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THE PREEMPTION OF STATE  
HAZARDOUS AND SOLID WASTE  
REGULATIONS: THE DORMANT  
COMMERCE CLAUSE AWAKENS  
ONCE MORE

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Last term, for the first time since its watershed decision in *Philadelphia v. New Jersey*,<sup>1</sup> the Supreme Court considered the extent to which the Commerce Clause of the United States Constitution<sup>2</sup> constrains a state's ability to regulate the disposal of hazardous and solid waste within its borders. In two cases, *Chemical Waste Management, Inc. v. Hunt*<sup>3</sup> and *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*,<sup>4</sup> the Supreme Court acted to limit substantially states' ability to respond independently to the crisis of solid and haz-

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1. 437 U.S. 617 (1978). Two members of the Court, Chief Justice Burger and then-Justice Rehnquist, dissented from the Court's decision.

2. The Commerce Clause of the Constitution provides: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST., art. I, § 8, cl. 3.

3. 112 S. Ct. 2009 (1992).

4. 112 S. Ct. 2019 (1992).

ardous waste disposal.<sup>5</sup>

The first three parts of this Article summarize and critique each of these decisions. The Article describes the harmful impact of the Court's application of dormant Commerce Clause doctrine in cases involving state waste regulation. The final part of the Article surveys the options available for states wishing to limit in-state disposal of out-of-state waste.

## I. CHEMICAL WASTE MANAGEMENT AND THE STRONG RULE AGAINST PROTECTIONIST STATE REGULATION

### A. A Summary of the Decision

In *Chemical Waste Management*,<sup>6</sup> Justice White, writing for eight members of the Court,<sup>7</sup> struck down an Alabama statute which imposed an "additional fee" on the operator of the Emelle, Alabama commercial hazardous waste disposal facility. The surcharge applied to each ton of hazardous waste "generated outside of Alabama" and disposed of at the facility.<sup>8</sup> *Chemical Waste Management*, the owner and operator of the Emelle facility,<sup>9</sup> challenged the constitutionality of the additional fee as applied to out-of-state waste.<sup>10</sup> The additional fee comprised a critical component of Alabama's effort to regulate the

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5. See Solid Waste Disposal Facility Criteria, 56 Fed. Reg. 50,978, 50,980 (1991) (to be codified at 40 C.F.R. §§ 257-58) (decrying the current "municipal solid waste crisis" and "[t]oday's disposal capacity crisis").

6. 112 S. Ct. 2009 (1992).

7. Chief Justice Rehnquist was the sole dissenter from the Court's opinion. See *id.* at 2017-19 (Rehnquist, C.J., dissenting).

8. *Id.* at 2012; ALA. CODE § 22-30B-2(b) (1990 & Supp. 1992).

The additional fee was \$72.00 for each ton of hazardous or solid waste. ALA. CODE § 22-30B-2(b). The additional fee comprised only one of three parts of a statute that regulated the disposal of waste at the Emelle facility. See *id.* §§ 22-30B-1 to 22-30B-18. The law imposed a cap on the total amount of hazardous waste and substances which a facility could receive for disposal during any one-year period. *Id.* § 22-30B-2.3. The code defined the cap as the amount of hazardous waste disposed of during the first year the fees established by the statute were in effect. The law also established a "base fee" of \$25.60 to be paid by the facility operator for every ton of hazardous waste disposed of at the facility. *Id.* § 22-30B-2(a). The Supreme Court did not review either of these other statutory provisions. See 112 S. Ct. at 2012 (stating that the grant of certiorari was "limited to petitioner's Commerce Clause challenge to the additional fee.").

9. 112 S. Ct. at 2011.

10. *Id.* at 2012. *Chemical Waste Management* brought its action in state court challenging each of the three requirements the Alabama statute imposed on the Emelle facility. *Id.* See also ALA. CODE §§ 22-30B-2 to 22-30B-2.3 for a full description of the constraints state law imposed on the Emelle facility. The state trial court upheld the

large amounts of out-of-state waste deposited at the Emelle facility.<sup>11</sup>

The Court's rejection of Alabama's additional fee for the disposal of out-of-state waste is significant for two reasons. First, consistent with its earlier decision in *Philadelphia v. New Jersey*, where the Court concluded that "the interstate movement of . . . waste" is subject to Commerce Clause protection,<sup>12</sup> the *Chemical Waste Management* Court indicated that, because hazardous waste "is simply a grade of solid waste, albeit one of particularly noxious and dangerous propensities," it is an article of commerce. The Court's characterization of the waste as an article of commerce subjects it to the Commerce Clause.<sup>13</sup>

*Chemical Waste Management* is also significant because it superficially applies the virtually per se rule of invalidity to state regulations which discriminate against out-of-state commerce. The invalidation of

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cap and base fee provisions, but struck down the additional fee as a violation of the Commerce Clause. 112 S. Ct. at 2012.

On appeal, the Alabama Supreme Court affirmed, ruling that the cap and base fee were valid, and reversed the trial court's decision that the additional fee was unconstitutional. *Hunt v. Chemical Waste Management, Inc.*, 584 So.2d 1367, 1390 (Ala. 1991), *rev'd*, 112 S. Ct. 2009 (1992). The court held that "[t]he Additional Fee provision in the Act advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. It has not been enacted for the purpose of economic protectionism." *Id.* at 1388.

11. The Emelle facility receives hazardous waste from 48 states and occupies 2730 acres of land. *State of Alabama ex rel. Siegelman v. EPA*, 911 F.2d 499, 501 (11th Cir. 1990).

The lack of hazardous waste disposal facilities and the relative importance of the Emelle facility in providing for disposal of the Nation's hazardous waste are apparent in the Supreme Court's statement of the facts: "Alabama is 1 of only 16 States that have commercial hazardous waste landfills, and the Emelle facility is the largest of the 21 landfills of this kind located in these 16 States." *Chemical Waste Management*, 112 S. Ct. at 2011. Moreover, "up to 90% of the [waste] tonnage permanently buried [at Emelle] each year is shipped in from other States." *Id.* at 2012.

12. 437 U.S. 617, 622-23 (1978).

13. 112 S. Ct. at 2012 n.3. The decision that hazardous waste is an article of commerce is consistent with the Court's decision in *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, which reached the same conclusion regarding solid waste. 112 S. Ct. 2019, 2023 (1992). In *Fort Gratiot Landfill* the Court found:

[W]hether the business arrangements between out-of-state generators of waste and the Michigan operator of a waste disposal site are viewed as 'sales' of garbage or 'purchases' of transportation and disposal services, the commercial transactions unquestionably have an interstate character. The Commerce Clause thus imposes some constraints on Michigan's ability to regulate these transactions.

*Id.* See also *New York v. United States*, 112 S. Ct. 2408, 2419-20 (1992) ("Space in radioactive disposal sites is frequently sold by residents of one State to residents of another. Regulation of the resulting interstate market in [low-level radioactive] waste disposal is therefore well within Congress' authority under the Commerce Clause.").

the state regulation fails to account for the fact that importation of the article of commerce at issue, hazardous waste, poses significant long-term risks to public health and safety within that state.<sup>14</sup> The Court first concluded that “[t]he Act’s additional fee facially discriminates against hazardous waste generated in States other than Alabama, and the Act overall has plainly discouraged the full operation of petitioner’s Emelle facility.”<sup>15</sup> The Court reiterated its long-standing rule that such discriminatory treatment of out-of-state commerce “is typically struck down without further inquiry.”<sup>16</sup> Given the discriminatory nature of the additional fee, the Court then articulated Alabama’s burden to demonstrate the fee’s permissibility under the Commerce Clause: “Because the additional fee discriminates both on its face and in practical effect, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.”<sup>17</sup>

Accordingly, the Court identified the local purposes purportedly served by statute, including the protection of the health and safety of Alabama citizens and the preservation of the State’s natural resources.<sup>18</sup> Although in the Court’s view such local interests “may all

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14. Although the Court rejected Alabama’s decision to burden only out-of-state waste with the additional fee, it recognized that the transportation and disposal of hazardous waste do pose risks to Alabama’s public health and environment. See 112 S. Ct. at 2014-15 & nn.6-7.

15. *Id.* at 2013-14.

16. *Id.* at 2014. See also *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) (“When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out of state interests, we have generally struck down the statute without further inquiry.”); *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 337 n.14 (1989) (approving *Brown-Forman*).

17. 112 S. Ct. at 2014 (internal quotations omitted). Because the Alabama statute’s effects on interstate commerce were not merely incidental, the Court rejected the use of the less rigorous balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). In *Pike*, the Court considered the effect of a statute which prevented an agricultural producer from sending its crops across state lines for inspection, packing and shipping. *Id.* at 138-41. The Court stated that, when a “statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Id.* at 142. Instead, the Court in *Chemical Waste Management* found that “the Act’s additional fee on its face targets only out-of-state hazardous waste.” 112 S. Ct. at 2014 n.5. See *infra* notes 123-31 and accompanying text for a critique of the *Pike* test.

18. 112 S. Ct. at 2014.

be legitimate,” the Court concluded that “only rhetoric, and not explanation, emerges as to why Alabama targets *only* interstate hazardous waste to meet these goals.”<sup>19</sup> In particular, as the state trial court originally found, Alabama failed to demonstrate that the out-of-state waste posed any greater danger to Alabama and its citizens than the hazardous waste generated in-state.<sup>20</sup>

Absent any difference between hazardous waste generated in-state and that generated out-of-state, the Court determined that “the volume of waste entering the Emelle facility” was Alabama’s fundamental concern.<sup>21</sup> With regard to that concern, the Court found that “[l]ess discriminatory alternatives, however, are available . . . not the least of which are a generally applicable per-ton additional fee on *all* hazardous waste disposed of within Alabama, or a per-mile tax on *all* vehicles transporting hazardous waste across Alabama roads, or an even-handed cap on the total tonnage landfilled at Emelle, which would curtail volume from all sources.”<sup>22</sup> Accordingly, Alabama’s additional fee failed to pass the Court’s test for discriminatory regulation of interstate commerce.

In dissent, Chief Justice Rehnquist recalled the themes articulated in his dissent to the Court’s opinion in *Philadelphia v. New Jersey*.<sup>23</sup> There, Justice Rehnquist concluded that the Commerce Clause did not foreclose New Jersey’s prohibition against importing most out-of-state waste. He criticized the majority’s reading of the Commerce Clause on grounds that the Court’s reading meant that:

New Jersey must either prohibit *all* landfill operations, leaving itself to cast about for a presently nonexistent solution to the serious problem of disposing of the waste generated within its own borders, or it must accept waste from every portion of the United States, thereby multiplying the health and safety problems which would result if it dealt only with such waste generated within the

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19. *Id.*

20. *See id.* at 2014-15.

21. *Id.* at 2015.

22. *Id.* (citations omitted). The Court also stated that:

To the extent Alabama’s concern touches environmental conservation and the health and safety of its citizens, such concern does not vary with the point of origin of the waste, and it remains within the State’s power to monitor and regulate more closely the transportation and disposal of *all* hazardous waste within its borders.

*Id.* at 2015-16.

23. 437 U.S. 617, 629-33 (1978) (Rehnquist, J., dissenting). Chief Justice Burger joined the dissent in *Philadelphia v. New Jersey*. *Id.* (Burger, C.J., dissenting).

State. . . [T]he Commerce Clause does not present [the State] with such a Hobson's choice. . . .<sup>24</sup>

In *Chemical Waste Management*, the Chief Justice stated this view even more bluntly:

It increasingly appears that the only avenue by which a State may avoid the importation of hazardous wastes is to ban such waste disposal altogether, regardless of the waste's source of origin. I see little logic in creating, and nothing in the Commerce Clause that requires us to create, such perverse regulatory incentives.<sup>25</sup>

As a matter of Commerce Clause doctrine, Chief Justice Rehnquist disagrees with the majority view that the Commerce Clause protects the free movement of waste across state borders. In his view, early Supreme Court cases established the principle that states may bar the importation of harmful materials. He supports his position that a state may bar the disposal of out-of-state waste because of the public health and safety risks associated with the disposal of such waste with his reliance on these earlier cases.<sup>26</sup>

### B. *A Critique of the Decision*

Professor Donald Regan presents a convincing case that the fundamental constraint imposed upon the states by the Commerce Clause is that the states are "prevent[ed] . . . from engaging in purposeful economic protectionism. . . . This and no more."<sup>27</sup> Viewed in light of this central proscription against protectionism, both the majority and dissenting decisions in *Chemical Waste Management* fail to demonstrate

24. *Id.* at 631.

25. 112 S. Ct. at 2018 (Rehnquist, C.J., dissenting). *But see* ENSCO, Inc. v. Dumas, 807 F.2d 743, 745 (8th Cir. 1986) (holding that federal law preempts a county's absolute prohibition on the storage, treatment or disposal of "acute hazardous waste" within its borders to the extent that the prohibition directly conflicts with federal law).

26. The Chief Justice first articulated this position in *Philadelphia v. New Jersey*. See 437 U.S. at 631-33 (Rehnquist, J., dissenting) (citing *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 525 (1935); *Sligh v. Kirkwood*, 237 U.S. 52, 59-60 (1915); *Asbell v. Kansas*, 209 U.S. 251, 256 (1907); *Bowman v. Chicago & N.W. Ry.*, 125 U.S. 465, 489 (1888); *Railroad Co. v. Husen*, 95 U.S. 465, 472 (1878)). Chief Justice Rehnquist continued to adhere to this position in *Chemical Waste Management*. 112 S. Ct. at 2017-18 (Rehnquist, C.J., dissenting).

27. Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1092 (1986). See also *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 (1992) (finding that "when the state statute amounts to simple economic protectionism, a 'virtually *per se* rule of invalidity' has applied.").

either the validity or invalidity of the additional state fee imposed on the in-state disposal of out-of-state hazardous waste. Rather, both decisions may be fairly criticized because their treatment of Commerce Clause doctrine is too narrow.

First, it is important to identify why the majority reached the correct conclusion that the Commerce Clause foreclosed Alabama's imposition of an additional fee on the disposal of out-of-state hazardous waste. The Court's conclusion cannot properly be based only on the fact that such waste is subject to a higher fee than in-state waste. The Commerce Clause does not dictate *laissez-faire*<sup>28</sup> or even "even-handed"<sup>29</sup> state regulation of interstate commerce. Rather, it is important to consider the harms of state protectionist legislation and determine whether the Alabama statute results in those harms to both commerce and the relations among the several states.

Professor Regan has identified "three objections to state protectionism."<sup>30</sup> In considering the Alabama statute, one objection is foremost and warrants a conclusion that the law is impermissible. The "concept of union objection" holds that "[s]tate protectionism . . . is inconsistent with the very idea of political union . . ."<sup>31</sup> To understand how the additional fee undermines the concept of union, one needs to under-

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28. See Regan, *supra* note 27, at 1096 ("Many sorts of regulation are inconsistent with *laissez-faire* that are not protectionist . . ."); Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMMENTARY 395, 401 (1986) ("[N]o evidence exists that the [Commerce] Clause was intended of its own force to institute free trade"); *id.* at 402 ("The breadth of congressional power [to regulate interstate commerce] long recognized by the Court seems to be in tension with the view that the [commerce] clause established free trade as a substantive constitutional goal."). See also Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 416 (1989) ("[T]he Court has emphasized, in the specific context of applying the dormant Commerce Clause, that the 'Constitution does not require the States to subscribe to any particular economic theory.'").

29. See Regan, *supra* note 27, at 1116-19 (discussing the permissibility of an Oregon bottle bill which had the effect of diverting business "from out-of-state bottlers to in-state bottlers").

30. Regan, *supra* note 27, at 1112-13. The three objections are the "concept-of-union" objection, *id.* at 1113-14, the "resentment/retaliation" objection, *id.* at 1114-15, and the "efficiency" objection. *Id.* at 1115-16. For a discussion of the application of each of these objections to *Chemical Waste Management*, see *infra* text accompanying notes 31-43 ("concept-of-union" objection); notes 44-51 ("efficiency" objection); and notes 57-63 ("resentment/retaliation" objection). For a discussion of the application of these objections to *Fort Gratiot Landfill*, see *infra* text accompanying notes 88-95 ("concept-of-union" objection); notes 96-100 ("resentment/retaliation" objection); and notes 101-14 ("efficiency" objection).

31. Regan, *supra* note 27, at 1113.

stand that the additional fee comprises one of a series of barriers erected by Alabama to counter the effective national response to the need for cleanup and disposal of hazardous substances. This national response admittedly imposes a special burden on Alabama by advocating disposal of a substantial amount of hazardous waste at the Emelle facility.<sup>32</sup> Alabama has attempted to erect barriers to lessen these burdens of the national response.

Prior to enacting the additional fee on out-of-state waste, Alabama enacted a statute forbidding the Emelle facility from importing hazardous waste from any state which failed to meet certain requirements prescribed by Alabama law. For example, the statute required that the generating state either enter a waste disposal agreement with Alabama or have a facility within its borders for the treatment and disposal of hazardous waste.<sup>33</sup> In *National Solid Wastes Management v. Alabama Department of Environmental Management*, the Eleventh Circuit held that the Commerce Clause barred this limitation on the disposal of out-of-state waste, reasoning that Congress never authorized the selective ban.<sup>34</sup> Indeed, Congress did address the waste-disposal responsibility of each state that generates hazardous waste. A state must provide the EPA with adequate assurance that there exists sufficient capacity to dispose of the hazardous substances that the state will remove when pursuing CERCLA cleanups.<sup>35</sup> The EPA interprets this provision to allow generating states to demonstrate adequate assurances of disposal

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32. For an example of the role that the Emelle, Alabama facility plays under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988), in the cleanup of hazardous substances, see *Alabama v. EPA*, 871 F.2d 1548 (11th Cir.), *cert. denied*, 493 U.S. 991 (1989). In *Alabama v. EPA*, the state sought to block the shipment of hazardous substances from a CERCLA site in Texas to the Emelle facility. *Id.* at 1551, 1553. Alabama raised both constitutional and statutory claims challenging the proposed disposal of the hazardous substances in Alabama. *Id.* at 1554.

33. ALA. CODE § 22-30-11(b) (1990) (referred to as the "Holley Bill"). *Gov. Hunt Announces States that are Prohibited from Shipping Hazardous Waste to Alabama*, Press Release, Aug. 29, 1989, at 2 ("In a press release announcing enactment of the Holley Bill, Governor Hunt said that Alabama was 'becoming the waste dump of the nation.'"), *cited in* *National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management*, 910 F.2d 713, 717 n.6 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2800 (1991).

34. 910 F.2d at 718-22.

35. See 42 U.S.C. § 9604(c)(9)(1988). The statute prevents the EPA from pursuing remedial actions within the state if a state fails to provide the adequate assurances about disposal capacity. *Id.* See also 910 F.2d at 721 & n.11 (construing this provision of CERCLA).



capacity by “contract[ing] with a privately owned waste management facility” in another state.<sup>36</sup> The Emelle, Alabama facility is such a disposal site.

In *National Solid Wastes Management*, the Eleventh Circuit also invalidated Alabama’s land disposal regulations which exceeded the standards established under the applicable federal regulations.<sup>37</sup> The court concluded that, in enacting the 1984 amendments to the Resource Conservation and Recovery Act (“RCRA”),<sup>38</sup> “Congress expressly disapproved” any state’s “attempt to ‘regionalize’ pretreatment requirements.”<sup>39</sup>

Viewed from this perspective, the additional fee represents another attempt by Alabama to extricate itself from its role as a principal disposal site for nationally generated interstate waste.<sup>40</sup> The United States filed an amicus curiae brief in *Chemical Waste Management*, which demonstrates the importance of the Emelle facility. The facility is one of the very few in the United States permitted to receive and dispose of the entire range of hazardous waste.<sup>41</sup> Therefore, hazardous waste

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36. 910 F.2d at 717. See also Brief for the United States as Amicus Curiae Supporting Petitioner at 11, *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992) (No. 91-471) (arguing that the EPA interprets the capacity assurance provision to bar a State from “ban[ning] the import of waste to the facilities upon which it is relying to provide its own assurance of capacity.”).

37. See 910 F.2d at 722-24 (discussing validity of ALA. ADMIN. CODE r. 14-9-03 (1990)). The court stated that Alabama’s “regulations are almost identical to the federal land disposal ban, except that Alabama did not adopt the EPA’s variances from the effective date of the ban for certain . . . waste.” *Id.* at 722. The result was that federal regulations allowed land disposal of certain waste, while Alabama foreclosed land disposal of the same waste. *Id.* at 724.

38. Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (1984) (amending Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (1976)) (codified as subsequently amended at 42 U.S.C. §§ 6901-6992K (1988)).

39. 910 F.2d at 724.

40. For example, Alabama did not seek to prove that the additional fee was valid as a proper compensatory tax because the state incurred greater disposal costs as a result of the out-of-state character of the waste. See *Chemical Waste Management*, 112 S. Ct. at 2016 n.9 (declining to consider whether the additional fee is valid as a compensatory tax because the theory was not the basis for the Alabama Supreme Court’s decision and was neither briefed nor argued by the parties).

41. See Brief for the United States as Amicus Curiae Supporting Petitioner at 1, *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992) (No. 91-471) (stating that “the Emelle facility is one of only two facilities east of the Mississippi River authorized under federal law to dispose of polychlorinated biphenyls” (PCBs)); *id.* at 7 (reporting that the “Emelle facility is one of a limited number of land disposal sites that

sites subject to Superfund cleanups substantially utilize the Emelle facility.<sup>42</sup> As a member of the federal Union, Alabama lacks the power to undermine unilaterally the national response to hazardous waste disposal.<sup>43</sup>

Another of Professor Regan's three objections to protectionism also leads to condemnation of Alabama's additional fee. The "efficiency" objection to protectionism,<sup>44</sup> although not as strong an objection as the notion of union, is important because it accounts for a critical flaw in Alabama's regulatory scheme. Professor Regan recognizes that if efficiency is to stand as a fair objection to protectionism, efficiency must permit state efforts to regulate in a way that internalizes external costs, such as pollution or litter.<sup>45</sup>

For a state regulation to avoid characterization as inefficient, and therefore protectionist, the state must provide a "colorable justification in terms of a benefit that deserves approval from the point of view of the nation as a whole."<sup>46</sup> For example, in 1971 the State of Oregon

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meets the[] statutory [technological] requirements" for disposal of wastes that fail to meet hazardous waste disposal pretreatment standards); *see also id.* at 8 n.11 (stating that "there are currently a small number of large regional hazardous waste disposal facilities: 35 commercial land disposal facilities in 17 States . . ."); *supra* note 11 (noting the national role the Emelle facility plays in disposing of hazardous waste).

42. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 1, *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992) (No. 91-471).

43. *Cf. Regan, supra* note 27, at 1113. Professor Regan makes the point that: Protectionism does not merely harm some foreign interests in the process of conferring an independent local benefit. Rather, it takes away from the foreigners in order to give to local residents exactly what has been taken away. . . . Such behavior has no place in a genuine political union of any kind.

*Id.*

44. *Id.* at 1115. Professor Regan describes efficiency as a "treacherous notion," which should be applied with care. *Id.* As the text that follows indicates, Professor Regan views the efficiency objection as limited to cases where burdens on interstate commerce cannot be justified on the basis of some colorable, nationally-recognized objective. *Id.* at 1118. *Cf. Coenen, supra* note 28, at 433 (stating that "the Framers' central goal in forging the Commerce Clause was not to maximize economic efficiency. Rather, the core goal of the Commerce Clause was and is to engender national solidarity." (footnote omitted)).

45. *See Regan, supra* note 27, at 1116. Professor Regan also states that:

Part of the point of federalism is to allow states to make their own decisions about such matters as what sort of an environment they value and want to maintain. So long as there is no constitutionally stipulated policy against minimizing litter . . . , the elimination of litter from Oregon's parks and highways is a good thing from the federal viewpoint if Oregon says it is.

*Id.*

46. *Id.* at 1118. Professor Regan argues that "protectionism is inefficient because it

enacted a “bottle bill,” which imposed a refundable deposit on beverage containers and encouraged the use of glass bottles instead of metal cans.<sup>47</sup> The bill favored Oregon bottlers over foreign bottlers because it increased transportation costs for out-of-state bottlers who had to transport the heavier containers for longer distances due to the requirement that returned containers be transported back for reuse.<sup>48</sup> While the bill did impose these extra costs on out-of-state bottlers, Professor Regan recognized a “colorable cost-based justification” in that the bill allowed for internalization of litter costs, which made in-state bottlers the low-cost producers.<sup>49</sup> The Oregon bill thus imposed consistent regulations on litter and all market participants in seeking to reduce the externalities associated with the amount of litter within the state.

The same statement cannot be made about Alabama’s additional fee. The Alabama statute was improperly underinclusive because it imposed the additional fee only on out-of-state waste. Alabama never demonstrated that this unequal regulatory burden was required in order to establish an adequate disposal program for the state’s own waste. Chief Justice Rehnquist tried to make this case when he argued that the additional fee was an effort by the state to internalize certain externalities,<sup>50</sup> but his understanding of the Alabama fee is flawed. The fee fails to restrict in any way the disposal of hazardous waste by Alabama citizens while it substantially restricts disposal of out-of-state wastes. To avoid condemnation as an inefficient, discriminatory regulation, Alabama, like Oregon, must demonstrate some basis, other than place of origin, for imposing different burdens on in-state and out-of-state waste. Unlike Oregon, Alabama adopted an underinclusive law that failed to address comprehensively the externalities associated with waste disposal. Accordingly, Alabama could not present any “colorable justification” for its regulation which, from a national perspective, deserves approval.<sup>51</sup>

Finally, the process-based concerns important to dormant Com-

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diverts business away from presumptively low-cost producers without any colorable justification in terms of a ‘federally cognizable benefit.’” *Id.*

47. *Id.* at 1102.

48. *Id.*

49. *Id.* at 1116-18.

50. See *Chemical Waste Management*, 112 S. Ct. at 2018 (Rehnquist, C.J., dissenting). The Chief Justice argued that the additional fee is a proper tax that “discourag[es] the consumption of scarce commodities — in this case the safe environment that attends appropriate disposal of hazardous waste.” *Id.*

51. See *supra* notes 44-46.

merce Clause doctrine also support the conclusion that the Commerce Clause bars Alabama's additional fee. The dormant Commerce Clause "prevent[s] discrimination against outsiders who are not represented in the state's political process . . . ." <sup>52</sup> Alabama's additional fee, which applies only to out-of-state wastes, is objectionable because the political process which yielded this fee failed to consider the out-of-state interests or the in-state proxies for those interests. <sup>53</sup>

Having identified why, contrary to the conclusion of the Chief Jus-

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52. Farber, *supra* note 28, at 396 (footnote omitted); see also Jesse H. Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1584-85 (1977). Dean Choper argues that:

[S]tate and local legislatures contain no representatives of the central government or of those persons outside the jurisdiction upon whom the weight of the local laws may fall. And since the force of special interest groups is markedly greater in local legislative bodies than in the federal political process, state and local lawmaking that affects the federal government or persons engaged in interstate activities may not be similarly trusted. The phenomenon is most clearly exemplified by laws that discriminate against outsiders to the benefit of local interests, either private or governmental. Moreover, even nondiscriminatory local rules that impose equivalent burdens on insiders and outsiders may nonetheless fail to express adequate concern for the broader national interest.

*Id.* (footnotes omitted).

Professor Regan rejects this process-based theory of dormant Commerce Clause doctrine. See Regan, *supra* note 27, at 1160-67. This rejection is based, in part, on his view that such process-based doctrine shifts power away from the legislatures to the courts:

By not requiring state lawmakers to be always looking over their shoulders for foreign interests and always calculating the proportionate incidence of benefits and burdens, we make legislation a possible task for lawmakers with less expertise and less administrative support available to them than Congress has. We also avoid a massive transfer of power to the courts, federal and state.

*Id.* at 1165-66.

Notwithstanding Regan's critique, process-based concerns have firm support in Supreme Court decisions. See, e.g., *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675 (1981) (plurality opinion) (affirming that whether a state law passes muster under the Commerce Clause depends in part on whether "a State's own political process will serve as a check against unduly burdensome regulations"); *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 447 (1978) (considering whether the "State's own political processes will act as a check on local regulations that unduly burden interstate commerce"); *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 185 n.2 (1938) (noting that "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state."). Indeed, Professor Farber contends that "the dormant Commerce Clause should be limited to its process rationale." Farber, *supra* note 28, at 403.

53. See Farber, *supra* note 28, at 400-01 ("The process rationale [for the dormant Commerce Clause doctrine] is based on the lack of representation for non-residents in the political process. . . . Like racial minorities during much of our history, out-of-state

tice, Alabama's additional fee was impermissible protectionist legislation, consider the majority's analysis. The majority premised its analysis on the relatively insignificant conclusion that the additional fee discriminates improperly against the movement of out-of-state waste and failed to confront Chief Justice Rehnquist's core concerns. In his dissent, the Chief Justice expressed concern that the disposal of out-of-state waste imposes real and uncompensated risks on the State's environment and the health of its citizens.<sup>54</sup> Rehnquist argued that the State may use the additional fee to minimize these risks.<sup>55</sup> The majority responded that Alabama's concerns relate to the volume of waste and this problem can be addressed by means other than a fee assessed only against out-of-state waste.<sup>56</sup>

The majority's response fails to recognize the existence of certain unique risks posed by importing and disposing of out-of-state waste. The unique risks suggest a non-protectionist motive behind Alabama's regulation. The third of Professor Regan's three objections to protectionist legislation helps in understanding this problem. The "resentment/retaliation" objection<sup>57</sup> arises because "protectionist legislation . . . is likely to generate a cycle of escalating animosity and isolation . . . , eventually imperiling the political viability of the union itself."<sup>58</sup> However, the threat of "resentment" to the additional fee imposed by Alabama is insignificant for two reasons. First, at an intuitive level, citizens of one state are unlikely to believe that they have a right to dispose of their hazardous waste in another state on the same terms as citizens of that state, regardless of whether the disposal site is publicly owned.<sup>59</sup> This intuition is based on the citizens' reluctance to allow

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residents lack political representation and thus the democratic process may fail fully to safeguard their interests." (footnote omitted)).

54. *Chemical Waste Management*, 112 S. Ct. at 2017-18 (Rehnquist, C.J., dissenting).

55. *Id.*

56. *Id.* at 2015-16.

57. Regan, *supra* note 27, at 1114.

58. *Id.*

59. *See id.* at 1113 (arguing that state legislation is not hostile when "[i]t takes nothing away from [out-of-staters] that we would normally think they have as much right to as [in-staters] have."). Chief Justice Rehnquist presents an analogous point in dissent in *Chemical Waste Management*:

As the Court acknowledges, [flat, unitary] taxes are a permissible effort to recoup compensation for the risks imposed on the State. Yet Alabama's general tax revenues presumably already support the State's various inspection and regulatory efforts designed to ensure the Emelle facility's safe operation. Thus, Alabamans will

any waste disposal site to be located near them.<sup>60</sup> This reluctance leads to the scarcity of waste sites, which, in turn, exacerbates the current waste-disposal crisis.<sup>61</sup> Citizens of every state come to perceive that those states willing to incur both the tangible and intangible costs of operating a hazardous waste disposal facility within their borders are likely to favor, and properly do favor, their own citizens' use of the disposal capacity at that facility. Advocates of the "market participant exception" to the Commerce Clause rely on this perception and expectation.<sup>62</sup>

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be made to pay twice, once through general taxation and a second time through a specific disposal fee. Permitting differential taxation would, in part, do no more than recognize that, having been made to bear all the risks from such hazardous waste sites, Alabama should not in addition be made to pay *more* than others in supporting activities that will help to minimize the risk.

112 S. Ct. at 2018-19 (Rehnquist, C.J., dissenting).

60. See Karen L. Florini, *Issues of Federalism in Hazardous Waste Control: Cooperation or Confusion?*, 6 HARV. ENVTL. L. REV. 307, 307-08 (1982) (finding that "the publicity surrounding [incidents involving inadequate disposal of hazardous waste] has focused public attention on the dangers associated with hazardous waste. As a result, virtually all recent attempts to site new facilities for treating, storing, or disposing of such waste have been defeated by opposition from local residents." (footnote omitted)); see also Jonathan R. Stone, *Supremacy and Commerce Clause Issues Regarding State Hazardous Waste Import Bans*, 15 COLUM. J. ENVTL. L. 1, 1 (1990) (discussing a study showing public opposition to siting of hazardous waste disposal facilities); see generally Sarah Crim, *The NIMBY Syndrome in the 1990s: Where Do You Go After Getting to 'No'?*, 21 Env't Rep. (BNA) 132 (1990) (discussing the problems of siting waste disposal facilities).

Interestingly, recent studies suggest that hazardous waste facilities present risks of the same magnitude to the public as solid waste facilities. See *infra* note 94.

61. See Solid Waste Disposal Facility Criteria, 56 Fed. Reg. 50,978, 50,980 (1991) (to be codified at 40 C.F.R. §§ 257-58) ("Today's disposal capacity crisis is further compounded by the difficulty in siting new solid waste management facilities."); see also Robert Meltz, *State Discrimination Against Imported Solid Waste: Constitutional Roadblocks*, 20 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,383, 10,383 (1990) ("Existing landfills are rapidly filling up and closing; proposed new ones . . . spark intense local opposition."); James Hinshaw, Note, *The Dormant Commerce Clause After Garcia: An Application to the Interstate Commerce of Sanitary Landfill Space*, 67 IND. L.J. 511, 511 (1992) ("Because sanitary landfill space is rapidly diminishing, it is quickly becoming one of the United States' most sought after resources.").

62. See Coenen, *supra* note 28, at 434, where the author states:

If it is 'obvious' that a state may prefer its own residents in distributing its resources, then few nonresidents will take umbrage when a state does so; and if few nonresidents take umbrage, then their home states are unlikely to pursue the retaliations and reprisals the dormant Commerce Clause was meant to neutralize.

*Id.* (footnote omitted).

For an example of the Supreme Court's application of the market participant exception, see *Reeves, Inc. v. Stake*, 447 U.S. 429, 447 (1980) (holding that South Dakota

The second reason why the resentment/retaliation objection lacks relevance to the problem of hazardous waste disposal is that retaliatory action by a state — through the construction of a waste disposal facility within its own borders and the enactment of a retaliatory limit on the import of out-of-state waste into that facility — would largely solve the problem of one state imposing upon another state the risks associated with disposal of its waste.<sup>63</sup> Because of the risks associated with the article of commerce being regulated in the hazardous waste disposal context and because the state and its citizens receiving the waste must accept the risks, the resentment/retaliation objection to protectionism has no force in the instant context.

In sum, although the Court properly struck down Alabama's additional fee on out-of-state waste, the Court's reasoning was too cursory and therefore failed to recognize the significance of the waste-regulation context. It becomes evident that this cursory decisionmaking resulted in an erroneous decision in the other state waste-regulation case decided during the October 1991 Term.

## II. *FORT GRATIOT LANDFILL AND THE DETERMINATION WHETHER THE EFFECTS OF REGULATION ARE PROTECTIONIST OR ONLY INCIDENTAL*

In contrast to Alabama's additional fee, a comprehensive state program for the disposal of waste was at issue in the second Commerce

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may discriminate in favor of its own citizens in sales of cement from a State-owned cement plant).

63. *Cf. Florini, supra* note 60, at 325. The author discusses the reverse commons problem associated with the siting of waste disposal facilities:

Local groups generally oppose hazardous waste facilities because such facilities create many costs and few benefits for local communities. Host communities bear the risks to health and the environment presented by hazardous waste facilities; whole states and regions, however, share the benefits of having a safe disposal site for waste produced in creating desirable products. Siting of hazardous waste facilities thus presents a "reverse commons" problem, where the costs of a facility to the host community outweigh the benefits; as a result, each community refuses to take action in the hope that if it delays long enough, facilities will be sited in other communities.

*Id.* (footnotes omitted).

It is clearly inefficient for each state to establish its own facility, located within its borders, capable of disposing of a full range of hazardous waste. Given the minimal quantities of at least some categories of hazardous waste produced in a given state, it is difficult for that state to justify the cost of a facility capable of disposing of a full range of hazardous materials. *See Crim, supra* note 60, at 137 (summarizing a report by the National Governors Association on state hazardous waste disposal issues).

Clause case before the Supreme Court last term. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*<sup>64</sup> involved a private landfill's challenge to Michigan's Solid Waste Management Act (SWMA).<sup>65</sup> The SWMA established a comprehensive regulatory scheme for the disposal of solid waste within the state.<sup>66</sup> The legislature amended the SWMA to define the limited circumstances when a landfill could receive permission to accept solid waste from outside the county in which the facility was located.<sup>67</sup> As amended, the SWMA established the following Waste Import Restrictions:

A person shall not accept for disposal solid waste . . . that is not generated in the county in which the disposal area is located unless the acceptance of solid waste . . . that is not generated in the county is explicitly authorized in the approved county solid waste management plan.<sup>68</sup>

In 1987, the petitioner in *Fort Gratiot Landfill* received a permit to operate a private landfill in St. Clair County, Michigan.<sup>69</sup> In 1989, the petitioner sought approval of its plan to accept out-of-state waste at the site.<sup>70</sup> The operator assured state officials that the facility possessed sufficient capacity to handle the out-of-state waste and all waste generated in the county during the next twenty years.<sup>71</sup> The county's solid waste planning committee denied the facility's request to import out-of-county waste, restricting the facility to the disposal of solid waste generated within St. Clair County.<sup>72</sup>

The landfill operator brought an action in the United States District Court for the Eastern District of Michigan, challenging the constitutionality of Michigan's statute because of the burdens that it imposed

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64. 112 S. Ct. 2019 (1992).

65. 1978 MICH. COMP. LAWS ANN. §§ 299.401-299.437 (West 1984 & Supp. 1992) (originally enacted as 1978 Mich. Pub. Acts 641).

66. See 112 S. Ct. at 2021-22 (describing the purposes of the SWMA).

67. See 1988 Mich. Pub. Acts 475, § 1 (codified as amended at MICH. COMP. LAWS ANN. §§ 299.413a, 299.430(2) (West Supp. 1992)).

68. MICH. COMP. LAWS ANN. § 299.413a (West Supp. 1992). See also MICH. COMP. LAWS ANN. § 299.430(2) (West Supp. 1992) ("In order for a disposal area to serve the disposal needs of another county, state, or country, the service . . . must be explicitly authorized in the approved solid waste management plan of the receiving county.").

69. 112 S. Ct. at 2022.

70. *Id.*

71. *Id.*

72. *Id.*



on interstate commerce.<sup>73</sup> The district court rejected this Commerce Clause challenge, holding that the statute did not discriminate on its face or in its effects.<sup>74</sup> The Sixth Circuit affirmed, holding that Michigan's regulation of solid waste did not violate the Commerce Clause. The court reasoned that the regulation did not subject out-of-state waste to more rigorous requirements than those applied to waste generated within the state but outside St. Clair County, where the landfill is located.<sup>75</sup>

In *Fort Gratiot*, the Court considered whether Michigan's regulation of the disposal of out-of-county waste, including out-of-state waste, comprised protectionist legislation, subject to the Court's virtually per se rule of invalidity.<sup>76</sup> Justice Stevens, writing for seven members of the Court, held that "the Waste Import Restrictions [in Michigan's SWMA] unambiguously discriminate against interstate commerce and are appropriately characterized as protectionist measures . . . ."<sup>77</sup> Accordingly, Michigan faced the same test that applied to Alabama's additional fee — "the State bears the burden of proving that the [Waste Import Restrictions] further health and safety concerns that cannot be adequately served by nondiscriminatory alternatives."<sup>78</sup> Michigan's hazardous waste regulation failed to survive this strict scrutiny test.<sup>79</sup>

In dissent, Chief Justice Rehnquist, joined by Justice Blackmun, concluded that the state law was not protectionist, but rather a legitimate state response to legitimate local concerns.<sup>80</sup> The state's response caused only an incidental impact on interstate commerce.<sup>81</sup> Justice

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73. *Bill Kettlewell Excavating, Inc. v. Michigan Dep't of Natural Resources*, 732 F. Supp. 761, 762 (E.D. Mich. 1990) *aff'd*, 931 F.2d 413 (6th Cir. 1991), *rev'd*, 112 S. Ct. 2019 (1992).

74. 732 F. Supp. at 765-66.

75. *Bill Kettlewell Excavating, Inc. v. Michigan Dep't of Natural Resources*, 931 F.2d 413, 417 (6th Cir. 1991), *rev'd*, 112 S. Ct. 2019 (1992).

76. Before focusing on this issue, the Court concluded that Michigan's regulation of solid waste disposal was subject to review under the Commerce Clause because waste disposal, as well as the commercial transactions associated with it, constitutes interstate commerce. 112 S. Ct. at 2023-24. See *supra* note 13 and accompanying text for a discussion of the Court's determinations that waste in various forms is an article of interstate commerce.

77. 112 S. Ct. at 2028. Justice Blackmun, who joined the majority in *Chemical Waste Management*, dissented with Chief Justice Rehnquist in *Fort Gratiot*.

78. *Id.* at 2027.

79. *Id.*

80. See *id.* at 2028 (Rehnquist, C.J., dissenting).

81. *Id.*

Rehnquist would have remanded the case for further proceedings involving a balancing of local interests against the burdens on interstate commerce.<sup>82</sup>

As with its analysis in the *Chemical Waste Management* decision,<sup>83</sup> the Court is superficial in its application of Commerce Clause doctrine. The Court fails to present a persuasive case that the SWMA is objectionable because it is protectionist. Indeed, the Court offers only one objection to the legislation — it favors local, in-state waste producers.<sup>84</sup>

Before seeking to associate this objection with any of Professor Regan's three core objections to protectionism,<sup>85</sup> it is important to recognize that, as an empirical matter, whether Michigan's Waste Import Restrictions actually favor local waste producers remains unanswered. Chief Justice Rehnquist argued that the regulation actually increases the costs of disposal for local waste generators.<sup>86</sup> Moreover, recall that

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82. *Id.* The Chief Justice's dissent advocates the use of the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). See *supra* note 17 and *infra* notes 123-31 and accompanying text (discussing the *Pike* test). The next part of this Article advocates the reformulation of dormant Commerce Clause doctrine and the abandonment of the *Pike* test. Thus, courts would uphold state laws that impose merely incidental burdens on interstate commerce, assuming they are not protectionist.

83. See *supra* notes 27-63 and accompanying text.

84. 112 S. Ct. at 2024. The court stated:

The Waste Import Restrictions enacted by Michigan authorize each of its 83 counties to isolate itself from the national economy. Indeed, unless a county acts affirmatively to permit other waste to enter its jurisdiction, *the statute affords local waste producers complete protection from competition from out-of-state producers who seek to use local waste disposal areas . . . .*

*Id.* (emphasis added).

85. See *supra* note 30 for an enumeration of Professor Regan's three core objections to protectionism.

86. See 112 S. Ct. at 2029 (Rehnquist, C.J., dissenting) (arguing that "by limiting potential disposal volumes for any particular site, various fixed costs will have to be recovered across smaller volumes, increasing disposal costs per unit for Michigan consumers. 56 Fed. Reg. 50,987.").

This language appears in the preamble to EPA's final regulations prescribing requirements for solid waste landfills. The preamble explains the range of incremental costs associated with the federal regulation of landfills. The EPA states that "[l]andfill size is a key factor in determining the cost per ton [of disposal], with larger landfills benefitting significantly from economies of scale." Solid Waste Disposal Facility Criteria, 56 Fed. Reg. 50,978, 50,987 (1991) (to be codified at 40 C.F.R. §§ 357-58). For private operators in Michigan to earn a profit, they may have to charge in-county waste generators increased fees which reflect the costs of complying with the Michigan regulations. Presumably, landfill owners and operators would raise this argument in seeking permission for disposal of out-of-county waste. *Cf. Crim, supra* note 60, at 137 ("[a] state that refused out-of-state waste at its [publicly-owned] facility probably would need to subsi-

the Commerce Clause dictates neither *laissez-faire* nor even-handed regulation by states.<sup>87</sup>

We now consider whether Michigan's regulatory scheme is objectionable because it is protectionist. The first objection to protectionism — an objection that applied to Alabama's additional fee<sup>88</sup> — is that it undermines the concept of union.<sup>89</sup> Professor Regan indicates that it is not enough to condemn state regulations based on the "concept of union" objection because the regulation "harm[s] some foreign interests in the process of conferring an independent local benefit."<sup>90</sup> The regulation must do more if it is to violate the concept of union: it must "take[] away from the foreigners to give to local residents exactly what has been taken away. . . ."<sup>91</sup>

Does Michigan's regulation work this type of transfer of interests? The majority does not rely directly on this objection, and the dissent presents a compelling argument that any such objection to Michigan's comprehensive regulation of solid waste disposal would be unavailing. The dissent considers the difficulties encountered by a state that responds to the waste disposal crisis<sup>92</sup> by attempting to ensure adequate

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dize the cost of its disposal services in order to attract business from in-state waste generators.").

87. See *supra* notes 28-29 and accompanying text.

88. See *supra* notes 31-43 and accompanying text for a discussion of the application of the "concept-of-union" analysis to the statute at issue in *Chemical Waste Management*.

89. See Regan, *supra* note 27, at 1113.

90. *Id.*

91. *Id.*

92. We have already indicated that a solid waste disposal crisis exists. See *supra* note 5 (noting that the problem of solid waste disposal has reached crisis proportions). The EPA indicated that this crisis is likely to worsen in the foreseeable future:

[I]n 1988 the nation generated nearly 180 million tons of municipal solid waste and that this quantity would likely grow to 216 million tons by the year 2000. This growing volume of waste is coupled with a steadily decreasing availability of disposal capacity. In a 1986 EPA survey, 45 percent of the municipal solid waste landfill owners/operators reported that their landfills would reach capacity by 1991.

Solid Waste Disposal Facility Criteria, 56 Fed. Reg. 50,978, 50,980 (1991). In considering solutions to this crisis, recognize that the responsibility for solid waste disposal, planning and implementation, including the siting of landfills, lies with the states. See, e.g., *id.* at 50,979. The EPA states that:

Subtitle D of RCRA establishes a framework for Federal, State, and local government cooperation in controlling the management of nonhazardous solid waste. The Federal role in this arrangement is to establish the overall regulatory direction . . . . The actual planning and direct implementation of solid waste programs under subtitle D, however, remain largely State and local functions . . . .

landfill capacity for its own waste.<sup>93</sup>

Because its comprehensive regulation of solid waste created something which would not otherwise have existed — sufficient landfill capacity for all of the state's solid waste — Michigan should not be viewed as undermining the concept of union. Sufficient disposal capacity was not taken from out-of-staters, but was established, at no small risk to the in-state population, through compulsory state regulation.<sup>94</sup>

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*Id.* See also Ann R. Mesnikoff, Note, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home*, 76 MINN. L. REV. 1219, 1221 (1992) ("RCRA created a comprehensive regulatory system for managing the nation's hazardous waste but left the responsibility for managing nonhazardous solid waste to state, regional, and local authorities.").

93. 112 S. Ct. at 2028 (Rehnquist, C.J., dissenting) (citation omitted). The Chief Justice pointed out that: "[T]he substantial risks attendant to waste sites make them extraordinarily unattractive neighbors. The result, of course, is that while many are willing to generate waste . . . few are willing to help dispose of it. Those locales that do provide disposal capacity to serve foreign waste effectively are affording reduced environmental and safety risks to the States that will not take charge of their own waste." *Id.*

94. Presently, the risks related to solid waste disposal are no less than the risks associated with hazardous waste disposal. See Solid Waste Disposal Facility Criteria, 56 Fed. Reg. 50,978, 50,982 (1991) (to be codified at 40 C.F.R. §§ 257-58) ("EPA agrees with commenters that data available to the Agency at this time do not provide strong support for distinguishing the health and environmental threats posed by [municipal solid waste landfills] and subtitle C [hazardous waste] facilities."). The extent of the threat to the public health and to the environment posed by solid waste landfills is reflected by present threats of ground water contamination. See Solid Waste Disposal Facility Criteria, 53 Fed. Reg. 33,314, 33,319 (1988) (to be codified at 40 C.F.R. §§ 257-58) (proposed Aug. 30, 1988) ("More than 500 [municipal solid waste landfills (MSWLFs)], or about 25 percent of MSWLFs with ground-water monitoring systems, were reported by States to be violating a State ground-water protection standard, although the nature and extent of these violations are unknown."). Additionally, the large number of landfills classified as priorities for Superfund cleanup, indicate ongoing hazards from solid waste landfills. See *id.* ("Of the 850 sites listed or proposed for listing on the [National Priorities List (NPL)] (in May 1986), 184 sites (22 percent) were identified as MSWLFs. In addition, of the 27,000 sites in the Superfund data base, almost one fourth are MSWLFs. In general, the MSWLFs on the NPL were poorly located and designed.").

The EPA has expressed hope and expectations for a substantial decrease in the risks associated with solid waste disposal. The EPA believes that the risks associated with solid waste disposal will decrease as a result of new state and local programs. See 56 Fed. Reg. at 50,982 ("[t]he Agency has many reasons to believe that the quality of the leachate from MSWLFs will improve over time. Increasingly, communities are instituting household hazardous waste programs and removing toxins from waste prior to its disposal in a municipal landfill."). Also, federal regulation of the design of solid waste landfills should reduce the risks associated with those facilities. See *id.* at 50,986 ("EPA believes that the promulgation of federal municipal solid waste landfill criteria will increase public confidence that landfills are designed to protect human health and the

As Professor Regan stated, in terms reminiscent of the dissent's argument, state legislation is not hostile when "[i]t takes nothing away from [out-of-staters] that we would normally think they have as much right to as [in-staters] have."<sup>95</sup>

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environment. EPA believes that this increased confidence will reduce opposition to landfills and make the siting of new landfills less difficult."); see also 53 Fed. Reg. at 33,321 ("EPA is aware of the crisis in solid waste management and believes that these proposed Criteria revisions should be a major step toward alleviating public concern with respect to inadequate controls on solid waste disposal.").

95. Regan, *supra* note 27, at 1113. See 112 S. Ct. at 2030 (Rehnquist, C.J., dissenting). The dissent argues that Michigan's regulation is more favorable to out-of-state waste generators than the Commerce Clause requires:

Michigan has limited the ability of its own population to despoil the environment and to create health and safety risks by excessive and uncontrolled waste disposal. It does not thereby violate the Commerce Clause when it seeks to prevent this resource from being exported — the effect if Michigan is forced to accept foreign waste in its disposal facilities. Rather, the "resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage." [*Sporhase v. Nebraska*, 458 U.S. 941, 957 (1982)]. Of course the State may choose not to do this, and in fact, in this case Michigan does permit counties to decide on an individualized basis whether to accept out-of-county waste. But such a result is not constitutionally mandated.

*Id.* See also *Swin Resource Sys., Inc. v. Lycoming County*, 883 F.2d 245, 254 (3d Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990), where the Third Circuit compared the siting of a private landfill within a community to the production of a public good by that community. *Id.* The court took

cognizance of the difficulties often attendant in efforts by municipalities to build waste disposal sites in light of their unpopularity with local residents. Neither the sacrifice of local residents in allowing a landfill to be built nearby nor the political character of much of the shortage of land available for landfill construction should be ignored.

*Id.*

In attempting to distinguish the regulation at issue in *Fort Gratiot* from the ban on out-of-state waste struck down in *Philadelphia v. New Jersey*, Michigan relied on *Sporhase v. Nebraska*, 458 U.S. 941 (1982). In *Sporhase*, the Court struck down a regulation on interstate groundwater use, but the Court noted that "a state that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the state." *Sporhase*, 458 U.S. at 955-56. In *Fort Gratiot*, Michigan argued that out-of-state waste could be treated differently because, unlike New Jersey, Michigan took steps to conserve limited landfill capacity and thereby created a public good. See 112 S. Ct. at 2026. The majority rejected this argument, concluding that Michigan's treatment of out-of-state waste was unjustified. See *id.* at 2027. The majority specifically rejected Michigan's reliance on *Sporhase's* public-good rationale, finding that the special role of states relating to groundwater and its quasi-public good character did not apply in the context of private landfills. *Id.* at 2027 n.7. The Court stated that "[t]here are . . . no analogous traditional legal expectations regarding state regulation of private landfills, which are neither publicly produced nor publicly owned." *Id.*

Another of Regan's principal objections to protectionism is that it causes resentment and a cycle of retaliation by other states.<sup>96</sup> The majority does not rely on this objection to Michigan's Waste Import Restrictions either. As in the case of Alabama's additional fee,<sup>97</sup> the resentment and retaliation objection lacks force in the context of Michigan's solid waste regulation. As the dissent in *Fort Gratiot* argues, Michigan's regulatory scheme "simply incorporates the common sense notion that those responsible for a problem should be responsible for its solution to the degree they are responsible for the problem but not further."<sup>98</sup>

Out-of-state citizens and legislators have no reason to resent a state's controls on hazardous waste disposal when that state imposes the very same restrictions on its in-state waste producers, all in the interest of conserving landfill space. As a matter of common sense, both residents and non-residents perceive the threat that hazardous waste disposal poses to the nearby environment and the public health. Moreover, because waste disposal restrictions are a necessity,<sup>99</sup> retaliation is unlikely

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96. See Regan, *supra* note 27, at 1114.

97. See *supra* notes 57-63 and accompanying text for a discussion of the resentment/retaliation objection and its application in *Chemical Waste Management*.

98. 112 S. Ct. at 2029 (Rehnquist, C.J., dissenting). Cf. *Swin Resource Sys., Inc. v. Lycoming County*, 883 F.2d 245, 251 (3d Cir. 1989) ("The residents who reside within the jurisdiction of a county or municipality are unlikely to pay for local government services if they must bear the cost but the entire nation may receive the benefit."), *cert. denied*, 493 U.S. 1077 (1990).

99. See *Swin Resource Sys., Inc.*, 883 F.2d at 253. The court stated that: [W]aste disposal is unlike some other natural resource industries in that few communities welcome the opening of a waste disposal site in their midst. The opening of the site is often viewed as a threat to property values and quality of life that is acceptable only because of the pressing need for waste disposal.

*Id.*

Arguably, the new federal standards for solid waste disposal facilities internalize the negative externalities associated with solid waste disposal. Consequently, the price for disposing of waste in the future should properly reflect the risks and burdens associated with disposal of solid waste. See *Solid Waste Disposal Facility Criteria*, 56 Fed. Reg. 50,978, 50,986 (1991) (to be codified at 40 C.F.R. §§ 257-58) ("[T]he final rule [establishing operating and siting standards for waste disposal facilities], by more fully reflecting the cost of safe waste disposal, will also lead to more responsible waste management practices and promote resource conservation."). When the externalities cease to exist, the state where the landfill is located does not assume any burden. Rather, the disposal facility becomes just another business located in the state.

While there exists some theoretical appeal to this argument, reality is far different. Communities will continue to oppose state plans to locate landfills nearby, and once a site is selected, the value of property near the site will continue to be affected. Moreover, it is unlikely that the new federal regulations generate a sufficient level of confi-

to follow the enactment of a regulatory scheme like Michigan's.<sup>100</sup>

Professor Regan's third objection to protectionism is the efficiency objection, an objection which also applied to Alabama's additional fee.<sup>101</sup> The Supreme Court focused on this objection in concluding that the Michigan Import Restrictions were protectionist, finding that the restrictions "afford[] local waste producers complete protection from competition from out-of-state producers who seek to use local waste disposal areas."<sup>102</sup>

Before assessing the efficiency objection, recall Professor Regan's concern that efficiency is a "treacherous notion."<sup>103</sup> Professor Regan suggests a cautious approach: the Commerce Clause does not condemn all inefficient state regulations; rather, it forecloses only those regulations that penalize commerce outside the state without furthering an independent value that is nationally beneficial.<sup>104</sup>

Does Michigan's regulatory scheme for solid waste disposal restrain the disposal of out-of-state waste to enhance such a cognizable interest? The majority fails to analyze whether there is some permissible basis for out-of-state waste disposal requirements that are inapplicable to in-state, and more specifically in-county, waste. The majority's analysis is also flawed with respect to the efficiency objection because it fails to account for both the type of commerce being regulated and the fact that the constraints imposed on out-of-state waste may be central to the underlying, legitimate purposes of the regulation.

With respect to the type of commerce regulated, the majority determines, *sub silentio*, that items of commerce need not be distinguished for purposes of applying Commerce Clause doctrine. The majority declined to dispute the dissent's statement that disposal of out-of-state and out-of-county waste imposed negative externalities on the county where the landfill was located.<sup>105</sup> In both its analysis and its conclu-

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dence in the safety of landfills to convince state residents to accept such a facility in their communities.

100. If such retaliation occurred, it would create the solution to the solid waste disposal crisis discussed at *supra* notes 5 & 92 because that retaliation would cause states to ensure sufficient landfill capacity within their jurisdictions. See *supra* note 63.

101. Regan, *supra* note 27, at 1115.

102. *Fort Gratiot*, 112 S. Ct. at 2024.

103. Regan, *supra* note 27, at 1115; see also *supra* note 44.

104. See Regan, *supra* note 27, at 1118; see generally *supra* notes 46-49 and accompanying text.

105. See 112 S. Ct. at 2028 n.1 (Rehnquist, C.J., dissenting) ("There can be little doubt that in accepting this garbage, [a private landfill operator] is also imposing envi-

sion,<sup>106</sup> the majority ignored the adverse affects associated with importing solid waste, because it equated the regulation of solid waste disposal with the regulation of the sale of wholesome milk.<sup>107</sup>

In assessing the efficiency objection to Michigan's Waste Import Restrictions, the majority also failed to recognize the legal significance of the burden those restrictions imposed on in-state commerce. The majority relied on previous holdings<sup>108</sup> to support its conclusion that the

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ronmental and other risks attendant to the waste's delivery and storage."'). One commentator stresses the burdens accepted by any state which receives out-of-state waste for disposal:

[R]egardless of who operates the disposal facility, it is the residents of the receiving state who bear the social costs of waste acceptance. These costs include the necessity of increased recycling efforts by local businesses and residents; health risks and environmental degradation; and eventually a divisive and expensive siting procedure for additional waste disposal facilities. The garbage-receiving state essentially exports a third benefit by enabling its neighbor to avoid those costs. It can do so because its residents have worked and will continue to work as a polity to reduce waste production, save open space for landfilling, absorb and mitigate the health and environmental costs of waste acceptance, and make a hard choice on siting.

David Pomper, Comment, *Recycling Philadelphia v. New Jersey: The Dormant Commerce Clause, Postindustrial "Natural" Resources, and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309, 1332-33 (1989) (footnotes omitted).

106. The majority ignored the externalities of waste disposal, holding that "Michigan has not identified any reason, apart from its origin, why solid waste coming from outside the county should be treated differently from solid waste within the county . . . ." 112 S. Ct. at 2024.

107. The majority viewed *Fort Gratiot* as legally indistinguishable from *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). See 112 S. Ct. at 2024-25. *Dean Milk*, however, involved constraints on the sale of "wholesome milk produced and pasteurized" out of state, 340 U.S. at 354, which lacks the detrimental aspects of solid or hazardous waste. See *infra* note 108.

108. Referring to its decisions in *Brimmer v. Rebman*, 138 U.S. 78 (1891), and *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), the Court concluded that "a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself." 112 S. Ct. at 2024-25.

*Dean Milk* is distinguishable from the instant case because *Dean Milk* involved regulations on the sale of wholesome milk — a product which does not impose negative externalities on the importing community. See 340 U.S. at 354. The *Brimmer* Court concluded that an inspection fee on the sale of meat slaughtered out-of-state bore no relationship to the state's asserted public health purpose of protecting its citizens from unwholesome meat. 138 U.S. at 82-84. The locally-produced meat simply was not subjected to the same inspection fee applied to out-of-state meat. *Id.* The dissent in *Fort Gratiot* made this basic point in rejecting the majority's reliance on these decisions:

[I]n both *Brimmer* and *Dean Milk* the Court simply rejected the notion that there could be a noneconomic protectionist reason for the bans at issue, because the objects being banned presented no health or environmental risk. . . . Neither *Dean*



Commerce Clause precluded burdens on interstate commerce despite a comparable impact on in-state businesses.<sup>109</sup>

This consideration of the intra-state impacts of the Waste Import Restrictions is flawed because it fails to recognize, or even to identify, the interest addressed by the state's regulation in considering whether the regulation is protectionist. When a regulation burdens both in-state and out-of-state wastes equally, it is difficult to argue that the interest being served by the regulation is the significant burdening of out-of-state waste disposal. Indeed, if Michigan is to ensure adequate solid waste disposal capacity throughout the state, the difference between in-county (or in-state-region) and out-of-county (or out-of-state-region) waste may be critical.<sup>110</sup> The distinction may be necessary for

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*Milk nor Brimmer* prohibits a State from adopting health and safety regulations that are directed to legitimate local concerns.

112 S. Ct. at 2029-30 (Rehnquist, C.J., dissenting) (citations omitted).

109. The Court decided that "neither the fact that the Michigan statute purports to regulate intercounty commerce in waste nor the fact that some Michigan counties accept out-of-state waste provides an adequate basis for distinguishing this case from *Philadelphia v. New Jersey*." 112 S. Ct. at 2025-26.

110. The text mentions regional disposal because a state is more likely to succeed in ensuring sufficient and cost-effective solid waste disposal capacity by requiring different regions within a state to provide the landfill capacity necessary for proper disposal. By requiring the siting and development of fewer landfills, this alternative is more likely to promote sufficiency and efficiency in the use of landfill capacity than Michigan's county-by-county regulation. The Michigan approach is, however, consistent with the traditional approach in the United States, which relies on small landfills for the disposal of most solid waste. See Solid Waste Disposal Facility Criteria, 56 Fed. Reg. 50,978, 50,988 (1991) (to be codified at 40 C.F.R. §§ 257-58) (reporting that "small landfills (less than 17.5 TPD [tons per day]) represented 51 percent of the total number of landfills in 1986, yet handled only 2 percent of the total waste."). Small landfills are generally poorly designed, located in less environmentally desirable places, and have higher per ton costs associated with disposal. See *id.*

EPA has recently identified a "strong trend toward regionalization," stating that: [S]mall communities have a number of strong incentives to regionalize and, in fact, many of them have moved or are currently moving to regional facilities. This trend is evidenced by the drop in landfills over the past twenty years. While 1970 estimates of the U.S. landfill population neared 18,000, EPA estimates that in 1986, only approximately 6,000 MSWLFs were operating — and that the total number of landfills continues to decrease.

*Id.* For an example of a state which pursued a regional approach to ensuring solid waste disposal capacity within the state, see *Industry Assails Pa. Waste-Shed Plan to Bar Out-of-State Trash*, INTEGRATED WASTE MANAGEMENT 1 (McGraw-Hill, Inc., New York, N.Y.) Jan. 22, 1992, at 1 (describing industry criticism of "a recent proposal by Pennsylvania Governor Robert Casey to create four in-state waste sheds, or regions, each of which would be responsible for the disposal of the solid waste generated within its own region.").

the state to succeed in developing sufficient support within affected populations for the siting of landfills in each county or waste disposal region throughout the state.

Michigan's SWMA is analogous to the Oregon bottle bill, which Professor Regan defended as nonprotectionist, because of the nationally-cognizable interest served by the legislation.<sup>111</sup> In order for the Bottle Bill to reduce litter effectively within Oregon's borders, the state imposed general restrictions that impacted both in-state and out-of-state producers of beverage containers. Any limitation on Oregon's ability to impose those restrictions on out-of-state producers, because of concerns about protectionism, would have made the law ineffective in reducing litter.<sup>112</sup>

The majority's superficial view of protectionism effectively foreclosed Michigan from enacting comprehensive regulations to ensure sufficient landfills in each county. Those regulations that rely on the siting of landfills throughout the state are able to achieve the desired objective only by curtailing the disposal of all out-of-county waste, regardless of whether it is in-state or out-of-state. Had this case been remanded for application of the *Pike* test, which upholds statutes which regulate evenhandedly to enhance a legitimate local interest unless the state imposes clearly excessive burdens on commerce in relation to the local benefits,<sup>113</sup> Michigan's statutory scheme would have survived. Michigan could not have accomplished its legitimate interest without restraints on out-of-state waste and the resulting impact on interstate commerce. If county residents knew that their local landfill would be required to accept solid waste from other parts of the state and from other states, they likely would have opposed siting the facility in their county.<sup>114</sup>

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111. See Regan, *supra* note 27, at 1102-03, 1116-19. See also text accompanying *supra* notes 47-50 for a brief explanation of the facts of the "Oregon bottle bill" legislation.

112. Regan, *supra* note 27, at 1118.

113. See *Pike v. Bruce Church, Inc.*, 397 U.S. 177 (1970). See also *supra* note 17 (discussing the *Pike* balancing test).

114. Although the majority rejected this argument because "traditional legal expectations" about landfill regulations are unlike expectations related to groundwater, see 112 S. Ct. at 2027 n.7 & *supra* note 95, the state's actions in developing its scheme for ensuring adequate solid waste disposal throughout the state make the state a quasi-market participant in landfill supply. The market participant exception from dormant Commerce Clause limitations is identified at *supra* note 62. Although the Court has repeatedly recognized and applied this exception, see generally Coenen, *supra* note 28, at 400-04 (summarizing decisions which have applied the market participant exception),

Finally, consider Michigan's SWMA in light of the other theoretical basis for dormant Commerce Clause analysis — the process-based principle that impacts on out-of-state commercial interests require judicial scrutiny because the state's political process precludes representation of these outside interests.<sup>115</sup> Michigan relied on this principle to support its comprehensive waste regulations. In the state's view, the regulations "do not discriminate against interstate commerce on their

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some jurists strongly criticize the exception. *See, e.g., Swin Resource Sys., Inc. v. Lycoming County*, 883 F.2d 245, 257 (3d Cir. 1989) (Gibbons, C.J., dissenting) (characterizing the market participant exception to the dormant Commerce Clause as "a peculiar eruption of Dixieism" and as economically unrealistic); *id.* at 262 ("The whole charade of the market participant exception totally unrelated to the regulatory effect of free markets operating with a profit motive, was never anything but a peculiar manifestation of the 'new federalism' run amok; states rights in drag.").

Analogizing the market participant exception to Michigan's enactment of the SWMA, the state's legislative action and imposition of mutual burdens within the state created more of a particular good — available sanitary landfill space. Although state dollars did not directly purchase the increased supply of this good, as in the market participant context, the state expended substantial political goodwill to ensure the conservation of landfill space and sufficient capacity for each county throughout the state. Each county had to ensure sufficient capacity within its borders for its own projected waste levels. *See Medical Waste Assocs. v. Mayor of Baltimore*, 966 F.2d 148, 151 (4th Cir. 1992) (relying on market participant exception to support decision that city may limit a private incinerator to the incineration of local medical waste).

The dissenters in *Fort Gratiot* made a similar point in chastising the majority for penalizing Michigan:

The Court today penalizes the State of Michigan for what to all appearances are its good-faith efforts, in turn encouraging each State to ignore the waste problem in the hope that another will pick up the slack. The Court's approach fails to recognize that the latter option is one that is quite real and quite attractive for many States — and becomes even more so when the intermediate option of solving its own problems, but only its own problems, is eliminated.

112 S. Ct. at 2030-31 (Rehnquist, C.J., dissenting). *Cf. Florini, supra* note 60, at 327 who states that:

The costs of a new facility, including the financial and political costs of dealing with local opposition, fall primarily on the host state, whereas the benefits of the facility accrue in part to the several surrounding states. . . . [S]tates that have too few hazardous waste facilities lack incentives to participate in the siting process and thereby to ensure that new facilities are built within their borders. The result . . . may be a nationwide shortage of safe [disposal] facilities . . . and thus a nationwide increase in unsafe disposal and illegal dumping.

*Id.* This view is consistent with Pomper, *supra* note 105, at 1333, who states that "The result of this cycle [caused by a failure to allow states to capture for themselves the benefits of investing in sufficient landfill space] is under-investment in waste reduction or facility siting, or as is most likely in this politically-charged context, under-investment in both." *Id.*

115. *See supra* note 52 and accompanying text (discussing this theory of the dormant Commerce Clause).

face or in effect because they treat waste from other Michigan counties no differently than waste from other States.”<sup>116</sup> The Court rejected this argument, stating that “a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself.”<sup>117</sup>

However, the dissent properly identified the process-based implications of the waste regulations and discussed how those implications would bolster a conclusion that the regulations are in accordance with the Commerce Clause. Consistent with Supreme Court precedent,<sup>118</sup> the dissent argued that the adversely affected in-state interests helped validate the integrity of the political process. These adversely affected in-state interests ensured that the regulatory scheme was not unduly onerous. The burden placed on in-state interests provides a representative or proxy for out-of-state interests that the waste regulations also adversely impact.<sup>119</sup>

In sum, the majority erred in concluding that Michigan’s regulatory scheme was protectionist and therefore subject to the Court’s virtually per se rule of invalidity. The dissenters properly concluded that the Waste Import Restrictions were neither protectionist nor the product of an unfair political process. The dissent also decided, however, that,

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116. *Fort Gratiot*, 112 S. Ct. at 2024.

117. *Id.*

118. *See supra* note 52 (citing several earlier cases based on the process-based theory of the Commerce Clause).

119. Recognize that burdens imposed within the state itself not only ensure fairer legislative deliberations within the state, but also serve as independent, effective constraints on unduly burdensome state regulations. *See Farber, supra* note 28, at 413 (“[T]he market exacts its own inexorable penalties for needlessly burdensome regulations.”). In *Fort Gratiot*, Chief Justice Rehnquist explained how this balance worked in Michigan:

By limiting potential disposal volumes for any particular site, various fixed costs will have to be recovered across smaller volumes, increasing disposal costs per unit for Michigan consumers. The regulation also will require some Michigan counties — those that until now have been exporting their waste to other locations in the State — to confront environmental and other risks that they previously have avoided. Commerce Clause concerns are at their nadir when a state act works in this fashion — raising prices for all the State’s consumers, and working to the substantial disadvantage of other segments of the State’s population — because in these circumstances a State’s own political processes will serve as a check against unduly burdensome regulations.

112 S. Ct. at 2029 (Rehnquist, C.J., dissenting) (internal quotations and citations omitted).

because Michigan's restrictions incidentally affected interstate commerce, its regulatory scheme had to be scrutinized under the more permissive *Pike* test.<sup>120</sup> The dissenters advocated remanding the case to the district court for application of that test.<sup>121</sup> Although a strong case exists that the regulation was permitted under the *Pike* test,<sup>122</sup> the next part of this article argues that dormant Commerce Clause doctrine should be reformed and the *Pike* test should be abandoned as part of the transformation of that doctrine.

### III. FORT GRATIOT LANDFILL'S FAILURE TO TRANSFORM DORMANT COMMERCE CLAUSE DOCTRINE

Michigan's system of solid waste regulation was not protectionist and was therefore consistent with the basic purpose of the Commerce Clause. The resolution of cases like *Fort Gratiot Landfill* suggests a need for greater judicial restraint in invalidating allegedly protectionist state statutory schemes. However, the Supreme Court appears steadfastly wedded to the current dormant Commerce Clause doctrine. That doctrine advocates active judicial review of state laws, even when those laws have only incidental, nonprotectionist effects on out-of-state commerce. This doctrine is flawed because it requires federal courts to assume an improper role within the federal system. The doctrine also undermines state experimentation while making politically accountable decisions less likely at the federal level.

#### A. *The Role the Pike Test Assigns to Federal Courts is Inappropriate*

The dissenters in *Fort Gratiot Landfill*, even after concluding that Michigan's SWMA was not protectionist legislation, advocated an application of the *Pike* balancing test to determine whether the state law complied with the Commerce Clause.<sup>123</sup> Thus, under existing Commerce Clause doctrine, even when a law's impact on interstate com-

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120. See *supra* note 17 and accompanying text, and *infra* notes 123-31 and accompanying text for a summary and critique of the *Pike* test.

121. 112 S. Ct. at 2028 (Rehnquist, C.J., dissenting) ("Because I think the Michigan statute is at least arguably directed to legitimate local concerns, rather than improper economic protectionism, I would remand the case for further proceedings."); *id.* at 2029 ("At a minimum, I think the facts just outlined suggest the State must be allowed to present evidence on the economic, environmental and other effects of its legislation.").

122. See *supra* notes 113-14 and accompanying text.

123. See *supra* note 121.

merce is incidental and imposes a similar burden on in-state commerce, the federal courts continue to balance the means and ends of the state's law.<sup>124</sup>

By assigning federal courts the role of evaluating the economic policy pursued by individual states,<sup>125</sup> current dormant Commerce Clause doctrine "[impairs] values of federalism and democratic self-rule."<sup>126</sup> The doctrine is undemocratic because it places courts in the role of an unelected legislature which considers the nature of public policy problems and the appropriate government response.<sup>127</sup> The federalism implications of the doctrine are no less clear: the federal judiciary assumes the role of testing and resolving the validity of state laws,

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124. The *Pike* test provides that "[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . ." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

125. Farber, *supra* note 28, at 399.

126. *Id.* at 414. In objecting to the *Pike* test, Professor Farber raised several practical objections. For example, Professor Farber argues that the test unfairly identifies various factors to be considered by the court, *see id.* at 398 ("*Pike* . . . establishes a judicial cost-benefit analysis in which all of the costs of a state law are counted, but only some of the benefits."), and yields decisions that "are notoriously unpredictable." *Id.* at 399 (footnote omitted).

Professor Farber also makes an even broader argument that federal courts should be less intrusive in reviewing state laws when those laws do not purposefully discriminate against out-of-state commerce. This author believes that the Court correctly decided *Dean Milk*, 340 U.S. 349 (1951), because Madison's regulation, which prevented the sale of wholesome milk produced more than five miles from the center of the city, *id.* at 350, was properly determined by the Court to be protectionist. *Id.* at 356. *See supra* notes 107-08 and accompanying text for a discussion and analysis of the holding in *Dean Milk*. In contrast, Professor Farber believes that the Court incorrectly decided *Dean Milk* because of the absence of evidence of purposeful discrimination against the out-of-state milk producers. In Farber's view, the federal courts should not have closely scrutinized the regulation at issue in *Dean Milk*. *See* Farber, *supra* note 28, at 406. There he writes:

In *Dean*, the existence of discrimination was considered so serious as to create almost a per se finding of invalidity . . . . Under the approach suggested in this section, *Dean* would be decided differently. In the absence of a finding of intent to exclude non-residents from the market, the mere existence of an exclusionary effect would be irrelevant.

*Id.*

127. *See* Choper, *supra* note 52, at 1585-86 ("In [determining whether the challenged state action unduly imposes upon a delegated but unexercised national power], the Court performs an essentially legislative role by nakedly constructing policies for the particular case that are the product of the Court's own balancing of national versus state concerns.").

notwithstanding that those laws are not protectionist<sup>128</sup> and that the judiciary's institutional competency to perform the role is questionable.<sup>129</sup>

Even ignoring the federalism and democratic theory problems inherent in the Court's current Commerce Clause doctrine, it is apparent that that doctrine is counterintuitive when compared to the Court's equal protection doctrine. As Professor Farber demonstrated:

Under current law, interstate businesses receive far more protection from state legislation [under the Commerce Clause] than do racial minorities [under the Equal Protection Clause]. A business can establish a prima facie claim under the Commerce Clause by showing either discriminatory intent, a disparate impact, or a substantial burden. . . . [M]inority groups must prove discriminatory intent.<sup>130</sup>

In sum, the balancing role performed by the courts under *Pike* should be abandoned. Federal courts should not review further non-protectionist state regulations that have only incidental effects on interstate commerce.<sup>131</sup>

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128. See Farber, *supra* note 28, at 400 ("The Court's willingness to allow vigorous judicial supervision of state regulation in Commerce Clause cases seems inconsistent with its proclaimed attachment to what Justice Black called 'Our Federalism.'").

129. As discussed previously, the Court is performing an essentially legislative role. See *supra* note 127 and accompanying text. In addition, the federal courts have no special competence in deciding at what level government regulatory initiatives should be pursued. See Choper, *supra* note 52, at 1556. Dean Choper states that:

Whatever the judiciary's purported or self-professed special competence in adjudicating disputes over individual rights, when the fundamental constitutional issue turns on the relative competence of different levels of government to deal with societal problems, the courts are no more inherently capable of correct judgment than are the companion federal branches.

*Id.*

130. Farber, *supra* note 28, at 403-04.

131. Although this author believes federal courts should be less intrusive in reviewing state laws and regulations that incidentally impact out-of-state commerce, others argue that courts should continue to pursue active review for structural, institutional or other reasons. See Choper, *supra* note 52, at 1586. Dean Choper argues that "[c]ontinuing judicial oversight of alleged state encroachments on national power" is proper for two functional reasons: first, Congress lacks sufficient time to review "the myriad of state and local rules that may arguably intrude on the national domain," and second, "Congress seems especially unsuited to the task of determining on an ad hoc basis the compatibility of isolated local ordinances with the broad demands of the federal system." *Id.*

See also Noel T. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1, 23 (1940). Professor Dowling argues that trial courts, because of their position "on the front line, where the impact of state action on interstate commerce is first felt," have the

### B. *Dormant Commerce Clause Doctrine Misallocates the Burden of Changing the Status Quo*

We begin this analysis with the premise that we are not concerned here with limiting activist judicial review of the protectionist rules or regulations adopted by states or localities, because such rules or regulations are properly subject to review and are foreclosed by the core of the Commerce Clause. We are concerned here instead with deciding how or whether the Court should review non-protectionist rules that nevertheless impose burdens on interstate commerce. The Court's role in reviewing these state rules is essentially one of statutory construction, because Congress retains the authority to overrule the Court's decision and either permit or prohibit the local rules at issue.<sup>132</sup> This potential for congressional legislative action to overrule a court is important in theory because it defines the Court's task, even though the act of overruling has very little practical impact: the Court's decision to strike down a local rule under the Commerce Clause is final in almost all cases.<sup>133</sup>

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opportunity to "appraise at close range the conflicting state and national interests," and, through their "sifting of the facts," are able to "sharpen[] the issues and facilitat[e] legislative efforts in the event that Congress, dissatisfied with the judicial results, should desire to take corrective action of its own." *Id.* See also Hinshaw, *supra* note 61, at 533 (dormant Commerce Clause doctrine properly "recognizes that because the political processes do not function effectively when Congress has not acted affirmatively the courts' continued intervention is necessary to protect the states' interests"). *Cf.* Pomper, *supra* note 105, at 1317 ("[C]ourts should consider whether a Congress focused on preserving and enriching the political culture of the Union would have authorized states to pass the challenged law.").

132. This is also true with regard to purely protectionist legislation. However, when reviewing local rules of that sort, the Court can be confident that core Commerce Clause values foreclose local regulation in the absence of congressional approbation.

133. See Choper, *supra* note 52, at 1586-87.

[I]f the courts were not to continue to review these state and local enactments, the final weighing of state and national interests would, due to congressional inertia, effectively rest with state and local lawmaking bodies. On the other hand, despite the undisputed power of Congress to alter judicial decisions in this area, the same legislative inertia usually results in the Court's judgment being the last. Given the unrepresentativeness and parochial perspective of the state and local lawmaking systems, and the federal judiciary's greater impartiality and sensitivity to federal needs, the latter is clearly preferable as a final decisionmaker on these questions. *Id.* Dean Choper's conclusion that the finality of the Court's decision supports activist judicial review is arguable. See Coenen, *supra* note 28, at 438. Professor Coenen argues that "[b]ecause the dormant Commerce Clause is the *dormant* Commerce Clause, Congress remains capable of protecting national interests in this area even if the Court holds back. This consideration . . . provides at best a 'background' justification for judicial restraint if other factors counsel a cautious approach." (footnote omitted). See also



In performing the role of interpreting statutes, courts must recognize the context in which they are acting.<sup>134</sup> In dormant Commerce Clause cases that do not involve protectionist rules, the critical context is federalism. Specifically, federalism provides states the freedom to experiment in developing effective governmental responses to grave public policy issues.<sup>135</sup> Indeed, the role of the states in formulating public policy responses to the waste disposal crisis is particularly important because EPA, interpreting RCRA, places prime responsibility on the states to design and implement programs that ensure adequate disposal capacity at an affordable price.<sup>136</sup> In the context of waste disposal,

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Pomper, *supra* note 105, at 1322 (“[T]he federal government’s broad power to preempt state decisions argues for granting states more, not less, leeway to legislate in the first instance.” (footnote omitted)).

134. Richard A. Posner, *Statutory Interpretation — in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 808 (1983) (“[I]t is impossible to make sense of statutory language without some context.”); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 199 (1983) (suggesting that a court “ignores reality” if, in interpreting a statute, it stops at the words of the statute and fails to consider their context).

135. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”); Coenen, *supra* note 28, at 429-30 (“[T]wo key goals of our constitutional federalism” are “the encouragement of novel state experiments and the fostering of governmental responsiveness to distinctive local needs.”); Henry J. Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019, 1034 (1977) (“No-fault insurance is a sufficient example [of the benefits of state experimentation]; we may end up with a uniform federal system or minimum federal standards, but we should never have had anything save for experimentation by the states.”). Cf. Pomper, *supra* note 105, at 1334-35 (“[W]aste disposal and processing is an area in which experimentation by the states is devoutly to be wished. Recycling, in particular, involves invention and the development of new institutions.” (footnote omitted)). But see Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 408 (“The importance attached by many to the states’ function as laboratories of experiment is at least in part exaggerated and, in any case, of little significance for constitutional adjudication.”).

136. See *Solid Waste Disposal Facility Criteria*, 56 Fed. Reg. 50,978, 50,980 (1991). In EPA’s view a state’s ability to ensure affordable waste disposal may necessitate reliance on larger, regional landfills to which local waste may be transported. *Id.* The regulations state:

EPA encourages owners/operators to employ their knowledge of the universe of solid waste management options . . . when evaluating the merits of available practicable alternatives . . . . As an example, owners/operators might want to consider how much a community must increase its percentage of total budget spent on solid waste disposal to cover costs for waste hauling to a regional facility. *Id.* at 50,991. See also *id.* (“Small communities, . . . whose small landfills do not qualify for a waiver under today’s rule should consider regionalization to mitigate costs. Due

courts need not concern themselves with the harmful impact of state experimentation on public health and the environment either within or outside the state. This is because under RCRA, EPA prescribed minimum standards for waste disposal facilities.<sup>137</sup> The EPA regulations prevent states from debasing those minimum standards and engaging in a "competition in laxity," by seeking waste disposal business at a discount price.<sup>138</sup> In sum, there is no need for an activist dormant Commerce Clause jurisprudence in the context of waste disposal. Such jurisprudence is in fact damaging because it limits opportunities for state experimentation in responding to an important public policy problem that has significant local effects.<sup>139</sup>

Instead of pursuing its activist approach to nonprotectionist legislation, the Supreme Court should use its doctrine to reinforce creative federalism, as well as congressional supremacy in the public policy and legislative arenas. Indeed, considering that dormant Commerce Clause

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to economies of scale, small landfills operate at a higher cost per ton than larger, regional facilities."'). However, this view of the importance of large regional landfills does not suggest that EPA premises its conception of solid waste disposal on the free movement of the waste across state borders. The regional landfills that EPA believes are necessary to reduce disposal costs may be located in the same state as a locality which produces insufficient volumes of waste to warrant construction of its own landfill.

137. See Solid Waste Disposal Facility Criteria, 56 Fed. Reg. at 50,978, 50,982 (1991) (to be codified at 40 C.F.R. §§ 257-58).

138. See Harry N. Scheiber, *State Law and "Industrial Policy" in American Development, 1790-1987*, 75 CAL. L. REV. 415, 436 (1987). Scheiber points out that:

Uniform minimum standards save [states] from the baneful effects of 'competition in laxity' and debasement of standards. Alternatively, a mandated national standard pulls the rug out from under the states that would lower the level of public goods and services they provide to their citizens in the quest for presumed short-term or even long-term advantage.

*Id.*

139. Activist review and overruling of nonprotectionist state and local laws discourage experimentation. Certain laws, such as Michigan's SWMA, are precluded, and, for those states that still wish to experiment, the costs of experimentation increase. See Coenen, *supra* note 28, at 429. Coenen defends the market participant exception to the Commerce Clause because "[i]f the state must pay the 'added price' of including nonresidents when it directs resources into the marketplace, the state will be encouraged to adopt non-marketplace programs not producing the greatest benefit for state residents." See also Hinshaw, *supra* note 61, at 537 n.140, who states:

[I]f a state cannot retain for its citizens the benefits of its own experimentation (through recognition of some sort of constitutionally enforced property right), the state will not spend as much of its resources on such projects. Because of this classic 'free rider problem,' states will not experiment and develop solutions to the nation's problems without some sort of incentive . . . ."

*Id.*

doctrine effectively determines which side must bear the burden of national political inertia, the importance of the Court's role comes into even sharper focus.<sup>140</sup> Dormant Commerce Clause doctrine should foreclose judicial overruling of nonprotectionist local regulations, in part because greater judicial restraint encourages legislative or other political<sup>141</sup> action. Judicial restraint also avoids the problem of discouraging political decisionmaking at the federal level.<sup>142</sup>

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140. See Farber, *supra* note 28, at 412 ("Since Congress can correct judicial mistakes, what is ultimately at stake under the dormant Commerce Clause is the burden of inertia. Should the states or interstate businesses have the burden of getting congressional action?"). Although the status quo may directly threaten the interests of some states, there is no assurance that such circumstances will result in congressional action. Professor Scheiber lauds examples of "the states' successful coalition-building, both during the 1981-83 crisis of threatened 'swaps' and 'turnbacks' of functions to the states and during the tax-revision debate of 1986 to protect their common institutional interests," which he views as "bear[ing] out Madison's prediction in *The Federalist No. 46* — that 'ambitious encroachments' by the national government on state authority would be perceived by the states as a common threat." Scheiber, *supra* note 138, at 438 (quoting *THE FEDERALIST No. 46*, at 320 (James Madison) (Jacob E. Cooke ed., 1961)). Although interstate coalitions may provide sufficient impetus to change the status quo in unusual circumstances, such a coalition is unlikely when the status quo benefits certain states at the expense of others.

141. Congress need not make all politically accountable decisions. Federal administrative agencies, with their substantive expertise and ability to gather information, also may review state laws impacting interstate commerce. See Farber, *supra* note 28, at 407. Compared to activist judicial review, agency review is "relatively [more] accountable to the political process" and has "the advantage of an express legislative mandate." *Id.* at 408; see *id.* at 409 ("When Congress has delegated its policymaking role to an administrative agency, that agency should be trusted to decide whether a state law is inconsistent with the national interest."); see also Choper, *supra* note 52, at 1587 n.194 (suggesting that, in lieu of decisionmaking by federal courts in dormant Commerce Clause cases, a federal administrative agency could be established to "enact general rules and regulations, as well as adjudicate particular cases. An agency would presumably possess greater expertise" and be more responsive to the "spoken and unvoiced thinking of Congress" because of its political nature.). *But cf.* *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 793 (4th Cir. 1991) ("EPA may deserve deference in its construction of its own regulations but it does not necessarily deserve deference with respect to whether Congress authorized it to permit states to violate the Commerce Clause.").

142. Dean Wellington and Professor Bickel suggest that a court's interpretation of a statute should promote a political decision on a pressing matter of public policy, rather than effectively foreclose legislative action on the public policy question. See Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 17 (1957) (arguing that in all statutory cases "Congress can have the last word if it chooses. [However, t]here are times when as a practical matter Congress may be able to act if the court does one thing but not if it does another."). The authors use *Cleveland v. United States*, 329 U.S. 14 (1946), to demonstrate how a court may interpret a statute in a way that limits congressional action to

A reformulated doctrine has these beneficial effects, because, when local regulations are permitted, two motivations for congressional action exist, as opposed to the one motivation that is present when the federal judiciary proscribes the regulation. Specifically, both the underlying public policy problem that a local regulation addresses and the impact of the local regulation may motivate congressional action when state regulation is permitted. When state regulation is foreclosed, it cannot impact congressional action. The nature of the local regulation, if permitted following review under the Commerce Clause, is likely to affect both the timing and the character of any corrective action by Congress. A reformulated, less-activist doctrine reinforces the virtues of federalism by allowing state experiments to continue. Similarly, a less activist doctrine reinforces the virtues of legislative supremacy by allowing Congress to investigate and account for the results of local regulation when it determines that federal action is needed.<sup>143</sup>

In sum, the Court should encourage congressional action, while permitting states to implement their own solutions, provided that they are not protectionist. The core of this reformulated dormant Commerce Clause doctrine, restated as a clear-statement rule, is: Unless state legislation is protectionist, and thus plainly inconsistent with Commerce Clause values, the Court, in recognition of the values of federalism and political decisionmaking, will refrain from overruling state and local regulations that incidentally burden out-of-state commerce.<sup>144</sup>

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overrule the interpretation. The issue in *Cleveland* was whether the Mann Act forbade interstate transportation of a woman for purposes of polygamy. *Id.* at 16. The Court found no evidence of congressional intent to limit the Mann Act's application to "commercialized sexual vice" and therefore held that the Act applied to polygamy. *Id.* at 19. Professor Bickel and Dean Wellington suggested that the Court reached the wrong conclusion because "the only way to leave the last word to Congress was to hold the Act inapplicable to polygamy, enabling Congress either to acquiesce or respond in a manner reasonably open to it." Bickel & Wellington, *supra* note 141, at 17 n.67.

143. See Pomper, *supra* note 105, at 1315 n.34. A less activist doctrine is also preferable because it removes federal courts from the inappropriate role of balancing the means and ends of state regulations. See *supra* notes 123-31 and accompanying text for a discussion of the current role of the judiciary in evaluating regulations under the dormant Commerce Clause.

144. Professor Farber reaches a similar conclusion about the implications of the fact that dormant Commerce Clause doctrine has the effect of determining the party that must bear the burden of changing the status quo. He states that:

In allocating th[e] burden [of gaining congressional action], it is useful to consider which party is more likely to get judicial mistakes corrected. The very reason for giving the power to regulate interstate commerce to Congress, rather than to state

#### IV. STATE REGULATION OF WASTE DISPOSAL AFTER THE 1991 TERM: SURVEYING A NARROWED RANGE OF OPTIONS

The Court's application of a flawed interpretation of the dormant Commerce Clause doctrine compels states to modify their regulation of waste disposal, if they wish to limit out-of-state waste disposal, without violating the dormant Commerce Clause.<sup>145</sup> Consider the remaining options for solid waste and hazardous waste regulation.<sup>146</sup>

##### A. *Permissible State Regulation of Solid Waste Disposal*

###### 1. Public Operation of Waste Disposal Facilities

For states or localities wishing to limit or bar the disposal of out-of-state waste, the most likely alternative is to pursue public ownership and operation of the disposal facility. This is the most likely alternative because public operation of landfills is common in the United

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legislatures, is that Congress is more responsive to the national interest and less responsive to parochial interests. If so, those claiming to represent the national interest should be better able to secure congressional action than their opponents. Hence, the burden of overcoming congressional inertia should be on them.

Farber, *supra* note 28, at 412 (footnote omitted).

Another argument in favor of a less activist dormant Commerce Clause doctrine follows from the burden that results from an erroneous decision by an unelected judiciary. Dean Choper thus states that because the Court's decision in a dormant Commerce Clause case is final:

[J]udicial error in engaging in its legislative-like balance of the nation's needs against local efforts to deal with pressing problems has significant consequences. . . . [I]f the Court inflates the strength of the national interest in uniform regulation (or nonregulation) and invalidates the state or local law before it, the result is politically unintended federal protection for those persons subject to the challenged ordinance. This immunity from needed and useful local regulation will likely be permanent . . . despite the fact that Congress may wholly approve of the state action. . . .

Choper, *supra* note 52, at 1587 n.194. This acknowledged danger of activist jurisprudence further supports the argument for restrained application of the dormant Commerce Clause doctrine.

145. In the event that states wish to treat in-state and out-of-state waste the same, the Supreme Court in *Chemical Waste Management* identified several even-handed regulations that allow states to accomplish different goals. See 112 S. Ct. at 2015 (quoted *supra* at text accompanying note 22).

146. These basic options are well recognized. See Hinshaw, *supra* note 61, at 513 ("The three most prominent methods developed for preserving landfill space involve, either independently or in combination, (1) recycling and resource recovery programs; (2) state control of landfill services; and (3) regulations which explicitly discriminate against out-of-state interests." (footnote omitted)). The two Supreme Court decisions that are the subject of this article foreclose the third option.

States.<sup>147</sup> Under current dormant Commerce Clause doctrine, a state or locality that owns and operates a waste facility is a market participant<sup>148</sup> and thus exempt from the limitations that the Commerce Clause would otherwise impose.<sup>149</sup> The *Fort Gratiot* Court did not decide “any question concerning policies that municipalities or other governmental agencies may pursue in the management of *publicly* owned facilities.”<sup>150</sup>

Two important and related factors constrain the ability and willingness of states and localities to pursue this option. First, states and localities already face substantial budget shortfalls. Therefore, they are likely to resist public projects requiring expenditures of funds.<sup>151</sup> Second, as a result of new mandatory federal standards for landfills, per-ton costs of operating a landfill are likely to increase substantially, par-

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147. See Solid Waste Disposal Facility Criteria, 53 Fed. Reg. 33,314, 33,318 (1988) (to be codified at 40 C.F.R. §§ 257-58) (proposed Aug. 30, 1988), which states that, “[a]ccording to the State Census, [municipal solid waste landfills] . . . are owned predominantly by local governments (80%), with the remainder owned by private entities (15%), the Federal Government (4%), and State governments (1%).” *Id.*

148. The market participant exception is discussed at *supra* notes 62 and 114.

149. See *Swin Resource Sys., Inc. v. Lycoming County*, 883 F.2d 245, 249 (3d Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990). The Third Circuit held that dormant Commerce Clause restraints do not apply to either a public landfill or the restrictions imposed on the disposal of out-of-county waste within that landfill. *Id.* The county is a market participant, rather than a market regulator; therefore, the dormant Commerce Clause is inapplicable. *Id.* The court stated that, “[i]f a city may constitutionally limit its trucks to collecting garbage generated by city residents, we see no constitutional reason why a city cannot also limit a city-operated dump to garbage generated by city residents.” *Id.* at 251. See also Pomper, *supra* note 105, at 1337 (“When the state not only absorbs the social costs of a landfill but also owns the land and operates the landfill, it should be allowed to withhold landfill space entirely from residents of other states.”); accord, Hinshaw, *supra* note 61, at 535-36 (finding that states should retain the benefits of the public funds they spend).

The *Swin Resource* court also rejected an argument that the county could not limit disposal of out-of-county waste because the Commerce Clause foreclosed such hoarding of a scarce natural resource. See 883 F.2d at 251-54. The court concluded that such an exception was inapplicable for several reasons, including the fact that “land, the natural resource at issue here, cannot be used for a landfill without the expenditure of at least some money to prepare it for that purpose. The Lycoming landfill is therefore ‘not simply happenstance.’” *Id.* at 252.

150. 112 S. Ct. at 2023 (emphasis added).

151. See Solid Waste Disposal Facility Criteria, 56 Fed. Reg. at 50,980 (1991) (to be codified at 40 C.F.R. §§ 257-58) (“The municipal solid waste crisis comes at a time when local governments and Indian Tribes are faced with a wide range of competing demands for their limited financial and technical resources.”).

ticularly for low-volume landfills that serve smaller communities.<sup>152</sup> Indeed, these increased operating costs may force some smaller public landfills to cease operations.<sup>153</sup> Therefore, state ownership of a regional landfill facility that serves a larger region of the state is a potentially useful scenario.<sup>154</sup>

## 2. Defining a Reason for Differential Treatment of Out-Of-State Waste That Would Be Acceptable Under Current Commerce Clause Doctrine

If a state decides not to pursue public operation of landfills, the state may nevertheless limit the disposal of out-of-state waste, assuming it is able to identify some permissible reason for treating the out-of-state waste differently.<sup>155</sup> The greatest opportunity for pursuing such a strategy is to require reductions in the sources of waste through a system of compulsory recycling. As the composition of solid waste disposed of throughout the country indicates,<sup>156</sup> local recycling has the potential to reduce dramatically the volume of solid waste.<sup>157</sup> A state

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152. The cost impact of the new federal standards on low-volume landfills is discussed at *supra* note 136.

153. The study that EPA relied on in *supra* note 147 to show that local governments own 80% of all landfills in the United States, also shows that many existing and, by inference, public landfills lack proper structural controls to ensure protection of public health and the environment. See Solid Waste Disposal Facility Criteria, 53 Fed. Reg. 33,314, 33,318-19 ("According to the State Census, . . . only 15 percent [of municipal solid waste landfills] are designed with liners (natural or synthetic) and only 5 percent have leachate collection systems. Current data also indicate that only 25 to 30 percent of MSWLFs have some type of ground-water monitoring system. . ."). *Id.* Once these inadequate public landfills, many of which are also small volume landfills, see *supra* note 110, are required to install new mandatory controls, states and localities may decide to close the landfills because the new requirements are too costly.

154. The potential benefits of a regional approach to solid waste disposal are discussed at *supra* note 110.

155. The Court in *Fort Gratiot* stated that "our conclusion would be different if the imported waste raised health or other concerns not presented by Michigan waste." 112 S. Ct. at 2027.

156. See Solid Waste Disposal Facility Criteria, 53 Fed. Reg. 33,314, 33,318 (1988) (codified at 40 C.F.R. §§ 257-58) (proposed Aug. 30, 1988). An EPA study found that: [O]n average, more than 50 percent of municipal solid waste comprises paper, paperboard, and yard waste; nearly 40 percent is metals, food waste, and plastics; and the remaining 10 percent is wood, rubber, leather, textiles, and miscellaneous inorganics. Waste composition was found to be highly site-dependent and influenced significantly by climate, season, and socioeconomic factors. *Id.*

157. Source reduction does not necessarily require a recycling program. It could

may establish even stronger grounds for differential treatment of out-of-state waste, if it pursues a coordinated recycling program that removes toxic materials from the municipal solid waste stream. However, state implementation of source reduction programs, like public operation of landfills, is costly.<sup>158</sup> A state will be far less willing to incur these expenses if the dormant Commerce Clause compels the state to transfer the conserved landfill space to unregulated and therefore inefficient, voluminous, out-of-state waste.<sup>159</sup>

There are three reasons why a state's use of source reduction through compulsory recycling should permit that state, consistent with the Commerce Clause, to bar out-of-state waste that are not subject to the same source reduction requirements. First, the state would properly be treating such out-of-state waste differently because those wastes use a commodity, conserved landfill capacity, that a state created through self-imposed thrift.<sup>160</sup>

Second, when implemented as part of a comprehensive source reduction and recycling program, a state's limitations on disposal of out-of-

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also be achieved through the use of "economic incentives, including volume-based pricing schemes, to promote increased source reduction." Solid Waste Disposal Facility Criteria, 56 Fed. Reg. 50,978, 50,981 (1991) (to be codified at 40 C.F.R. §§ 257-58). Under current dormant Commerce Clause doctrine, such economic incentives, if pursued as the only way to achieve source reduction, must be applied to out-of-state waste on a nondiscriminatory basis.

158. See Pomper, *supra* note 105, at 1332 n.129 ("The leading legislative proposals to increase recycling are expensive; they are economical only because their costs are offset by disposal cost savings.") In the future, the expense of source reduction and recycling is less likely to discourage state programs because the new federal standards will increase disposal costs. See Solid Waste Disposal Facility Criteria, 56 Fed. Reg. at 50,978, 50,988 (1991) (to be codified at 40 C.F.R. §§ 257-58) ("[T]oday's rule, by calling for communities, including public and private entities, to pay the true cost of safe landfilling, makes source reduction and recycling programs more competitive.").

159. See *supra* note 139 for a discussion of why state experimentation in costly solutions to public policy problems is less likely when the state cannot enjoy the benefits of its investment.

160. See Hinshaw, *supra* note 61, at 542, where the author discusses "state-enacted recycling and resource recovery programs," which "might require all landfills to accept solid waste that has first been separated as 'true waste' through an effective recycling program." Such a program results in the "creat[ion] . . . of landfill capacity." *Id.* at 543. A sufficiently rigorous recycling program equates the state's reasons for limiting disposal of out-of-state waste to the reasons for limiting out-of-state use of ground water, which the Court concluded were proper in *Sporhase*. 458 U.S. 941, 956-57 (1982). See also *supra* note 95 (discussing *Sporhase*); Pomper, *supra* note 104, at 1331 (arguing that a "thrift exception" may properly be applied "when the state, in order to encourage conservation, has purposefully encouraged or coerced its residents into changing their practices from some preexisting or national norm.").



state waste is consistent with the Commerce Clause because out-of-state waste pose proportionately greater health and safety risks, due to their volume and toxicity. These important differences in the inherent characteristics of the waste make the out-of-state waste the proper subject of a state quarantine on importation. In *Chemical Waste Management*, the Court specifically rejected Alabama's argument that its additional fee was a constitutional quarantine against out-of-state hazardous waste, because "the additional fee applies only to interstate hazardous waste, but at all points from its entrance into Alabama until it is landfilled . . . , every concern related to quarantine applies perforce to local hazardous waste, which pays no additional fee."<sup>161</sup> Alabama's failure to demonstrate that the out-of-state waste presented a greater threat to the state's public health and environment invalidated the states' efforts to quarantine that waste. A source reduction and recycling program provides strong grounds for imposing such a quarantine.

Finally, a state's effort to pursue source reduction and recycling is likely to survive a Commerce Clause challenge levied against state efforts to ban the disposal of out-of-state waste, because the state's efforts to reduce the volume of waste promotes federal solid waste disposal policies.<sup>162</sup> Unless Congress and the courts permit states to retain for themselves the benefits of their investment in source reduction and recycling, states will be far less willing to pursue this strategy. Absent some incentive for states to reduce the volume of waste, the federal policy will be undermined. Although this last reason, standing alone, is insufficient to warrant a conclusion that the limits on out-of-state

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161. 112 S. Ct. at 2017. Alabama sought to rely on the Court's decision in *Maine v. Taylor*, 477 U.S. 131 (1986). There, the Court applied the quarantine doctrine to uphold Maine's prohibition against the importation of out-of-state baitfish. *Id.* at 151. The Court upheld that limit on out-of-state commerce because the baitfish "were subject to parasites foreign to in-state baitfish," and their importation threatened the state's own baitfish industry. 112 S. Ct. at 2017 (citing *Maine v. Taylor*, 477 U.S. at 140). The *Chemical Waste Management* Court concluded that the reasoning in *Maine v. Taylor* was inapposite in considering Alabama's additional fee because the out-of-state hazardous waste "is the same regardless of its point of origin." 112 S. Ct. at 2017.

162. See Solid Waste Disposal Facility Criteria, 56 Fed. Reg. at 50,978, 50,980 (1991) (to be codified at 40 C.F.R. §§ 257-58). The regulation provides that "the strategy [for addressing the municipal solid waste management problems] strongly encourages the use of source reduction (i.e., reduction of the quantity and toxicity of materials and products entering the solid waste stream) followed by recycling as first steps in a solid waste management system." *Id.* See also *id.* at 50,981 ("The highest priority in EPA's strategy for addressing the nation's solid waste problems is increasing source reduction.").

commerce are proper, it is a sound argument in support of more sensitive review by federal courts of the state's laudable program to reduce waste.

### B. *Permissible State Regulation of Hazardous Waste Disposal*

The same basic options and arguments apply to state efforts to limit or bar disposal of out-of-state hazardous waste.<sup>163</sup> Consider the extent to which the hazardous waste context affects those options.

The market participant exception is likely less attractive to states when it is presented in the hazardous waste context. The costs associated with administering a hazardous waste disposal facility are much higher than the costs of a solid waste facility.<sup>164</sup> Many states simply do not produce sufficient amounts of hazardous waste to permit cost-effective operation of a comprehensive disposal facility that accepts only in-state waste.<sup>165</sup> Even if these direct costs were not sufficient to discourage a state's market participation, few states would welcome the political firestorm that would follow the announcement of plans to site a major hazardous waste disposal facility within its borders, even if the facility were open only to in-state waste.

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163. In his dissent in *Chemical Waste Management*, Chief Justice Rehnquist also suggests that states may accomplish the desired effect of limiting out-of-state waste disposal through the use of state subsidies to producers of hazardous waste. See 112 S. Ct. at 2019 (Rehnquist, C.J., dissenting). Presumably, the state would then apply a uniformly high fee for the disposal of any hazardous waste within the state. However, such a program involves substantial administrative costs to prevent fraud through the counterfeiting and dilution of waste. See Clifford S. Russell, *Economic Incentives in the Management of Hazardous Waste*, 13 COLUM. J. ENVTL. L. 257, 266-67 (1988) (discussing the practical and theoretical difficulties of administering an economic incentive system for managing hazardous waste).

If a state wishes to foreclose entirely the disposal of any hazardous waste within its borders, it may wish to impose environmental requirements that exceed the federal standards for disposal facilities. Such stringent environmental requirements might effectively preclude operation of a disposal site within that state. See *North Carolina Law No Reason to Revoke RCRA Authority*, EPA Administrative Judge Rules, 20 Env't Rep. (BNA) 1979 (1990) (discussing permissibility of a state water quality law that blocked operation of a commercial hazardous waste treatment facility). The permissibility of this strategy, which turns on questions of federal preemption, is beyond the scope of this article.

164. See Solid Waste Disposal Facility Criteria, 56 Fed. Reg. 50,978, 50,986-87 (1991) (to be codified at 40 C.F.R. §§ 257-58) (enumerating and comparing costs for various types of waste disposal).

165. Brief for the United States as Amicus Curiae Supporting Petitioner, at 8 & n.11, *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992) (No. 91-471). See also *supra* note 63.

With regard to the second option available to states — defining some permissible basis for regulating the disposal of out-of-state waste more stringently than in-state waste — the hazardous waste context is also likely to constrain the state's options. States likely lack the resources necessary to develop a recycling program that treats hazardous waste as comprehensively as a recycling and source reduction program treats solid waste. Even if a state wished to pursue recycling and source reduction of hazardous waste, including, for example, a deposit-refund system,<sup>166</sup> the state would likely differentiate between various categories of hazardous waste in deciding whether source reduction was economically and practically feasible and in determining the type of recycling to pursue.<sup>167</sup> The result would be that, even if a state adopts recycling, the state will not have sufficient grounds for barring disposal of all out-of-state hazardous wastes within the state. Commerce Clause doctrine allows the state to bar disposal of only the types of hazardous waste that are subject to an appropriate recycling program.

In sum, although the Court's dormant Commerce Clause doctrine does not absolutely foreclose state limits on the disposal of out-of-state waste, states are unlikely to develop permissible limitations when the waste at issue is hazardous. States must await congressional action sanctioning limits on the disposal of out-of-state hazardous waste.<sup>168</sup>

### CONCLUSION

In the almost fifteen years since *Philadelphia v. New Jersey*, the nation's waste disposal crisis has worsened. In its first decisions considering state regulation of waste disposal since that case, the Court failed in two ways. First, the Court rigidly and superficially applied its dormant Commerce Clause doctrine in the waste disposal context. As a result, the Court failed to account for the legitimate local needs and unavailability of less discriminatory alternatives, when it struck down Michigan's SWMA.

Second, the Court failed to take advantage of an opportunity to transform its dormant Commerce Clause doctrine both to relieve fed-

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166. See Russell, *supra* note 163, at 267-69.

167. See *id.* at 271-72.

168. Cf. Florini, *supra* note 60, at 337 ("Congress should amend RCRA to encourage states to enter interstate compacts governing hazardous waste facilities. Such legislation would give states an incentive to expedite the siting of additional facilities and would address the reverse commons problem without relying on the market participant doctrine.").

eral courts of their improper role in evaluating the propriety of nonprotectionist state laws and to encourage political decisionmaking at the federal level to address an important public policy problem. The result is that states have a more limited range of options available to ensure, in a politically and financially feasible way, sufficient capacity to dispose of the solid and hazardous waste that their citizens produce.