme Court indicated that it was applying a strict scrutiny level of review to Alabama's Additional Fee provision.\textsuperscript{143} However, because of the court's narrow interpretation of City of Philadelphia, the court effectively applied a deferential standard of review.\textsuperscript{144} The court concluded that the Additional Fee serves a legitimate local interest that could not be adequately served by reasonable, nondiscriminatory alternatives.\textsuperscript{145} To reach its conclusion, the court focused primarily on determining whether legitimate objectives existed and did not strictly analyze whether reasonable, nondiscriminatory alternatives were available.

Instead, it found that the Additional Fee served to equalize the financial burden between in-state and out-of-state generators and protect Alabama's citizens and environment.\textsuperscript{146} The Court stated that the Additional Fee served four purposes:

(1) Protection of the health and safety of the citizens of Alabama from toxic substances; (2) conservation of the environment and the state's natural resources; (3) provision for compensatory revenue for the costs and burdens that out-of-state waste generators impose by dumping their hazardous waste in Alabama; (4) reduction of the overall flow of wastes traveling on the state's highways, which flow creates a great risk to the health and safety of the state's citizens.\textsuperscript{147}

effectively "deal with health and environmental hazards to Alabamians created by hazardous waste imported [into Alabama] from other states." \textit{Id.}

\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.} at 1386 (citing New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 278 (1988)).

\textsuperscript{144} \textit{Id.} at 1387-88. The Alabama Supreme Court interprets the Supreme Court of the United States' decisions as establishing two categories of facially discriminatory state statutes: measures that "discriminate arbitrarily against out-of-state commerce in order to give in-state interests a commercial advantage, i.e., simple economic protectionism, and state measures that seek to protect public health or safety or the environment." \textit{Chemical Waste}, 584 So. 2d at 1387. The court relies on \textit{Maine v. Taylor}, 477 U.S. 131, 148 n.19 (1986), as authority for allowing greater deference for environmental measures than ordinary legislative acts. \textit{Id.} at 1388. The court also cites Rehnquist's dissent in \textit{City of Philadelphia v. New Jersey}, 437 U.S. 617, 629-33 (1978) (Rehnquist, J., dissenting) (considering quarantine case law dispositive of state's authority to ban out-of-state solid waste), as further authority for its position. \textit{Id.}

\textsuperscript{145} \textit{Id.} at 1390.

\textsuperscript{146} \textit{Id.} at 1389. The court also specifically found that Alabama's Legislature did not enact the Additional Fee for the purpose of economic protectionism. \textit{Id.} at 1387.

\textsuperscript{147} \textit{Id.}
To reach this conclusion, the court noted that the wastes dumped at Emelle included known carcinogens and "extremely hazardous" materials that can cause severe medical ailments.148 In addition, the court recognized that exfiltration of wastes from the Emelle facility could pollute Alabama's natural resources, contaminate its drinking water, or enter the food chain.149 The court noted that the probability of exposure from the transportation of hazardous waste on Alabama's roads increases as the volume of waste transported on its roads increases.150 Also, the court expressed its concern that Alabama was quickly nearing its finite capacity for hazardous waste because of the influx of out-of-state generated waste.151 It characterized the Legislature's action as asking out-of-state generators, who dispose their waste in Alabama, to bear the cost of increased environmental and safety risks to Alabama and its citizens.152 Recognizing that the risks associated with the permanently stored hazardous waste would continue forever, the court reasoned that Alabama taxpayers will bear a disproportionate burden of the State's regulatory and monitoring costs for Emelle if it did not uphold the Additional Fee.153

After determining that the Legislature's objectives were legitimate, the court quickly rejected two possible nondiscriminatory alternatives. The court rejected the possibility of returning to the status before the Additional Fee's enactment because Emelle was quickly reaching the limit of its finite capacity.154 The court stated that "nothing in the Commerce Clause . . . compels . . . Alabama to yield its total capacity for hazardous waste to other states."155 Apparently, the court was concerned that the volume of waste disposed within Alabama would continue to increase dramatically without the Additional Fee measure. The court also rejected the second alternative of taxing in-state and out-of-state waste at the same rate. The court felt that a nondiscriminatory tax was not a viable alternative because Alabama "is bearing a grossly

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148 Id. at 1389 (noting that hazardous wastes can cause birth defects, genetic damage, blindness, crippling, and death).
149 Id. at 1373.
150 Id. at 1375.
151 Id. at 1389.
152 Id. at 1388.
153 Id.
154 Id. at 1389. The Alabama Supreme Court's statement seems to contradict the lower court's finding of fact, which the higher court approved, that Emelle has another 100 years of capacity. Id. at 1373.
155 Id.
disproportionate share of the burdens of hazardous waste disposal for the entire country.\textsuperscript{156}

Thus, the Alabama Supreme Court concluded that the Additional Fee serves a legitimate local purpose that cannot be adequately served by reasonable, nondiscriminatory alternatives. As a result, the court held that the Additional Fee did not violate the Commerce Clause and the Legislature properly exercised its regulatory power by using this measure to protect Alabama's natural resources and the health of its citizens.\textsuperscript{157}

V. ALABAMA'S ADDITIONAL FEE DOES NOT WITHSTAND STRICT COMMERCE CLAUSE SCRUTINY

In upholding Alabama's Additional Fee provision, the Alabama Supreme Court failed to analyze the discriminatory measure with the level of review that the Commerce Clause demands. The Clause creates a national economic union that requires the states to "sink or swim" together.\textsuperscript{158} As an article of commerce,\textsuperscript{159} hazardous waste, despite its inherent risks, enjoys Commerce Clause protection to the same extent as other "goods" of interstate commerce. Congress, though, can authorize states to enact measures which interfere with this ideal.\textsuperscript{160} But, Congress has not granted the states authority to impede the interstate flow of hazardous waste.\textsuperscript{161} In the absence of congressional authority,

\begin{footnotesize}
156 Id.
157 Id. at 1390. Quoting almost verbatim from the Supreme Court's holding in Maine v. Taylor, 477 U.S. 131, 151-52 (1986), the Alabama court held:

that the Additional Fee provision of Act No. 90-326 is not invalid under the Commerce Clause of the United States Constitution. The Additional Fee does not needlessly obstruct interstate trade or attempt to place Alabama in a position of economic isolation. It merely retains Alabama's broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources. The evidence in this case amply supports the conclusion that the Additional Fee serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives. This is not a case of arbitrary discrimination against interstate commerce; the record suggests that Alabama has legitimate reasons, apart from their origin, to treat out-of-state wastes differently.

Chemical Waste, 584 So. 2d at 1390.
158 Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935). The full quote reads: "[The Constitution] was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." Id.
159 See infra notes part V.A.
160 See supra notes 62-65 and accompanying text.
161 See infra part V.B.
\end{footnotesize}
Alabama's discriminatory measure is subject to Commerce Clause review. Alabama's measure does not withstand a proper strict scrutiny review; reasonable alternatives to the Additional Fee exist which attain the Legislature's objective of protecting Alabama's citizens and environment as well as equitably distributing the facility's financial burden. At the same time, these reasonable alternatives prevent Alabama from effectively "weighing down" the safe, efficient disposal of the nation's hazardous waste.

A. Hazardous Waste Qualifies as an Article of Commerce

To determine whether Alabama's Additional Fee is unconstitutional, one must initially determine whether hazardous waste is an article of commerce subject to Commerce Clause protection. In Chemical Waste, the Alabama Supreme Court questions whether hazardous waste falls within the scope of "commerce" defined by the Commerce Clause. Although the Supreme Court of the United States has not expressly concluded that the Commerce Clause protects hazardous waste as an article of commerce, federal judicial decisions strongly suggest that the traditional interpretation of "commerce" does include hazardous waste.

In analyzing the extent of the Commerce Clause's protection, City of Philadelphia, focusing on the transportation and disposal of solid waste, suggests that articles of commerce include all waste types. However, the transportation and disposal of hazardous waste contains significantly greater risks to human health and the environment. Scientists recognize that hazardous waste contains "poisonous chemicals that can cause cancer, birth defects, genetic damage, blindness, crippling, and death." Looking solely at hazardous waste and its known dangers, it seems to fall within the Bowman quarantine exception as defined in City of Philadelphia.

Despite its potential for causing significant harm, the Eleventh Circuit, in National Solid Wastes Management Association v. Alabama

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162 See infra part V.C.
163 The Alabama Supreme Court assumed that hazardous waste was an article of commerce for the purposes of its analysis. Hunt v. Chemical Waste Management, Inc., 584 So. 2d 1367, 1387 (Ala. 1991), cert. granted, 112 S. Ct. 964 (1992). Justice Houston, in a concurring opinion, expressed that the Commerce Clause should not protect hazardous waste as an article of commerce. Id. at 1390-91 (Houston, J., concurring).
164 See supra notes 52-61 and accompanying text.
165 Chemical Waste, 584 So. 2d at 1389; see also National Solid Wastes, 910 F.2d at 718-19.
166 For a discussion of this exception, see supra notes 57-61 and accompanying text.
Department of Environmental Management, explicitly held that hazardous waste is an article of interstate commerce, falling under the Commerce Clause’s protection. To reach its conclusion, the court determined that the quarantine exception did not apply because the “dangers associated with hazardous waste movement do not outweigh the value of moving hazardous waste across state lines.” Congress’ comprehensive hazardous waste regulatory scheme played a key role in the court’s decision. According to the court, hazardous waste only causes health risks when improperly treated, stored, transported, or disposed. The court suggests that improper handling of hazardous waste will occur infrequently due to the comprehensive regulatory scheme in place.

While a comprehensive regulatory scheme reduces its potential dangers, hazardous waste plays a substantial role in interstate commerce. Efficient, safe, and inexpensive disposal of hazardous waste is essential for competitive trade in the primary product’s market, as well as the landfill services market. A recent federal circuit court acknowledged the role of waste disposal in interstate trade: “The efficient disposal of wastes is as much a part of economic activity as the production that yields the wastes as a byproduct...” The sale price of the primary product includes

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169 National Solid Wastes, 910 F.2d at 719.
170 Id. (interpreting Congress’ hazardous waste definition in 42 U.S.C. § 6903(5) (1988)). For the text of Congress’ definition of hazardous waste, see supra note 2.
171 National Solid Wastes, 910 F.2d at 719. The scheme is designed to minimize risks to the public and environment by requiring waste generators, transporters, and managers to strictly comply with these regulations. Id. For a discussion of the extent of the regulatory scheme for hazardous waste, see supra part II.
173 Illinois v. General Elec. Co., 683 F.2d 206, 213 (7th Cir. 1982), cert. denied, 461 U.S. 913 (1983). General Electric dealt with an Illinois ban on the importation of spent nuclear fuel for disposal at a facility located in Illinois. Id. The Seventh Circuit struck down the measure noting that the ban did not prohibit intrastate movements of nuclear fuel used in Illinois nor did it prohibit the transportation of fuel through Illinois for disposal in another state. Id.
costs associated with disposal of unwanted byproducts, like hazardous waste. Parochial impediments to efficient disposal of these wastes, therefore, will directly alter the delicate balance of interstate commerce. In effect, interference with the disposal of the unwanted byproduct will adversely affect the competitiveness of the primary product in interstate commerce.\textsuperscript{174}

The service market of commercial hazardous waste disposal is becoming very competitive.\textsuperscript{175} Businesses are increasingly focusing on minimizing hazardous waste generation by modifying production processes and implementing waste minimization plans to reduce the costs associated with hazardous waste disposal.\textsuperscript{176} As the volume of hazardous waste decreases, these disposal companies will have to market their services to a broader geographic area.\textsuperscript{177} Barring any parochial impediments, the hazardous waste service market will increase the efficiency and decrease the expense of hazardous waste disposal.\textsuperscript{178}

\textsuperscript{174} See, e.g., General Electric, 683 F.2d at 213 ("[T]o impede the interstate movement of [nuclear] wastes is as inconsistent with the efficient allocation of resources as to impede the interstate movement of the product that yields them.").

\textsuperscript{175} See Smith, supra note 11, at 1 (predicting increased competitiveness in commercial hazardous waste landfill services).

\textsuperscript{176} Businesses are recognizing that complying with environmental regulations has become costly and time consuming. For example, TRW spends $20 million per year to manage its hazardous materials. Debra Polsky, Defense Firms Explore Environmentally Safe Ways of Cutting Waste, DEFENSE NEWS, July 8, 1991, at 5. In the defense industry, Northrup has set a corporate goal of reducing its hazardous waste generation 90\% by 1996, and Martin Marietta has already reduced its generation of hazardous waste 80\%. Id.

\textsuperscript{177} Other industries are embarking on similar waste minimization efforts. J. Winston Porter, Cutting Pollution at the Source, THE CHRISTIAN SCIENCE MONITOR, July 1, 1991, at 18. With these efforts, companies are increasing their productivity and lowering their costs. Id. 3M, for example, has saved over $435 million as a result of its "Pollution Prevention Pays" program. Crim, supra note 11, at 133. Amoco has saved over $100 million in a similar program, "Responsible Care," which sets zero as its goal: zero accidents, zero hazardous waste, zero emissions, and zero environmental and safety citations. Gregory Morris, Responsible Care: Amoco, CHEMICAL WEEK, July 17, 1991, at 74.

These programs are also impacting the volume of waste sent to commercial hazardous waste landfills. Smith, supra note 11, at 1. In fact, some companies have cut the volume of waste sent to hazardous waste land disposal facilities by 50\%. Id.

\textsuperscript{178} Hazardous waste land disposal facilities are expanding their services and aggressively pursuing cleanup of Superfund and state hazardous waste sites. Id. at 6-7. In fact, the industry considers remedial efforts of the nation's hazardous waste sites as the key
The national common market concept relies on the trading of goods, but the production of these goods necessarily generates unwanted byproducts, like hazardous waste. Parochial state efforts that impede the free flow of these byproducts are tantamount to interfering with interstate trade of the primary product. With respect to hazardous waste, the Bowman quarantine exception does not apply; unimpeded interstate flow of hazardous waste adds value to interstate commerce while the regulatory scheme significantly reduces its dangers. Thus, given the presumption that all objects of interstate trade merit Commerce Clause protection, hazardous waste should receive the same level of protection given to the interstate trade of a "good."

B. Federal Hazardous Waste Regulatory Scheme Does Not Authorize Alabama's Additional Fee

The Commerce Clause grants virtually unquestioned power to Congress to regulate commerce among the states. With this power, Congress can authorize states to enact legislation which would otherwise violate the Commerce Clause. The Court, however, requires Congress to give an unambiguous indication of its intent to authorize the states to enact laws that adversely affect interstate commerce. Congress has established a national program, through RCRA, for regulating hazardous waste that relies on full integration of state-authorized hazardous waste programs. Federal courts, reviewing state actions limiting hazardous waste imports, conclude that Congress does not authorize the states, under either RCRA or CERCLA, to take action that would other-

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179 See supra notes 56-59 and accompanying text.
180 See supra notes 52-61 and accompanying text.
181 See cases cited supra note 62.
185 Hazardous Waste, 945 F.2d at 795; National Solid Wastes Management Ass'n v.
wise violate the Commerce Clause. Therefore, Alabama cannot rely on these measures as a basis for removing its Additional Fee from Commerce Clause scrutiny.

RCRA seeks to ensure that hazardous wastes are handled and disposed in a safe, environmentally sound manner. To achieve this objective, Congress allows, through EPA authorization, states to implement their own hazardous waste management program in lieu of the federal program. Once a state obtains authorization, nothing in RCRA prohibits the state from imposing more stringent requirements than the federal standards. However, the scope of this authorization is limited. Because Congress intended these state programs to become integrated into a national program of hazardous waste control, the state’s program must be “equivalent to” and “consistent with” the federal program, as well as those of its sister states.

The consistency criteria are designed to prevent state actions which limit, directly or indirectly, the importation of hazardous waste. According to the EPA, state programs are inconsistent when

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

(b) [a]ny aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste . . . ; and

(c) [i]f the State manifest system does not meet the [proper] requirements . . . 

Alabama’s Additional Fee contradicts the consistency requirements established by Congress. Since the fee’s enactment, waste disposal at Emelle has dropped 50%.\(^\text{192}\) Thus, the fee clearly acts as an indirect ban on the interstate movement of hazardous waste and interferes with Congress’s objective of disposing hazardous waste in a safe, environmentally sound manner. Congress has not authorized states to act in this manner.

CERCLA also does not demonstrate congressional intent to redistribute its power over interstate commerce. CERCLA’s primary purpose is the prompt cleanup of hazardous waste sites.\(^\text{193}\) Chemical Waste Management’s Emelle facility plays a vital role in achieving this objective.\(^\text{194}\) Emelle receives one-third of the waste materials shipped offsite from Superfund cleanup sites.\(^\text{195}\) Alabama’s Additional Fee reduces the effectiveness of CERCLA by increasing cleanup costs.\(^\text{196}\) It also undermines the goals of safe disposal of hazardous waste and prompt cleanup of hazardous waste sites by erecting a barrier around the State of Alabama.\(^\text{197}\)

Alabama cannot rely on CERCLA’s disposal capacity requirements as congressional authorization for its Additional Fee. CERCLA section 104(c)(9)\(^\text{198}\) requires each state to provide the

\(\text{of hazardous waste is automatically inconsistent. Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781, 793 (4th Cir. 1991) (citing 45 Fed. Reg. 53,395 (1980)). The Fourth Circuit interprets this explanation as indicating that the EPA would refuse to authorize a state’s program if any aspect would prove unconstitutional under the Commerce Clause. Id. In a later statement, the EPA indicates that section 271.4 only prohibits states with authorized programs from implementing unreasonable restrictions or impediments. Id. at 794 (citing 50 Fed. Reg. 46,439 (1985)). The EPA also indicates that it is not required to use the Constitution’s or Congress’s test for consistency. Id.; see 50 Fed. Reg. 46,437 (Nov. 8, 1985) (EPA permitting South Carolina to impose $5 greater fee on out-of-state hazardous waste because it did not unreasonably restrict movement of hazardous waste). The Fourth Circuit noted that EPA statements do not control in determining whether a state law is consistent or not, only the Constitution and Congress do. Hazardous Waste, 945 F.2d at 794.}\)

\(\text{192 Chemical Waste Management’s Petition for Writ of Certiorari at 29, Chemical Waste (No. 91-471); Loesel, supra note 11, at SR7; U.S. Calls for End to Alabama Waste Tax, ENGINEERING NEWS, Jan. 20, 1992, at 35 [hereinafter Alabama Waste Tax].}\)


\(\text{194 See Chemical Waste Management’s Petition for Writ of Certiorari at 2, Chemical Waste (No. 91-471).}\)

\(\text{195 Id. at 2 (quoting Brief for the United States at 9, National Solid Wastes Management Ass’n v. Alabama Dep’t of Envl. Management, 910 F.2d 713 (11th Cir. 1990), modified, 924 F.2d 1001 (11th Cir.), cert. denied, 111 S. Ct. 2800 (1991)).}\)

\(\text{196 Congress expressed concern that increased costs of interstate waste management would lead to creation of additional Superfund sites. Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781, 784 (4th Cir. 1991) (citation omitted).}\)

\(\text{197 See supra part II.}\)

\(\text{198 Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C.} \)
EPA with assurance that it has a twenty-year capacity for its hazardous waste.\textsuperscript{199} Congress places the burden of capacity assurances on the generating state.\textsuperscript{200} If that state fails to provide the necessary assurances, Congress only denies Superfund money to that state.\textsuperscript{201} It does not impose the sanction of requiring recalcitrant states to live in environmentally unsafe conditions.\textsuperscript{202} Congress, therefore, has not authorized the states to restrict the free movement of hazardous waste into the state in order to satisfy capacity requirements.\textsuperscript{203}

Alabama's Additional Fee interferes with safe, efficient disposal of hazardous waste. Congress, through its broad regulatory scheme, has not clearly demonstrated its intent to expand the limits of states' regulatory power otherwise imposed by the Commerce Clause. If Congress intends to allow state restrictions on hazardous waste, it still could plainly say so.\textsuperscript{204}

\section*{C. Strict Review of Alabama's Additional Fee}

In the absence of congressional authorization for state discriminatory regulations on interstate commerce, hazardous waste, as an article of commerce, falls under the Commerce Clause's broad protection against parochial state regulations. \textit{City of Philadelphia}, the seminal Commerce Clause waste disposal case, compels the finding that Alabama's additional disposal tax violates the Commerce Clause because Alabama's law violates the Court's artic-

\begin{itemize}
  \item \textsuperscript{199} 42 U.S.C. § 9604(c)(9) (1988).
  \item \textsuperscript{200} Id.; see \textit{Hazardous Waste}, 945 F.2d at 784-85, 794-95 (capacity assurances designed to ensure, in theory, that no future cleanup sites arise because sufficient capacity will exist somewhere).
  \item \textsuperscript{201} 42 U.S.C. § 9604(c)(9) (1988). All 50 states have submitted capacity assurance plans (CAPs) to the EPA. Loesel, supra note 11, at SR7. Of the 47 plans which have been approved, almost all of them were part of interstate agreements. \textit{Id.} (quoting Jackie Tenusak, chief of EPA's CAP section).
  \item \textsuperscript{202} \textit{Hazardous Waste}, 945 F.2d at 785, 795.
  \item \textsuperscript{203} See cases cited supra note 184-85.
  \item \textsuperscript{204} See \textit{National Solid Wastes}, 910 F.2d at 721-22. In the area of low-level radioactive waste, Congress has demonstrated that it knows how to use express language to allow states to interfere with the free flow of waste. Under the Low-Level Radioactive Waste Policy Act of 1980 (LLRWPA), 42 U.S.C §§ 2021b-2021j (1988), Congress encouraged interstate disposal compacts for the establishment and operation of low-level radioactive waste facilities. § 2021d. The Act, which predates SARA, authorizes approved compacts to bar wastes generated outside the states comprising that compact.\textsuperscript{201} For a comparison of LLRWPA and CERCLA, see Stone, supra note 11, at 25-30 (advocating LLRWPA as a model program for hazardous waste disposal).
\end{itemize}
ulated nondiscriminatory principle.\textsuperscript{205} Even if \textit{City of Philadelphia} does not compel this conclusion, Alabama's Additional Fee cannot withstand the strict Commerce Clause review given to discriminatory state regulatory measures. Although the Commerce Clause's limitation on state regulatory power "is by no means absolute,"\textsuperscript{206} the state's burden of justification is heavy. In its analysis, the Alabama Supreme Court uses the proper words, but fails to apply the level of scrutiny that the Supreme Court demands when reviewing state laws that facially discriminate against interstate commerce. This failure is due to the Alabama Supreme Court's misapplication of \textit{Maine v. Taylor}.\textsuperscript{207} In reality, Alabama has not met its burden of proof. Assuming that the Additional Fee serves legitimate local objectives,\textsuperscript{208} reasonable, nondiscriminatory alternatives to Alabama's higher disposal tax on out-of-state hazardous waste exist.

1. \textit{City of Philadelphia} Compels the Finding that the Additional Fee Violates the Commerce Clause

The \textit{City of Philadelphia} opinion demonstrates the nondiscrimination principle that governs interstate commerce.\textsuperscript{209} The Court, under this principle, prohibits a state from treating domestic and foreign articles of commerce differently unless some reason, apart from their origin, exists to treat them differently. The Alabama Supreme Court concludes that Alabama has financial, health, and environmental reasons for treating out-of-state hazardous waste differently.\textsuperscript{210} In reality, these reasons do not present an adequate basis for Alabama's discriminatory treatment of out-of-state hazardous waste. The State fails to demonstrate that Alabama suffers a disproportionate financial burden from out-of-state hazardous waste that necessitates a greater disposal tax on that waste.\textsuperscript{211} Instead, a uniform tax on all hazardous waste would off-

\textsuperscript{205} See supra notes 66 & 76-85 and accompanying text.
\textsuperscript{207} 437 U.S. 131 (1986).
\textsuperscript{208} See supra note 147.
\textsuperscript{209} See supra notes 66 & 76-85 and accompanying text.
\textsuperscript{211} See supra notes 136-38 and accompanying text. The Supreme Court, in Commerce Clause cases, places the burden on the state to justify its regulatory measure both in terms of local benefits and nondiscriminatory alternatives. See, e.g., Maine v. Taylor, 477 U.S. 131, 152-53 (1986) (Stevens, J., dissenting); Hughes v. Oklahoma, 441 U.S. 322, 336 (1979); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 354 (1977);
set Alabama's financial burden because of the disposal of in-state and out-of-state hazardous waste in Alabama. Public health and environmental concerns also do not provide sufficient foundation for Alabama's discriminatory measure. Hazardous waste, regardless of its source, presents the same health, safety, and environmental concerns. Because in-state and out-of-state hazardous waste are not sufficiently different, *City of Philadelphia* compels the finding that the Additional Fee violates the Commerce Clause's nondiscrimination principle and, therefore, is unconstitutional.

The Alabama Supreme Court, however, attempts to distinguish *City of Philadelphia* by narrowly interpreting its holding. According to the Alabama Supreme Court, *City of Philadelphia*’s holding only applies to state statutes enacted for simple economic protectionism and does not apply to statutes motivated by noneconomic objectives, such as protection of public health, safety, or the environment. Thus, based on its misinterpretation of *City of Phila-

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212 *See infra* notes 241-246 and accompanying text.


214 *See supra* notes 139-45 and accompanying text.


The court also distinguishes *National Solid Wastes*’ ruling on similar grounds. The Eleventh Circuit, in *National Solid Wastes* held that Alabama’s selective ban on out-of-state hazardous waste, commonly known as the Holley Bill, violated the Commerce Clause because it did “not distinguish on the basis of type of waste or degree of dangerousness, but on the basis of the state of generation.” National Solid Wastes Management Ass’n v. Alabama Dep’t of Envtl. Management, 910 F.2d 713, 721 (11th Cir. 1990), modified, 924 F.2d 1001, cert. denied, 111 S. Ct. 2800 (1991). Relying on this quote, the Alabama Supreme Court, in *Chemical Waste*, interprets the Eleventh Circuit’s holding as characterizing the Holley Bill as a measure designed for the purpose of economic protectionism, *Chemical Waste*, 584 So. 2d at 1387. In contrast, the Alabama Supreme Court characterizes Act No. 90-326, containing the Additional Fee provision, as a measure “specifically found by the legislature to be an effective way to deal with health and environmental hazards to Alabamians created by hazardous waste imported . . . from other states.” *Id.*

The court’s attempt to distinguish the Holley bill fails. The legislative findings of both pieces of legislation reflect the same intentions and objectives. *Compare* 1989 Ala. Acts No. 89-788 § 1(8) to (14) (1989) (motivated by fear of increasing volumes of out-of-
the objectives motivating Alabama's differential fee structure with those served by New Jersey's import ban. Yet, the Court, in City of Philadelphia, clearly indicates that the Commerce Clause limits state acts which discriminate against interstate trade in their effect, regardless of the legislative purpose underlying the statute. Subsequent court decisions clearly demonstrate that the Commerce Clause limits the state's ability to achieve noneconomic objectives, such as resource conservation and environmental protection, by enacting legislation which discriminates against interstate commerce.

Thus, distinguishing City of Philadelphia on an economic/noneconomic basis is untenable. In addition, state acts motivated by noneconomic reasons can still result in economic protectionism of in-state concerns. Alabama's Additional Fee essentially protects in-state hazardous waste generators, in direct contradiction with City of Philadelphia.

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state hazardous waste, desire for distributing the financial burden caused by this waste, and interest in protecting its citizens and environment) with ALA. CODE § 22-30B-1.1(1) to (8) (motivated by increase in volume of out-of-state hazardous waste, desire for distributing the financial burden caused by this waste, interest in protecting its citizens and environment, and encourage industry to eliminate hazardous waste generation).

216 See supra notes 140-42 and accompanying text.

217 "The evil of protectionism can reside in legislative means as well as legislative ends. Thus, it does not matter whether the ultimate aim of [New Jersey's ban] is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment." City of Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978).

218 See New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 279 n.3 (1988) (subjective purpose of protecting public health, even if true, "inadequate to validate patent discrimination against interstate commerce"); Maine v. Taylor, 477 U.S. 131, 148 n.19 (1986) (City of Philadelphia rule applies "not only to laws motivated by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade"); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1980) ("When legislating in areas of legitimate local concern, such as environmental protection and resource conservation, States are nonetheless limited by the Commerce Clause.") (citations omitted); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 350 (1977) ("[F]inding that state legislation furthers matters of legitimate local concern, even in the health and consumer protection areas, does not end the inquiry. Such a view, we have noted, 'would mean that the Commerce Clause of itself imposes no limitations on state action . . . save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods.") (quoting Dean Milk Co. v. Madison, 397 U.S. 349, 354 (1951)); National Solid Wastes, 910 F.2d at 725 (noting that Alabama's honorable intentions in attempting to come to grips with its environmental problems do not remove its laws from Commerce Clause scrutiny).

219 The Court has invalidated state statutes because of an economic protectionist effect. See cases cited supra 72.
Because of Alabama’s higher tax on foreign hazardous waste, domestic hazardous waste generators enjoy a preferred right of access to commercial hazardous waste land disposal facilities located in Alabama over those generators located in other states.\(^{220}\) In effect, Alabama places the burden of conserving its natural resources on out-of-state hazardous waste generators while exempting in-state generators. As a result, in-state businesses gain a competitive advantage over foreign businesses in the primary product and land disposal markets.\(^{221}\) Alabama’s Additional Fee, thus, results in economic protectionism. According to the Court, “where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected.”\(^{222}\)

2. Alabama’s Additional Fee Does Not Withstand Strict Commerce Clause Review

Even if City of Philadelphia does not compel the conclusion that Alabama’s Additional Fee violates the Commerce Clause, the law must still withstand strict Commerce Clause scrutiny. Alabama’s Supreme Court relies on Maine v. Taylor\(^ {223}\) as authority for its position that “environmental measures are entitled to greater deference than ordinary legislative acts.”\(^ {224}\) The Alabama Supreme Court’s interpretation is supported by the fact that the Taylor Court seems to defer to Maine’s proffered environmental justification for the total ban on out-of-state baitfish.\(^ {225}\) The Court stat-

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\(^{220}\) See City of Philadelphia, 437 U.S. at 627 (“a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders”).

The Fourth Circuit noted that it is better that the burden of hazardous waste disposal and treatment fall disproportionately among the states than that future Superfund sites are created. Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781, 792 (4th Cir. 1991); cf. Illinois v. General Elec. Co., 683 F.2d 206, 214 (7th Cir. 1982) (nuclear waste disposal should be stored without regard to parochial interests of the state), cert. denied, 461 U.S. 913 (1983).

\(^{221}\) See supra notes 172-80 and accompanying text.

\(^{222}\) City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (citations omitted); see supra notes 75-76 and accompanying text; see also Regan, supra note 45, at 1269 (stating that the City of Philadelphia Court recognizes that protectionist motivation of any feature of a statute makes that statute unconstitutional).

\(^{223}\) 477 U.S. 131 (1986).


\(^{225}\) Taylor, 477 U.S. at 152-53 (Steven, J., dissenting) (arguing that presumption that possible presence of parasites and nonnative species in out-of-state baitfish shipments could cause ecological impact should run against state). The majority opinion, however,
ed that "Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible." Similarly, Alabama has a legitimate interest in protecting its citizens and natural resources from unquantifiable risks associated with hazardous waste disposal, even though the comprehensive regulatory scheme may negate those risks.

In contrast to the deference given to the existence of legitimate interests, the Taylor opinion does not permit a less-than-strict scrutiny of the means used to achieve those health, safety, and environmental objectives. The Court strictly scrutinizes Maine's total ban on out-of-state baitfish and determines that reasonable, alternative inspection techniques did not exist. Therefore, lies squarely on the proposition that out-of-state baitfish were in fact different from in-state species and posed substantial danger to Maine's delicate ecological balance. In contrast, in-state and

states that Maine's proffered justification must survive the strictest scrutiny. Id. at 144.

In the area of transportation safety, the Court has expressed a deferential standard of review to state measures. See Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 675 (1981) (recognizing 'special deference' to highway safety regulations); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 443-44 (1977) (challengers of "state regulations said to promote highway safety must overcome 'a strong presumption of [their] validity.'") (citing Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 524 (1959)). The Court's deference to state highway safety regulations derives in part from an assumption that the regulations apply evenhandedly and the burdens placed on local economic interests will act as a political check against burdensome regulations. See Kassel, 450 U.S. at 675-76; Raymond Motor, 434 U.S. at 444 n.18. Its deferential policy also derives from the fact that states have primary responsibility for construction, maintenance, and policing their highways and that highway conditions vary among the states. See Kassel, 450 U.S. at 675-76; Raymond Motor, 434 U.S. at 444 n.18.

Alabama's Additional Fee does not fulfill these policy requirements for affording deferential review. The fee facially discriminates against out-of-state hazardous waste generators; it does not serve as a political check because in-state generators enjoy a competitive advantage in both the primary product and waste disposal costs. See supra notes 172-80 and accompanying text. Also, hazardous waste disposal conditions do not vary among the states, unlike highway conditions, because of the comprehensive hazardous waste regulatory scheme in place, see supra Part II, and the consistency requirements ensure that the state schemes are similar. See supra notes 34-36, 181-90 and accompanying text.

Taylor, 477 U.S. at 148.

Id. at 140.

Id. at 146-47 (scientifically accepted techniques for sampling and inspecting live baitfish not available).

In Taylor, Maine banned the importation of out-of-state baitfish because they contained parasites "not common to wild fish in Maine," and shipments of these baitfish could include nonnative Maine species that "could disturb Maine's aquatic ecology to an unpredictable extent." Id. at 141-43.

Taylor demonstrates that not all barriers to interstate trade are protectionist, id. at 148 n.19, and that the Commerce Clause does not guarantee the right to import into a
out-of-state hazardous waste do not have similar distinguishing characteristics. Regardless of where the hazardous waste originates, it creates significant potential danger to the State's environment and citizens. In fact, the trial court specifically recognizes that in-state waste does not enjoy superior environmental and safety virtues over out-of-state waste and, therefore, rejects the State's proffered safety and environmental reasons for treating out-of-state hazardous waste differently. Because in-state and out-of-state hazardous waste do not substantially differ, Taylor does not authorize the Alabama Supreme Court to lower its level of review of Alabama's Additional Fee.

Because of its misplaced reliance on Taylor, the Alabama Supreme Court, in upholding the Additional Fee, did not apply the level of review that courts are required to apply to state laws that facially discriminate against interstate commerce. Assuming that legitimate, noneconomic concerns exist, the Additional Fee provision violates the Commerce Clause because it arbitrarily discriminates against out-of-state hazardous waste. A proper examination of Alabama's law demonstrates that reasonable, nondiscriminatory alternatives would have effectively met the Legislature's intended objectives. Thus, the Additional Fee unconstitutionally interferes with the free flow of interstate commerce.

The Additional Fee does not serve the health and safety purposes espoused by its Legislature. Logically, if the Legislature in-

state whatever one may please regardless of its effect on the state. Id. (citations omitted). Maine's barrier is not a protectionist measure because differences did exist between in-state and out-of-state baitfish. Taylor, thus, is an example of the Court's quarantine exception to the Commerce Clause. See, e.g., Bowman v. Chicago & Nw. Ry., 125 U.S. 465 (1888). The implicit assumption in upholding these import bans is that the quarantine is aimed at protecting the state from some harmful item that does not exist locally, see Regan, supra note 45, at 1270, but this is not the case in Chemical Waste. In effect, quarantine cases demonstrate that "[t]he hostility is to the thing itself," Illinois v. General Elec. Co., 683 F.2d 206, 214 (1982), cert. denied, 461 U.S. 913 (1983), and that the state is simply acting to prevent harm to its citizens and environment, regardless of where the harmful item originates. Id.

230 See supra notes 134-35 and accompanying text.
231 See supra text accompanying note 147.
232 For the objectives served by the Additional Fee, see supra text accompanying note 147.

tends to use the revenue generated by its additional tax to protect its citizens and environment, it would have allocated the revenue to an environmental protection/health safety fund in order to provide such a safeguard. The Legislature instead places a majority of the proceeds into "the general budget of the state to be used for general operations." Clearly, Alabama intends to benefit from the Additional Fee proceeds by enhancing its financial position, rather than using the revenue to provide adequate health protection measures against toxic exposure or to ensure the level of monitoring necessary to protect the State's natural resources, and citizens, and to establish sufficient financial resources to cover potential future remedial efforts.

Even if Alabama allocated all the Additional Fee's proceeds to an environmental protection/health safety fund, the provision would still not withstand strict Commerce Clause scrutiny. Alabama contends that the Additional Fee is necessary to offset potential future remedial costs. The Supreme Court, in Complete Auto Transit, Inc. v. Brady, specifically recognizes that "interstate commerce may be made to pay its way." According to Complete Auto, state tax measures survive Commerce Clause scrutiny if the tax is: "applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." Alabama's Additional Fee fails the nondiscrim-

233 ALA. CODE § 22-30B-3 (1990) (10% of funds allocated for administrative and collection costs). The Legislature allocated a maximum of $4.2 million per year to the county housing a hazardous waste site, § 22-30B-2.1, and a maximum of $4.5 million per year to a public health finance authority fund, § 22-30B-2.2. Apparently, the Legislature expects low future costs associated with monitoring, regulating, and remedial efforts for Emelle. Furthermore, the Additional Fee is not necessary to provide financial resources for these two allotments. At a volume of 350,000 tons per year, see Alabama Waste Tax, supra note 192, at 35 (Chemical Waste Management, Inc. spokesman stating that waste shipments to Emelle fell below 400,000 tons per year), the revenues generated from the Base Fee ($25.60 per ton) will cover these allocations. Therefore, the proceeds from the Additional Fee will go solely into Alabama's general fund. In total, Alabama collects about $25 million per year in extra fees under the law. Paul Kemezis, CMA and Waste Generators Fight Alabama's Fee Structure, CHEMICAL WEEK, Nov. 6, 1991, at 14.

236 Id. at 284.
237 Id. at 279; accord Maryland v. Louisiana, 451 U.S. 725, 754 (1980); Department of Revenue of Wash. v. Association of Wash. Stevedoring Ass'n, 435 U.S. 724, 750 (1978); see also Sedler, supra note 47, at 912-14 (elements (1), (2), and (4) measure due process concerns of reasonableness and fairness; element (3) measures Commerce Clause con-
inatory element of the *Complete Auto* test. Because Alabama only applies the tax to out-of-state generators, in-state generators enjoy a commercial advantage in their waste needs that translates directly to the primary product. 238 The effect of the Additional Fee contradicts the Court's holding that "[n]o State, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." 239 Alabama's tax discriminates because of the interstate nature of the hazardous waste, and, thus, violates the Commerce Clause. 240

Other measures can provide the same, or higher, level of security without discriminating against out-of-state generators. For example, Alabama could enact a nondiscriminatory tax, 241 like the Base Fee that the *Chemical Waste* court upheld, 242 on all haz-

cerns).

Underlying these tests is an "internal consistency" principle. This principle requires that if the state tax were "applied by every jurisdiction, there would be no impermissible interference with free trade." American Trucking Ass'ns v. Scheiner, 483 U.S. 266, 283 (1987) (quoting Armco, Inc. v. Hardesty, 467 U.S. 638, 644-45 (1984)). *See generally RONALD D. ROTUNDA ET AL., 1 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 13.2 (1st ed. 1986 & Supp. 1991).

238 See discussion of waste disposal costs on the primary product *supra* notes 172-80.

239 *Maryland*, 451 U.S. at 754 (citations omitted).


242 The *Chemical Waste* court upheld Alabama's Base Fee provision after applying the
ardous waste disposed at commercial facilities within Alabama. A flat tax will properly apportion the costs associated with Emelle among in-state and out-of-state hazardous waste generators. Those generators who dispose more waste at Emelle will bear a greater share of the State's financial burden. An evenhanded tax also meets the criteria established in Complete Auto for state tax measures. The required nexus exists because the disposal activities taxed occur within Alabama. A nondiscriminatory fee meets the fairly-apportioned requirement because the tax does not cause a multiple tax situation for the same activity. The fee is fairly related to the services provided because the tax is measured by the tonnage of waste disposed in Alabama. Finally, a flat tax does not discriminate against interstate commerce. It merely apports the burden among those generators who use Emelle to dispose their waste. Thus, instead of improperly focusing on the waste’s state of origin, a nondiscriminatory tax will equitably allocate the State's burden among those who created it.

In addition to financial resources, an elaborate federal/state hazardous waste regulatory scheme already in place presents a reasonable, effective alternative for protecting the people and natural resources of Alabama from hazardous waste risks. Chemical Waste Management’s Emelle facility operates under both federal and state permits that require hazardous waste facilities to comply with stringent regulations designed to ensure safe disposal of hazardous waste. In fact, Governor Guy Hunt of Alabama considers Emelle one of the “safest [hazardous waste land disposal facilities] in the country.” Although absolute protection from hazardous wastes' dangers is not feasible with current technology,
the elaborate regulatory scheme gives to the individual states, like Alabama, a reasonable means of protecting its citizens. In addition, states have the power to alter general regulations to coincide with the characteristics unique to that individual state. For example, Alabama can enact stricter regulations and require that in-state operators utilize new disposal techniques as the new hazardous waste disposal technology becomes available. Furthermore, the federal government developed a comprehensive scheme for hazardous waste transporters designed to protect human health and the environment by reducing the probability of toxic spills. Unlike the Additional Fee provision enacted by Alabama's Legislature, the comprehensive hazardous waste regulatory scheme effectively protects the citizens of Alabama in a nondiscriminatory manner.

According to the Alabama Supreme Court, the Additional Fee serves the legitimate local interests of conserving Alabama's natural resources and reducing the hazardous waste volume travelling on Alabama's highways. Evidence indicates that the Additional Fee serves these objectives effectively. Since its enactment, the yearly volume of hazardous waste disposed at Emelle has dropped about 50%. However, other nondiscriminatory measures can achieve these goals just as effectively. For example, placing a cap on the volume of all waste disposed at large commercial hazardous waste land disposal facilities would effectively preserve Alabama's disposal capacity and limit the number of trucks hauling hazardous waste on Alabama's highways. Alabama already caps the volume of

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251 The extent to which a state can alter its hazardous waste regulations is limited. See *supra* notes 33-36, 181-192 and accompanying text.

252 See *supra* note 44 and accompanying text.

253 *Alabama Waste Tax, supra* note 192, at 35.

254 Prior to the cap, the Alabama court notes that Emelle was quickly reaching its disposal capacity, primarily due to the large influx of out-of-state waste. Hunt v. Chemical Waste Management, Inc., 584 So. 2d 1367, 1389 (Ala. 1991), *cert. granted*, 112 S. Ct. 964 (1992). Also, 85% to 90% of the 40,000 truckloads of waste entering Emelle in 1989 originated outside of Alabama. *Id.* at 1375.

The Court recognizes that states have the power to conserve their natural resources and protect their environment by "slowing the flow of all waste into the State's remaining landfills, even though interstate commerce may incidentally be affected." City of Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978); cf. Bill Kettlewell Excavating, Inc. v. Michigan Dep't of Natural Resources, 732 F. Supp. 761 (E.D. Mich. 1990) (statute requiring county approval for disposal of out-of-county waste serve legitimate purpose of extending lives of county's landfills), *aff'd*, 931 F. 2d 413 (6th Cir. 1991), *cert. granted sub. nom.*, Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 857
all waste entering Emelle, regardless of its state of origin.255 With a valid cap, Alabama does not face a situation in which imported hazardous waste is dramatically increasing and threatening to consume all of Alabama's disposal capacity. The cap provision effectively conserves the State's natural resources and reduces the volume of waste transported on its highways. The Alabama Supreme Court erred by not relying on the cap provision as a reasonable, nondiscriminatory alternative to the Additional Fee.

Finally, the Alabama Supreme Court justifies the Legislature's use of the Additional Fee on the basis that it compensates the State's taxpayers for the costs and burdens that out-of-state generators impose by dumping their waste in Alabama. However, the Alabama court did not analyze the Additional Fee under the Supreme Court's "compensatory tax" doctrine. This doctrine permits a state to impose an additional tax on out-of-state commerce in order to "equalize[] previously unequal tax burdens by offsetting 'a specific tax imposed only on intrastate commerce for a substantially equivalent event.'"256

The Supreme Court states that a condition precedent to enacting a compensatory tax is that the state first must identify the


A state, however, may not give its citizens a preferred right of access to its natural resources. City of Philadelphia, 437 U.S. at 625; see also Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911).

255 Ala. Code § 22-30B-1.1(9) (1990). The Alabama Supreme Court ruled that this provision does not violate the Commerce Clause. Chemical Waste, 584 So. 2d at 1380-81.

The court analyzed the Cap provision using the Pike balancing test because the provision applied uniformly to in-state and out-of-state waste. Id. at 1380. The court found that the cap serves the legitimate local purpose of extending the life of the landfill for all waste generators. Id. Noting that landfilling is the least desirable method of disposing hazardous waste, the court also found that it furthers the State's interest in controlling health and safety risks by regulating the amount of waste travelling on its highways. Id. at 1381. In light of these legitimate purposes, the court also determined that the cap created "no discriminatory burden on existing levels of commerce or on existing rates of waste generation and landfilling." Id. Thus, the court concluded that a cap does not violate the Commerce Clause. Id.; see also Wetzel County Solid Waste Auth. v. West Va. Div. of Natural Resources, 401 S.E. 2d 227 (W. Va. 1990) (tonnage restrictions which apply equally to all solid waste, regardless of origin, do not violate Commerce Clause).


The common theme underlying states' compensatory taxes is that the states are attempting to assure equal treatment between intrastate and interstate commerce. Maryland v. Louisiana, 451 U.S. 725, 759 (1981); see also Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 331-32 (1977); Henneford v. Silas Mason Co., 300 U.S. 577, 583-84 (1937).
burden for which it is attempting to compensate.\textsuperscript{257} The Alabama Supreme Court recognizes that the State is trying to compensate for the expense of monitoring, regulating, and reducing the potential health and environmental harms associated with the Emelle hazardous waste facility.\textsuperscript{258} However, no evidence demonstrates that in-state hazardous waste generators suffer a disproportionate tax burden as a result of Emelle.\textsuperscript{259}

Instead of relying on the burdens of specific taxpayers as required by the Court, the Alabama Supreme Court considers the increased tax burden imposed on all of Alabama’s taxpayers due to Emelle.\textsuperscript{260} The Supreme Court, however, has indicated that a “state [cannot] impose [an additional] tax on out-of-state businesses and justify [it] on the basis that the tax was in lieu of other types of state taxes.”\textsuperscript{261} In addition, an unquantified burden on all taxpayers does not satisfy the doctrine’s requirement of “substantially equivalent” items of commerce.\textsuperscript{262} Therefore, the court cannot rely on the Supreme Court’s compensatory tax exception as authority for upholding the Additional Fee against the Commerce Clause’s free trade ideal.

\textbf{D. Conclusion}

The Commerce Clause limits state regulatory power in favor of creating national economic unity. Hazardous waste is an article of commerce subject to Commerce Clause protection and disposal of these wastes is a matter of national concern. The free flow of hazardous waste in interstate commerce ensures that future clean-up sites are not created.\textsuperscript{263} Open borders are essential to protect

\begin{itemize}
\item \textsuperscript{257} \textit{Maryland}, 451 U.S. at 758.
\item \textsuperscript{258} \textit{Chemical Waste}, 584 So. 2d at 1889; see also \textit{ALA. Code} § 22-30B-1.1 (1990) (Alabama’s legislative findings supporting its differential taxing scheme).
\item \textsuperscript{259} See supra part II.B. Because Alabama’s Legislature only recognizes a $4.5 million per year need for the State’s related hazardous waste issues, the revenue generated from the Additional Fee is not necessary to provide this financial this support. See supra note 233.
\item \textsuperscript{260} \textit{Chemical Waste}, 584 So. 2d at 1889 (“A disproportionate share of these costs will be borne by the taxpayers of the State of Alabama for the wastes dumped by other states.”).
\item \textsuperscript{262} See \textit{American Trucking}, 483 U.S. at 287; \textit{Maryland}, 451 U.S. at 758-59 (sales tax and use tax seen as equivalent taxes, but Louisiana’s First-Use Tax does not complement its Severance Tax imposed on local production of natural gas).
\item \textsuperscript{263} See, e.g., \textit{Waste Shipment Bans Seen Danger to Chemicals; Hazardous Waste Transportation
the nation's citizens and ensure that hazardous waste is disposed in an environmentally sound manner.264

Congress has not authorized states to limit the importation of hazardous waste by discriminating against out-of-state interests. Yet, despite the lack of congressional authorization, states like Alabama are threatening these national goals by enacting legislation that effectively limits the importation of out-of-state hazardous waste. Alabama has just intentions for enacting its discriminatory measure. The State wants to protect its citizens and environment from the potential dangers of hazardous waste and equitably distribute the financial burdens associated with housing the Emelle facility in its State.

Despite these legitimate objectives, Alabama cannot enact a measure which arbitrarily discriminates against out-of-state hazardous waste without congressional approval. In its plain effect, Alabama’s higher disposal tax on out-of-state hazardous waste violates the nondiscrimination principle underlying the Commerce Clause. Alabama does not have an adequate basis for erecting a barrier against out-of-state waste because hazardous waste, regardless of its source, creates the same financial, health, and environmental concerns. Essentially, Alabama is offering a preferred right of access, in violation of City of Philadelphia,265 to in-state companies which generate hazardous waste.

In addition, reasonable, nondiscriminatory alternatives are available that the State could have instituted in place of the Additional Fee. Alabama can institute a nondiscriminatory tax which would equitably place the burden on the generators of the waste.266 A uniform tax, set properly, would supply Alabama with sufficient revenue to offset the State’s additional costs resulting from Emelle. It can require strict conformance to the comprehensive regulatory program in order to minimize the potential risks of hazardous waste. Finally, the State can impose a cap on all hazardous waste entering land disposal facilities in Alabama which would effectively conserve Alabama’s natural resources and limit the volume of hazardous waste travelling on its roads.


264 See, e.g., Kemezis, supra note 233; Controversy Continues, supra note 11 (interstate hazardous waste requires open borders in order to safely manage the waste); Waste Shipment Bans, supra note 263, at 3.

265 See supra notes 76-85 & 209-22 and accompanying text.

266 See supra notes 241-46 and accompanying text.
The Supreme Court has established a high standard that a state must overcome before its discriminatory regulatory measure that interferes with interstate trade can withstand strict Commerce Clause review. Alabama has not overcome this hurdle. Even though Alabama's Additional Fee serves legitimate local objectives, reasonable alternatives exist that will serve the State's objectives just as effectively, without discriminating against out-of-state interests. Because alternatives to placing a higher disposal tax on out-of-state waste exist, Alabama's Additional Fee unnecessarily interferes with interstate commerce. Thus, the Alabama Supreme Court erred when it failed to rule that the Additional Fee violates the Commerce Clause.

VI. PROPOSAL: A UNIFORM TAX ON HAZARDOUS WASTE GENERATORS

States cannot discriminate against out-of-state hazardous waste generators by imposing a higher disposal tax on hazardous waste generated outside that state. However, maintaining the status quo would unfairly place the hazardous waste burden on a minority of the states that house hazardous waste facilities while the rest of the nation enjoys the benefits associated with the generation of hazardous waste. This problem requires a national solution to balance these competing interests.

Congress should resolve this controversy by instituting a uniform fee on all hazardous waste disposed in landfills. The tax will encourage waste generators to develop waste minimization plans. It will also discourage land disposal of hazardous waste, thus, supporting the federal policy against landfiling these wastes. A uniform tax will also ensure that states choosing to house hazardous waste facilities will not bear the long-term financial burden by permitting a hazardous waste treatment facility to operate within its state. Instead, those generators creating the hazardous waste disposal problem will equitably bear the financial responsibility for their actions.

Congress must act to resolve the interstate hazardous waste disposal controversy threatening to divide the nation. Recently members of Congress have focused their efforts on conservation and hazardous waste minimization. While this approach will

267 See supra notes 27-31 and accompanying text.
logically reduce the volume of waste requiring land disposal, it may serve to intensify the interstate controversy. Hazardous waste landfills draw hazardous waste from a broader geographic area, requiring interstate shipments of hazardous waste.\textsuperscript{269} Therefore, reaching an effective solution requires a delicate balance of the federal interest in safe, efficient disposal of hazardous waste and cleanup of existing hazardous waste sites against the states' interest in equitably distributing the burden of hazardous waste land disposal. A uniform tax, set by Congress, on all hazardous waste generators who dispose waste at land disposal facilities will effectively fulfill these interests.

Conservation and waste minimization should be at the forefront of the hazardous waste solution. Some businesses have voluntarily engaged in these efforts and have reaped substantial economic benefits.\textsuperscript{270} Members of Congress have recently recognized the economic and environmental benefits of conservation and waste minimization as well.\textsuperscript{271} In fact, reducing the generation of hazardous waste is the principal focus of a proposed Senate bill for amending RCRA.\textsuperscript{272} The bill proposes to use financial incentives to encourage all businesses to reformulate their manufacturing processes, substitute nontoxic materials, and generally reduce the volume of waste requiring treatment and disposal.\textsuperscript{273} However, the bill will not address the interstate transportation of hazardous waste issue.\textsuperscript{274}

Amendments of 1991). The Senate Committee on Environment and Public Works is currently reviewing the Bill, authored by Senator Max Baucus (D-Mont.), and is working against a deadline of April 30, 1992. Solid Waste: Senate RCRA Bill Undergoing Revision; Key Committees Press for Quick Action, 22 Env't Rep. (BNA) 2329 (Feb. 7, 1992) [hereinafter RCRA Revision]. When introduced to the Senate, the bill authorized importing states to impose fees on waste exported from other states and states having their own approved waste management plans to ban the import of waste outright. 137 CONG. REC. S5167-01 (daily ed. Apr. 25, 1991). However, an aide who works with the Subcommittee on Environmental Protection recently stated that the revised version of S. 976 will not address the interstate transportation of hazardous waste because such a provision would upset capacity agreements currently in place. RCRA Revision, supra. Instead, the committee is now focusing on recovery and conservation. Id.

\textsuperscript{269} See, Smith, supra note 11, at 3-4 (general consensus among waste treatment companies); see also Loesel, supra note 11, at SR7 (waste management firms have centralized waste facilities, making interstate transport absolutely essential) (quoting Larry Bone, Dow Chemical's senior associate environmental consultant).

\textsuperscript{270} Smith, supra note 11, at 3 (general consensus among waste treatment companies is that waste minimization is working); see supra note 176.

\textsuperscript{271} See supra note 268.

\textsuperscript{272} See supra note 268 and accompanying text.

\textsuperscript{273} See RCRA Revision, supra note 268, at 2323.

\textsuperscript{274} See supra note 268 for a discussion of S. 976. Committee's in both the Senate
While focusing on conservation and waste minimization makes sense, it may exacerbate the current hazardous waste land disposal controversy. Industry cannot eliminate the volume of hazardous waste that it generates, but can only reduce it.\footnote{275} According to industry executives, interstate shipments are necessary to ensure that hazardous waste is treated in the most environmentally sound manner.\footnote{276} Most of the waste shipped outside the generating state requires specialized technology not available in that state.\footnote{277} Requiring each state to provide the full range of hazardous waste TSD facilities will dramatically increase the cost of hazardous waste disposal and may act as an incentive for illegal and improper disposal.\footnote{278} These consequences contradict the national policy of safe, efficient disposal of hazardous waste. With effective waste minimization and conservation, states will rely on a state-to-state network of interdependence. As the volume of hazardous waste requiring land disposal decreases, land disposal facilities will become centralized and will rely on interstate waste shipments in order to remain economically viable operations.\footnote{279} States housing these facilities will still bear the brunt of the nation's hazardous waste disposal problem.\footnote{280}

A uniform tax on all hazardous waste generators disposing their waste at landfills will distribute this burden among those businesses causing the problem. The tax will encourage industry to minimize or recycle its waste. At the same time, it will discourage land disposal, which is the least desired means of hazardous waste

\footnote{275} Crim, supra note 11, at 133.
\footnote{276} See supra note 263-64 and accompanying text.
\footnote{277} See, e.g., Kemezis, supra note 238; \textit{Controversy Continues}, supra note 11.
\footnote{278} See supra notes 263-64 and accompanying text.
\footnote{279} See supra note 269.
\footnote{280} As the Fourth Circuit recently noted, the treatment and disposal of hazardous waste is necessary to prevent future superfund sites, "even if spread disproportionately among the states." \textit{Hazardous Waste Treatment Council v. South Carolina}, 945 F.2d 781, 792 (4th Cir. 1991).
disposal, in favor of other methods of treating hazardous wastes that are presently more expensive.\footnote{281 For a list of treatment and disposal methods, see \textit{supra} note 109.} A uniform national tax also ensures that state parochial measures will not impede the cleanup of existing hazardous waste sites. Without a uniform tax, the states will continue to enact measures limiting the volume of waste entering from outside their borders.\footnote{282 For example, Alabama has tried three different methods to decrease the importation of out-of-state waste. In addition to the differential fee measure at issue in \textit{Chemical Waste}, Alabama has attempted to limit the importation of hazardous waste by instituting a selective ban on out-of-state hazardous waste and by filing a suit to prevent the cleanup of a Texas Superfund site. See \textit{supra} note 132.} Allowing such acts to continue will only make these remedial efforts less efficient and less economical.\footnote{283 The federal policy is to cleanup hazardous waste sites in the most efficient and environmentally sound manner. See \textit{supra} note 37-44 and accompanying text for a discussion of CERCLA. Bans and differential fees on out-of-state hazardous waste will lead to delays in hazardous waste site cleanup and discourage responsible waste management practices now in place. See, e.g., \textit{Controversy Continues}, \textit{supra} note 11; \textit{Waste Shipment Bans}, \textit{supra} note 263.}

In addition to serving these federal hazardous waste objectives, a uniform tax will satisfy the states’ interest in protecting their environment and citizens and will equitably distribute the long-term burdens of housing these facilities among those who create the problem, hazardous waste generators. In order to avoid penalizing those states that permit land disposal facilities to operate within their borders, states should receive all the revenue generated from the hazardous waste disposed at facilities within its territory. Congress should require states receiving this money to establish an environmental protection/health safety trust fund. States should use these financial resources to cover long-term monitoring, regulating, and potential remedial costs. In addition, states could train local environmental and medical response units to minimize the potential risks and dangers of these disposal facilities. Congress should also allocate a percentage of these funds to the state’s general budget. This financial incentive will serve to increase the number of safe, state-of-the-art land disposal facilities by encouraging the states to overcome local NIMBY ("not in my backyard") political pressures.\footnote{284 For a discussion of NIMBY, see \textit{supra} note 11.}

A national uniform tax equitably balances the competing national and state interests. The tax places the burdens associated with hazardous waste disposal where it belongs, on the generators.
It also ensures that states housing these facilities will not be penalized for permitting these waste disposal centers to operate within their borders. Finally, the uniform tax prevents states from erecting economic barriers against out-of-state hazardous waste. This serves the national objective of treating and disposing hazardous waste in a safe and environmentally sound manner.

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