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NEMA v. Sorrell: It's Lights out for the National Electrical Manufacturers Association - A Look at NEMA's Failed Commerce Clause Challenge

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Fluorescent lamps and High Intensity Discharge Lamps are used to light law school classrooms, office buildings, streets and football games because they are energy efficient. These lamps, however, contain mercury. Mercury may enter local water supplies if it is not disposed of properly. In water, mercury transforms biological processes into a toxic form that accumulates in the fish that people eat.

Unfortunately, even exposure to low levels of mercury may damage one's senses or brain. Men with high levels of mercury in their bloodstream may have a higher risk of heart disease. Children of women who ingest high levels of mercury during pregnancy are more likely to develop abnormalities. Thus, many states took


2. Fluorescent lamps, supra note 1, at 4 (noting average four-foot fluorescent lamp contains roughly 11.6 mg of mercury).


4. See United States Environmental Protection Agency, Frequently Asked Questions About Mercury at http://www.epa.gov/mercury/information.html - questions. (stating primary way in which people are exposed to mercury is by eating fish).

5. See United States Environmental Protection Agency, Frequently Asked Questions About Mercury at http:// www.epa.gov/mercury/information.html - questions. (explaining "[a]t levels more commonly seen in the United States, the mercury exposure effects documented include more subtle - yet still serious - damage to the senses and brain.").

6. Dr. Sanjay Gupta, Fish Oil and Toenails, TIME, Dec. 9, 2002, at 99. One study conducted by the New England Journal of Medicine found that men with high levels of mercury in their toenails were more likely to suffer a heart attack and one study found no link between mercury and heart disease. Id.

7. See EPA FAQ, supra note 3 (providing children of women exposed to high levels of methyl-mercury during pregnancy may exhibit abnormalities, such as delayed onset of walking and talking, and reduced neurological test scores).
steps to alert industry of the need to identify and properly dispose of products containing mercury.\textsuperscript{8} For example, some Michigan towns require energy-saving fluorescent bulbs containing reduced levels of mercury.\textsuperscript{9} Vermont also recently enacted a statute that requires lamp manufacturers to label all mercury-containing lamps destined for Vermont.\textsuperscript{10} The labels must clearly indicate that the lamp contains mercury and instruct consumers not to dispose of them in regular trash or recycling containers.\textsuperscript{11}

In \textit{National Electrical Manufacturing Association v. Sorrell (Sorrell II)},\textsuperscript{12} the National Electrical Manufacturers Association (NEMA) argued that the Vermont statute was unconstitutional under the dormant Commerce Clause.\textsuperscript{13} The United States Court of Appeals for the Second Circuit disagreed, finding that the local benefits of the Vermont labeling statute outweighed the burden on interstate commerce.\textsuperscript{14}

Section II of this Note explains the facts and procedural history of \textit{Sorrell II}.\textsuperscript{15} Section III defines dormant Commerce Clause doctrine and demonstrates how the clause has been applied in various

\textsuperscript{8} See http://www.epa.gov/mercury/information Industrial demand for mercury dropped 75 percent from 1988 to 1997 because of state-mandated recycling programs. \textit{Id}.


\textsuperscript{10} VT. STAT. ANN. tit. 10, § 6621d(a) (2000) [hereinafter Vermont statute]. The statute explains that Effective March 1, 2000, a manufacturer may not sell in Vermont, to a retailer in Vermont, and the retailer may not knowingly sell, lamps if the lamps contain mercury added during manufacture, unless the item is labeled. \textit{Id}. The label must clearly inform the purchaser or consumer that mercury is present in the lamp and that the lamp may not be disposed of or placed in a waste stream destined for disposal until the mercury is removed and reused, recycled, or otherwise managed to ensure that it does not become part of solid waste or wastewater. \textit{Id}. Primary responsibility for affixing labels required under this section shall be on the manufacturer. \textit{Id}.

\textsuperscript{11} \textit{Sorrell I}, 72 F. Supp. 2d. 449, 450 (D. Vt. 1999). Specifically, the Vermont statute states that effective March 1, 2000, a manufacturer may not sell lamps at retail if they contain mercury added during manufacture, unless the item is labeled. \textit{Id}.

\textsuperscript{12} 272 F.3d 104, 110-13 (2d Cir. 2001) [hereinafter \textit{Sorrell II}]. The National Electrical Manufacturing Association [hereinafter NEMA] argued that the Vermont statute is unconstitutional under the Commerce Clause because it has “extra-territorial effects” and it exposes its members to inconsistent regulation. \textit{Id}.

\textsuperscript{13} For a discussion of the dormant Commerce Clause see \textit{infra} notes 31-38 and accompanying text.

\textsuperscript{14} \textit{Sorrell II}, 272 F.3d at 116 (holding that NEMA failed to show likelihood of success on merits of both claims).

\textsuperscript{15} For a further discussion of the facts and procedural history of \textit{Sorrell II}, see \textit{infra} notes 20-30 and accompanying text.
cases.\textsuperscript{16} Section III also provides a general background of the Resource Conservation and Recovery Act (RCRA).\textsuperscript{17} Next, Section IV describes in detail, analyzes and critiques the reasoning used by the Second Circuit Court of Appeals in reaching its decision in \textit{Sorrell II}.\textsuperscript{18} Finally, Section V of this Note discusses the potential impact of \textit{Sorrell II} on dormant Commerce Clause doctrine, state mercury labeling standards and the environment.\textsuperscript{19}

\section*{II. Facts}

NEMA is a trade association that includes lamp manufacturers who sell mercury-containing lamps nationwide and in Vermont.\textsuperscript{20} William Sorrell, the Vermont Attorney General and John Kassel, the Vermont Secretary of the Agency of Natural Resources, are responsible for administration and enforcement of 10 V.S.A. Section 6621d(a) (Vermont statute), which requires manufacturers of mercury-containing lamps to affix a particular label to both the lamp and its packaging.\textsuperscript{21} Specifically, the mercury-containing lamp must display the letters “Hg” surrounded by a circle and explain that “Hg” means mercury.\textsuperscript{22} The lamp’s packaging must contain the statement, “[i]f Purchased in Vermont-Don’t Put in Trash-Recycle or Dispose of as Hazardous Waste.”\textsuperscript{23}

\begin{footnotesize}
\textsuperscript{16} For a further discussion of the dormant Commerce Clause, see infra notes 31-65, and accompanying text.
\textsuperscript{17} For a further discussion of the Resource Conservation and Recovery Act [hereinafter RCRA], see infra notes 66-71 and accompanying text.
\textsuperscript{18} For a further discussion of the Second Circuit’s holding and reasoning in \textit{Sorrell II}, see infra notes 72-175, and accompanying text.
\textsuperscript{19} For a further discussion of the impact of the Second Circuit’s decision, see infra notes 176-185 and accompanying text.
\textsuperscript{20} \textit{See Sorrell I}, 72 F. Supp. 2d 449, 452 (D. Vt. 1999) (explaining that lamps are manufactured throughout world including Europe, Asia and South America). After manufacturer, NEMA lamps are shipped to central distribution centers, which serve large regions. \textit{Id.}
\textsuperscript{21} \textit{See VT. STAT. ANN. tit. 10, § 6621d(a) (2000); see also Sorrell II, 272 F.3d 104, 107 (2d Cir. 2001) (noting that Kassell and Sorrell are responsible for administration of Vermont statute).}
\textsuperscript{22} \textit{See Sorrell I}, 72 F. Supp. 2d at 453 (explaining that “Hg” is abbreviation on periodic table for mercury).
\textsuperscript{23} \textit{Id.} Vermont chose this label pursuant to Section 6-803(b) of the Agency of Natural Resources’ Solid Waste Management Rules, which requires that the label clearly inform the consumer that mercury is present in the lamp and therefore, it may not be disposed of in a waste stream destined for disposal until the mercury is removed and reused or recycled to ensure that it does not become part of solid waste or wastewater. \textit{Id.} at 451.
\end{footnotesize}
Vermont enforced the statutory requirements on NEMA members.24 Instead of complying with the statutory requirements, on July 27, 1999, NEMA filed suit in the United States District Court for the District of Vermont asking for a preliminary injunction to enjoin Sorrell from enforcing the Vermont statute against NEMA members.25 Specifically, NEMA alleged that both the statute and its underlying regulations violated NEMA members' rights under the Commerce Clause of the United States Constitution.26

On November 8, 1999, the District Court of Vermont held that the Vermont statute was unconstitutional because it violated the dormant Commerce Clause.27 The court granted NEMA's request for a preliminary injunction against the statute's enforcement.28 On November 6, 2001, the United States Court of Appeals for the Second Circuit reversed the district court's decision.29 The Second Circuit held that the statute did not violate the dormant Commerce Clause and vacated the preliminary injunction.30

III. BACKGROUND

A. The Dormant Commerce Clause

Article I, Section 8, clause 3, of the United States Constitution is commonly known as the "Interstate Commerce Clause."31 This clause gives Congress "affirmative" authority to "regulate commerce . . . among the several states" through the enactment of legislation.32 The United States Supreme Court has held that the Interstate Commerce Clause also prohibits state regulations that burden

24. See id. at 452-53 (noting that Agency rejected NEMA's offer to meet new statutory obligations by only providing informational and warning signs for Vermont retailers to post at point of purchase).
25. Sorrell II, 272 F.3d at 107-08. On July 27, 1999, NEMA sued the Vermont defendants claiming that both the statute and its underlying regulations violate NEMA's members' rights under the Commerce Clause of the United States Constitution. Id.
26. Id. NEMA also alleged that the statute violated its members' first amendment rights. Id.
27. See Sorrell I, 72 F. Supp. 2d at 455 (holding Vermont statute unconstitutional in violation of dormant Commerce Clause).
28. See id. at 456 (granting plaintiff's motion for preliminary injunction).
29. See Sorrell II, 272 F.3d at 116 (reversing district court's holding).
30. See id. (providing reasons for vacating judgment).
31. See U.S. CONST. art. I, § 8, cl. 3. Article I, § 8, cl. 3 states, "Power of Congress to regulate commerce. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Id.
the flow of interstate commerce, even where Congress has failed to legislate. This judicially created "negative" power is commonly referred to as "dormant" commerce power.

Under the dormant commerce power, courts always strike down state statutes that "facially discriminate" against interstate commerce. Conversely, courts almost always uphold non-facially discriminatory state statutes that are rationally related to a legitimate state purpose, unless the incidental burden imposed by the statute on interstate commerce is clearly excessive when compared to the putative local benefits. Generally, the burden on interstate commerce clearly outweighs the local benefits in two instances:

1. when the state statute has "extraterritorial effects;" when the statute has the practical effect of regulating commerce that occurs wholly outside the state's borders or
2. when the state statute imposes a great financial burden on businesses because the statute is inconsistent with that of other states.

33. See Laurence H. Tribe, American Constitutional Law 403 (2d ed. 1988) (stating that certain state measures that regulate interstate commerce are constitutionally prohibited unless Congress affirmatively authorized states to regulate that interstate commerce).

34. See id. (reasoning that power is "dormant" because "nowhere does [Constitution] explicitly limit state interference with interstate commerce," yet Supreme Court limited scope of state power by interpreting these "silences" of Constitution).

35. See Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 275 (14th ed. 2001) (stating that United States Supreme Court treats laws that facially discriminate against interstate commerce and laws that are "protectionist" in purpose or practical effect as "virtually per se invalid.").

36. See Pike v. Bruce Church Inc., 397 U.S. 137, 142 (1970) (ruling that state statute that regulates even-handedly to effectuate legitimate local public interest will be upheld, as long as statute's effects on interstate commerce are only incidental, and burden imposed on interstate commerce is not clearly excessive in relation to putative local benefits).

37. See Healy v. The Beer Institute, 491 U.S. 324, 336 (1989) (holding that extraterritorial statute fails Pike test); see also Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 674 (1981) (invalidating statute because it imposed substantial costs upon trucking industry). But see Cotto Waxo Co. v. Williams, 46 F.3d 790, 793 n.3 (8th Cir. 1995). It may also be correct to say that "extraterritorial reach" is a special example of "directly" regulating interstate commerce and thus is facially discriminatory, not subject to Pike balancing. Id.

38. See Bibb v. Navajo Freight, 359 U.S. 520, 525 (1959). In this case, Illinois enacted a unique law that required trucks driving on its highways to place a mudguard over its tires. Id. The Court noted that the initial cost of installing those mudguards on all the trucks owned by the challengers ranged from $4,500 to $45,840. Id. There was also evidence in the record to indicate that the cost of maintenance and replacement of these guards is substantial. Id.
B. The Pike Balancing Test

In *Pike v. Bruce Church, Inc.*, the United States Supreme Court declared that a state statute is unconstitutional under the dormant Commerce Clause when the burden imposed by the statute on interstate commerce clearly outweighs the statute's putative local benefits. The Court further stated that even if the burden on commerce does not clearly outweigh local benefits, the statute is still unconstitutional if the local interest could be promoted with a lesser impact on interstate commerce.

Specifically, in *Pike*, an Arizona statute required in-state fruit growing companies to label and package their fruit in Arizona. Arizona enforced the statute on a local grower of cantaloupes who shipped his fruit to California for packaging and labeling. The Court first determined that the putative local interest that Arizona sought to protect was the proper identification of the state's high quality fruit and thus, the reputation of Arizona fruit growers. While this was an important state interest, the Court ultimately held that this interest was "tenuous" compared to the burden on the fruit grower, which was two hundred thousand dollars to construct an in-state packing plant. Thus, the Court held that the state's activity violated dormant Commerce Clause doctrine.

40. See *Pike*, 397 U.S. at 142 (explaining Pike balancing test).
41. See id. (stating that extent of burden on interstate commerce will depend on nature of local interest involved and whether promotion is possible with lesser impact on interstate activities).
42. *Id.* at 138. The Arizona Fruit and Vegetable Standardization Act required "all cantaloupes grown in Arizona and offered for sale [to] be packed in regular compact ... containers approved by the supervisor." *Id.*
43. *See id.* at 139 (noting that company had to ship fruit to California because company did not have required "packing shed").
44. *See id.* at 143. This purpose was to maximize state profit in the fruit industry by enabling purchasers to identify Arizona grown fruit. *See id.* The Court also noted that the statutory purpose was not to promote safety "where the propriety of local regulation has long been recognized." *Id.*
45. *See Pike*, 397 U.S. at 145 (Douglas, J., dissenting) (explaining cost to company would be $200,000 to construct "unneeded" packing plant within Arizona).
46. *Id.* at 146. The Court also stated that a state cannot require a person to go into a local packing business solely for the sake of enhancing the reputation of other producers within its' borders. *See id.* The Court determined that the state's prohibitive order burdened interstate commerce because it required an out of state operation to become an in state operation. *Id.* at 141.
1. Extraterritoriality

In *Healy v. The Beer Institute,* the United States Supreme Court declared that state statutes having "extraterritorial effects" always fail the *Pike* balancing test and thus, are per se invalid under the dormant Commerce Clause. At issue in *Healy* was a Connecticut statute that required out-of-state beer brewers to affirm that the prices they charged to Connecticut wholesalers were no higher than the prices the brewers charged in neighboring states. Connecticut enacted this statute in an effort to eliminate the price differential between Connecticut and its bordering states.

The Court held that this statute violated the dormant Commerce Clause because the statute had the practical effect of regulating commerce wholly outside of the state's boundaries through the threat of legal sanctions. The Connecticut statute did not explicitly prohibit brewers from lowering their out-of-state prices once brewers affirmed to Connecticut. Nevertheless, the statute made it legally impossible for brewers who sold in Connecticut to adjust their prices to reflect current supply and demand. Moreover, the brewers' only alternative to compliance with the statute was to discontinue sales to distributors in Connecticut.

47. 491 U.S. 324 (1989). *Healy* is one of the Supreme Court's "price regulation" cases. See generally id.

48. See id. at 336. See also *Cotto Waxo,* 46 F.3d 790, 793 n.3 (8th Cir. 1995) (stating that state regulation is per se invalid when it has "extraterritorial reach"); see also CHRISTOPHER MAY & ALLAN IDES, CONSTITUTIONAL LAW NATIONAL POWER AND FEDERALISM 315 (2d ed. 2001). A statute has extraterritorial reach when it regulates commerce wholly outside the boundaries of the state in which it is enacted. Id.

49. See *Healy,* 491 U.S. at 326 (stating Connecticut statute simply required out-of-state distributors to affirm under oath that their posted prices would not remain higher than lowest prices they would charge for each beer product border states charged during effective period).

50. See id. Connecticut realized that Connecticut residents were traveling to bordering states to purchase beer because the bordering states' prices were lower. See id.

51. See id. at 343 (affirming judgment of Court of Appeals).

52. See id. (explaining Connecticut statute).

53. See id. at 338 (stating that Connecticut statute has extraterritorial effect of preventing brewers from undertaking competitive pricing in Massachusetts based on prevailing market conditions).

54. See *Healy,* 491 U.S. at 338 (noting that there was no way for brewers to recoup added cost of affirmation).
2. Conflicts Among State Laws

In Bibb v. Navajo Freight Lines, Inc., the United States Supreme Court declared that state regulations imposed a clearly excessive burden on interstate commerce if the regulation was in conflict with or unique to the laws of other states and that conflict caused businesses to incur substantial costs. In Bibb, the Supreme Court invalidated an Illinois statute that required all trucks passing through the state to have particular mud flaps. In doing so, the Court reasoned that the statute's burden on interstate commerce was substantial because no other state required these particular mud flaps.

The principles of Bibb were later expanded in Kassel v. Consolidated Freightways Corp. and Raymond Transportation, Inc. v. Rice. These cases involved state regulations that were inconsistent with other state regulations. Specifically, Kassel and Rice presented statutes that limited truck lengths on state highways in order to promote safety. Because the statutes in Kassel and Rice were unique compared to the laws of other states, these statutes had the practical effect of forcing trucking companies to reroute around the regulating states or separate their trucks upon entering the regulating state. As a result, trucking companies suffered great financial losses. As in Bibb, the Court found this financial burden clearly outweighed the safety benefits of the statute, even though the Court

56. See id. at 529-30 (stating "[a] state which insists on a design out of line with the requirements of almost all the other States may sometimes place a great burden of delay and inconvenience on those interstate motor carriers entering or crossing its territory.").
57. See id. at 523 (emphasizing that forty-five other states allowed use of straight mudguards and one other state required use of these mudguards).
58. See id. (noting that one state even barred use of contoured mud flaps).
61. See Kassel, 450 U.S. at 665 (stating that no other state in Midwest disallows sixty-five foot trucks).
62. See id. The Iowa statute restricted the length of trucks on Iowa highways. Id.; see also Raymond Transp., Inc. v. Rice, 434 U.S. 429, 432 (1977) (dealing with Wisconsin law that prohibited trucks longer than fifty-five feet).
63. See Kassel, 450 U.S. at 667. Trucking companies had four options: (1) use fifty-five foot singles, (2) use sixty-five foot doubles, (3) detach the trailers of a sixty-five foot double and shuttle each through the State separately, (4) divert a sixty-five foot double around Iowa. Id.
64. See id. at 674 (stating that record shows Iowa's law added about 12.6 million each year to trucking companies' costs).
noted that courts should give a state greater deference when legis-
\[ \text{\textit{noted that courts should give a state greater deference when legis}} \]
\[\text{\text{\textit{lating to promote safety.}}]}\]

B. Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act (RCRA) established minimum federal standards for disposing of hazardous waste. RCRA allows states to implement their own hazardous waste programs. State requirements however, must be equal to or greater than federal requirements. The United States Supreme Court declared that permission to set higher standards does not shield state statutes from Commerce Clause challenges.

Many courts however, have reasoned that even though RCRA does not completely shield a state statute from interstate commerce challenges, it provides a "sturdy buffer." In other words, RCRA gives states leeway to adopt stricter hazardous waste disposal standards without violating the dormant Commerce Clause.

IV. NARRATIVE ANALYSIS

Using the Pike balancing test, the Second Circuit Court of Appeals in \textit{Sorell II}, concluded that the Vermont statute did not vio-

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65. \textit{See id.} at 678-79 (finding Iowa statute unconstitutional); \textit{see also Rice}, 434 U.S. at 446 (noting burden imposed on interstate commerce by Wisconsin's regulations is no less than burden imposed by statute invalidated in \textit{Bibb}).


67. \textit{See id.} RCRA states, "any State which seeks to administer and enforce a hazardous waste program pursuant to this subtitle may develop and, after notice and opportunity for public hearing, submit to the Administrator an application, in such form as he shall require, for authorization of such program." \textit{Id.}

68. \textit{See id.} (stating "[s]uch State is authorized to carry out [a state program] in lieu of the Federal program under this subtitle within ninety days following such notice and after opportunity for public hearing, . . . [unless the federal administrator] finds that (1) such State program is not equivalent to the Federal program under this subtitle."); \textit{see also} \textit{Korot, supra} note 32, at 330 (quoting Envtl. Tech. Council v. Sierra Club, 98 F.3d 774, 779 (4th Cir. 1996)).

69. \textit{See Wyoming v. Oklahoma, 502 U.S. 437, 458 (1992) (stating "Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve such a violation of the Commerce Clause as Oklahoma here seeks to justify."); see also Chem. Waste Mgmt. v. Hunt, 504 U.S. 334 (1992). The Court held that state regulations may violate dormant Commerce Clause despite the RCRA provision that explicitly allows states to adopt waste disposal standards stricter than federal waste disposal standards. \textit{Id.}}

70. \textit{See Sorell II, 272 F.3d 104, 113 (2d Cir. 2001) (stating "[w]e have held that a federal statute's authorization of supplementary state regulation 'confers upon the state regulations, if not a shield, at least a sturdy buffer against a Commerce Clause challenge.'").}

71. \textit{See id.} (explaining that environmental policy decisions such as waste disposal, are properly left in Congress's hands).
late the dormant Commerce Clause. Specifically, the court held that the burden imposed by the Vermont statute on interstate commerce did not outweigh the statute’s putative local benefits. The statute did not have extraterritorial regulatory effects, it did not promote interstate regulatory conflicts, and the statute’s purposes and provisions were consistent with RCRA.

A. Extraterritorial Regulatory Effects

First, NEMA argued that the burdens imposed upon interstate commerce by the Vermont statute clearly outweighed the statutory benefits because the statute had extraterritorial effects. Specifically, NEMA alleged that as a practical matter, its members could not continue to produce and distribute lamps efficiently and continue to sell in Vermont, unless they affixed the Vermont label to all of their mercury-containing lamps, regardless of their destination. Thus, NEMA concluded that the Vermont statute had the practical effect of forcing its members to conduct their entire business at Vermont’s direction.

The Second Circuit rejected this argument. The court reasoned that the statute does not force NEMA members to conduct their entire business at Vermont’s discretion because the statutory language does not specifically require manufacturers to label all lamps regardless of where sold. Unlike the unconstitutional statutes examined in Healy and Pike, the Vermont statutory language does not mention any other state for any purpose. The court concluded that NEMA members are not forced to modify their production and distribution methods to differentiate between Vermont and non-Vermont bound lamps, but

72. See id. at 109 (applying Pike balancing test to facts of Sorrell II).
73. See id. at 116 (holding that Vermont statute does not violate dormant Commerce Clause).
74. For a discussion of the Second Circuit's reasoning, see infra notes 75-175 and accompanying text.
75. See Sorrell II, 272 F.3d at 104 (arguing that Vermont statute forces members to label lamps sold in every other state).
76. See Sorrell I, 72 F. Supp. 2d 449, 452 (D. Vt. 1999) (explaining that lamps are manufactured throughout world including Europe, Asia and South America).
77. See id. (arguing costliness to label for one state only).
78. See Sorrell II, 272 F.3d at 111 (finding Vermont statute without extraterritorial effects).
79. See id. at 110 (stating Vermont statute is “indifferent to whether lamps sold anywhere else in the United States are labeled or not.”).
80. See id. (distinguishing statutory restrictions in Sorrell II from restrictions involved in Supreme Court’s price-regulation cases).
rather simply choose not to modify their methods.\textsuperscript{81} The court also reasoned that, unlike the beer distributors in \textit{Healy}, NEMA members could pass the additional costs required to modify their production methods on to Vermont consumers instead of on to consumers of all states, or they could simply forego sales to Vermont consumers.\textsuperscript{82}

The Second Circuit also declared that the Vermont statute does not force NEMA members out of the Vermont market.\textsuperscript{83} The court first noted that the statute does not control the many factors that influence the decision of whether to sell within a state.\textsuperscript{84} Second, only Vermont residents would be hurt if mercury-filled light manufacturers withdrew from Vermont.\textsuperscript{85} Third, the Vermont legislature was the appropriate body to deal with the consequences of lamp producers leaving the state, not the courts.\textsuperscript{86}

Finally, the court noted that the statute was constitutional even though it hurt NEMA members' ability to generate profits because this burden is a result of legitimate intrastate regulation.\textsuperscript{87} The court therefore, concluded that the Vermont statute does not have extraterritorial effects.\textsuperscript{88}

\section*{B. Interstate Regulatory Conflicts}

Second, NEMA argued that the Vermont statute excessively burdens interstate commerce because it creates the potential for

\begin{itemize}
  \item \textsuperscript{81} \textit{See id.} (reasoning statute does not require labels on lamps sold outside Vermont, rather, manufacturers are unwilling to modify their production and distribution systems to differentiate between Vermont-bound and non-Vermont bound lamps).
  \item \textsuperscript{82} \textit{See id.} (explaining in \textit{Healy}, state prevented firms from recouping any costs imposed by state statute from residents of state).
  \item \textsuperscript{83} \textit{See Sorrell II,} 272 F.3d at 111 (arguing Vermont's labeling requirement violates Commerce Clause because it effectively forces manufacturers not to sell lamps in Vermont is unpersuasive).
  \item \textsuperscript{84} \textit{See id.} (reasoning neither state nor statute controls factors that influence decision to sell in particular state such as production costs, opportunity cost of capital or demand).
  \item \textsuperscript{85} \textit{See id.} The court however, conceded that residents of other states may suffer minor injury from a total withdraw from Vermont. \textit{Id.}
  \item \textsuperscript{86} \textit{See id.} at 112 (reasoning risk that labeling requirements would erode manufacturer's profits and thus encourage them to leave Vermont is appropriate consideration for Vermont legislature, not federal courts).
  \item \textsuperscript{87} \textit{See id.} at 111 (stating "[the fact] that manufacturers must bear some of the costs of the Vermont regulation in the form of lower profits does not cause the statute to violate the Commerce Clause. Such a burden is simply attributable to legitimate intrastate regulation.").
  \item \textsuperscript{88} \textit{See Sorrell II,} 272 F.3d at 113 (holding Vermont statute does not have extraterritorial effects).
\end{itemize}
costly interstate regulatory conflicts. Specifically, NEMA asserted that like the plaintiffs in the "transportation cases," NEMA members would incur significant costs in order to sell to both Vermont and other states because Vermont is the only state that requires mercury-containing lamps to bear a label. The court rejected this argument. In doing so, the court explained that the Vermont law does not burden interstate commerce because it has not created an actual conflict, only the potential for conflict. The court also explained that the statute does not conflict with laws of other states because no other state regulates mercury-containing lamps in the same manner as Vermont. Moreover, the Second Circuit noted that other states are considering statutes similar to the Vermont statute.

C. Consistency With Federal Law

Finally, the Second Circuit reasoned that the Vermont statute does not violate the dormant Commerce Clause because RCRA explicitly allows states to adopt waste disposal standards stricter than neighboring states. The court noted that policy decisions regarding waste disposal appropriately rest with Congress and not the federal courts. The court also stated, "the idea that there is a general

89. See id. at 112 (arguing that "[Vermont] statute burdens interstate commerce by exposing [NEMA] members to the possibility of multiple, inconsistent labeling requirements imposed by other states.").

90. See id. (stating "NEMA also contends that the statute burdens interstate commerce by exposing its members to the possibility of multiple, inconsistent labeling requirements imposed by other states" even though "NEMA concedes that no other state even regulates the labeling of mercury-bearing bulbs, much less does so in conflict with Vermont's approach."). The "transportation cases" are Bibb, Kassel and Rice. For a further discussion of the transportation cases, see supra notes 55-65 and accompanying text.

91. Sorrell II, 272 F.3d at 112. NEMA argued that the statute burdens interstate commerce because it exposes its members to the possibility of multiple, inconsistent labeling requirements imposed by other states. Id. The court finds no conflict here. Id.

92. See id. (citing Procter & Gamble Co. v. City of Chicago, 509 F.2d 69, 77 (7th Cir. 1975)).

93. See id. The court stated, "[N]o other state even regulates the labeling of mercury-bearing bulbs, much less does so in conflict with Vermont's approach." Id.

94. See id. (noting there is record evidence that Vermont statute is consistent with programs under consideration by other states).

95. See id. at 113 (reasoning that Congress's enactment of RCRA, and provision giving states ability to enact stricter standards than that of federal government, bolsters conclusion that dormant Commerce Clause does not invalidate Vermont statute).

96. See Sorrell II, 272 F.3d at 113 (discussing policy considerations with regard to Congress and federal courts).
interest in [interstate] regulatory uniformity is inconsistent with our society's decision to have separate states with separate legislative competencies . . . to regulate interstate commerce." 97

The Second Circuit upheld the Vermont statute because the statute does not force NEMA members to conduct their entire business at Vermont's discretion, it has not created an actual conflict with other state laws, only the potential for conflict and because RCRA explicitly allows states to adopt stricter standards than neighboring states when regulating waste disposal. 98

V. CRITICAL ANALYSIS

It was proper for the Second Circuit to apply the *Pike* balancing test in *Sorrell II*. 99 The Vermont statute is rationally related to a legitimate state purpose; reduction of mercury in Vermont's waterways. 100 Further, the statute does not facially discriminate against interstate commerce. 101 The court's *Pike* balancing test analysis concluded that the Vermont statute does not burden interstate commerce at all. 102 As a result, the court found the statute constitutional. 103 The court, however, misapplied the *Pike* test to the facts in *Sorrell II*. 104

97. *Id.* (quoting Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1881 (1987)).

98. For a discussion of the Second Circuit's reasoning in *Sorrell II*, see *supra* notes 72-98 and accompanying text.

99. *Sorrell II*, 272 F.3d at 108-09. The Vermont law is not an "economic protectionist" statute because the statute does not give in-state lamp manufacturers an economic advantage over out-of-state lamp manufacturers. See *id.* at 110-12 (noting that both in-state and out-of-state mercury-containing-lamp producers will have to affix same label under Vermont law). Proper disposal of mercury is related to less mercury in waterways, which is related to safety. See *id.*

100. See *FLUORESCENT LAMPS*, *supra* note 1, at 3 (explaining adverse affects of mercury on human health).

101. See *Sorrell II*, 272 F.3d at 107 (providing specific language of Section 6621d(a) of Vermont statute).

102. See *id.* at 110-13. The court held that the statute is constitutional because it does not have extraterritorial effects, does not pose a risk of exposing NEMA members to inconsistent legislation and is consistent with RCRA. See *id.* However, the court did not address the local benefits of the Vermont statute. See *id.*

103. See *id.* at 116 (holding that NEMA failed to show success on merits of Commerce Clause claim).

104. For a further discussion of the Second Circuit's analysis in *Sorrell II*, see *supra* notes 72-98 and accompanying text.
A. Extraterritoriality

The Second Circuit correctly found that the Vermont statute does not have extraterritorial effects. Nevertheless, the court’s reasoning was incomplete. The Second Circuit determined that the Vermont statute does not have extraterritorial effects simply because the statute does not explicitly force lamp manufacturers to affix the Vermont label upon all lamps, regardless of their destination. The court cited *Healy* as support for its position.

Under *Healy*, however, a court must consider three factors to determine extraterritoriality. Specifically, a statute has extraterritorial effects when: (1) it has the practical effect of regulating activity wholly outside the state’s borders, (2) it has the effect of prohibiting certain behavior through the threat of legal sanctions, and (3) it is designed to provide one state with a competitive economic advantage over another. The Vermont statute does not have extraterritorial effects because it only satisfies part one of this three-part test.

The Vermont statute has the practical effect of regulating activity wholly outside of Vermont’s borders. NEMA members cannot alter their production methods to affix special labels on lamps bound for Vermont because the cost to do so is prohibitively expensive. Thus, all mercury-containing lamps, regardless of destina-

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105. See *Sorrell II*, 272 F.3d at 110 (holding that Vermont statute does not have extraterritorial effects).
106. For a further discussion of the Second Circuit’s analysis in *Sorrell II*, see supra notes 72-98 and accompanying text.
107. See *Sorrell II*, 270 F.3d at 110 (stating Vermont statute is “indifferent” to whether lamps sold anywhere else in the United States are labeled).
108. See id. (citing *Healy*, 491 U.S. 324 (1989) and *Cotto Waxo*, 46 F.3d 790 (8th Cir. 1995) as support for position).
110. See id. (stating that most important consideration is whether practical effect of statute is to control conduct beyond boundaries of state); see also *May & Ides*, supra note 48, at 317 (suggesting that under *Brown-Forman* and *Healy*, state laws have extraterritorial effects if they satisfy first two steps of test). The purpose of the challenged laws in *Brown-Forman* and *Healy* were to eliminate any competitive advantage enjoyed by dealers in other states and thus, the first two elements of the test were satisfied. See id.
111. See *May & Ides*, supra note 48, at 317 (explaining three-part test).
112. See id. The example on this page explains that state A’s statute has extraterritorial effects if it requires a label unique to other states and when this labeling requirement makes it prohibitively expensive for manufacturers to differentiate products headed into state A versus other states. See id.
tion, must contain the Vermont label.\textsuperscript{114} For example, a lamp containing the Vermont label, sold in Pennsylvania, is considered a transaction occurring wholly outside Vermont's borders.\textsuperscript{115}

The Vermont law however, does not threaten legal sanctions upon NEMA members if they do not label their lamps for every state in which they sell.\textsuperscript{116} Rather, NEMA members may choose to apply the labels on all lamps in order to avoid the additional expense of labeling only for Vermont.\textsuperscript{117} Therefore, NEMA members' behavior with regard to other states is ultimately influenced by economic considerations, not legal sanctions.\textsuperscript{118} Finally, unlike the statute at issue in \textit{Healy}, the Vermont statute was not designed to eliminate the competitive advantage enjoyed by dealers of products in other states.\textsuperscript{119} Rather, the statute was designed to protect the state's environment and preserve the health of its citizens.\textsuperscript{120} The Second Circuit correctly determined that the Vermont statute does not have extraterritorial effects.\textsuperscript{121} The court however, reached this conclusion without considering each part of the three-part test.\textsuperscript{122}

\textsuperscript{114} See \textit{id.} (noting impossible for NEMA members to predict where any particular lamps will end up because it is prohibitively expensive for NEMA to change production methods).

\textsuperscript{115} See \textit{May} & \textit{Ides}, \textit{supra} note 48, at 316 (explaining that labeling requirements are wholly extraterritorial activity as far as regulating state is concerned).

\textsuperscript{116} See \textit{id.} (explaining statute is constitutional under dormant Commerce Clause if statute only imposes economic and not legal sanctions on sellers).

\textsuperscript{117} See \textit{Sorrell II}, 272 F.3d 104, 110 (2d Cir. 2001) (noting that Vermont statute only requires labeling on lamps sold outside of Vermont because NEMA members chose to label all lamps regardless of where sold).

\textsuperscript{118} See \textit{May} & \textit{Ides}, \textit{supra} note 48, at 316 (reasoning that extraterritorial effect of state labeling requirement is economic rather than legal and thus, constitutional).

\textsuperscript{119} See \textit{Healy}, 491 U.S. 324, 326 (1989) (stating that Connecticut enacted Connecticut statute in effort to eliminate price differential between Connecticut and bordering states because Connecticut citizens were traveling out of state to buy beer).

\textsuperscript{120} See \textit{May} & \textit{Ides}, \textit{supra} note 48, at 315 (stating that laws designed to eliminate any competitive advantage enjoyed by dealers in other states is form of economic protectionism). The Vermont statute is not protectionist. See \textit{Sorrell I}, 72 F. Supp. 2d 449, 451 (D. Vt. 1999). The statute's purpose is environmental protection. See \textit{id}.

\textsuperscript{121} See \textit{Sorrell II}, 270 F.3d at 116 (explaining why Vermont statute does not have extraterritorial effects).

\textsuperscript{122} For a discussion of the extraterritorial effects of the Vermont statute, see \textit{supra} notes 75-88 and accompanying text.
B. The Second Circuit’s Pike Balance

1. The Burden on Interstate Commerce

   a. Economic Burdens

   The Second Circuit’s reasoning, in Sorrell II, that the Vermont statute does not impose economic burdens on interstate commerce was flawed.123 In Kassel, the Supreme Court found that an Illinois statute imposed a significant burden on interstate commerce because compliance with the statutory provisions caused a two million dollar increase in a trucking company’s annual costs.124 Similarly, NEMA member General Electric estimates that it will incur approximately eight million dollars to alter its production lines to affix the Vermont label upon its lamps and packaging, plus annual compliance costs of an additional four million, seven hundred thousand dollars.125 Moreover, the cost of labeling only those lamps destined for Vermont would exceed General Electric’s total revenues of lamp sales within Vermont.126

   The Second Circuit distinguished the Vermont statute from the unconstitutional statute in Healy by noting that the Vermont statute allows NEMA members to pass increased production costs on to Vermont consumers.127 The court also asserted that even if NEMA members could not pass these costs on to Vermont consumers, they could simply forego doing business in Vermont altogether.128 In the price regulation cases, producers could not pass increased production costs on to consumers.129 In Healy, however, out of state beer distributors, like NEMA members, had the option of discontinuing sales of beer within Connecticut.130 The United

123. For a discussion of the Second Circuit’s Pike balance, see infra notes 124-132 and accompanying text.


125. Sorrell I, 72 F. Supp. 2d at 453. See also Kassel, 450 U.S. at 667 (explaining Iowa’s law added about $12.7 million each year to trucking costs).


127. See Sorrell II, 272 F.3d 104, 110 (2d Cir. 2001) (stating that unlike price regulation cases, NEMA members could pass along increased costs to Vermont consumers).

128. See id. at 111 (discussing manufacturers’ ability to forego sales in Vermont).

129. See Healy, 491 U.S. 324, 339 (1989). In Healy, it was impossible for out of state beer distributors to pass along costs to Connecticut distributors because out of state distributors already agreed to sell to the Connecticut distributors for a certain price. Id. at 340.

130. Id. In Healy, nothing prevented Massachusetts or New York beer distributors from simply discontinuing sales to Connecticut. See id. at 339.
States Supreme Court however, struck down the Connecticut statute without considering this fact. Thus, the court’s holding that the Vermont statute did not economically burden interstate commerce was inconsistent with prior Supreme Court decisions.

b. Risk of Inconsistent Legislation

The Second Circuit’s finding in Sorrell II, that the Vermont statute does not burden interstate commerce because the statute does not expose NEMA members to the risk of inconsistent regulations, was flawed. The court first reasoned that unlike the statutes at issue in the transportation cases, “no other state . . . [currently] regulates the labeling of mercury-bearing bulbs, much less does so in conflict with Vermont’s approach.” Second, the court noted that the Vermont statute is consistent with regulations under consideration by other states.

First, a statute may expose an entity to a risk of inconsistent interstate legislation even if it is the only statute of its kind. For example, in Kassel, the Court held that an Iowa law that disallowed sixty-five foot trucks on its highways, imposed a disproportionate burden on interstate commerce because no other state in the Midwest disallowed sixty-five foot trucks on its highways. Further, a court cannot conclude that Vermont’s statute is consistent with that of other states simply because other states are considering similar legislation. It is likely that such legislation will never pass given how quickly the balance of political power can change in a state.

131. See id. (holding Connecticut statute is invalid without addressing whether beer distributors could simply discontinue sales to Connecticut).
132. For a discussion of the Second Circuit’s analysis in Sorrell II, see supra notes 72-98 and accompanying text.
133. See generally Sorrell II, 272 F.3d 104.
134. Sorrell II, 272 F.3d at 112.
135. Id. The court stated that there is record evidence showing that the Vermont statute is consistent with regimes under consideration by other states. Id.
137. See Kassel, 450 U.S. 662, 688 (1980) (noting that “[e]very State in the Union regulates the length of vehicles permitted to use the public roads.”). But see Chief Justice Rehnquist, noting, “[sixty-five foot trucks were] prohibited in other areas of the country as well, some 17 states and the District of Columbia, including all of New England and most of the Southwest.” Id.
138. See id. (holding Iowa statute unconstitutional even though seventeen other states had laws similar to Iowa’s).
139. See Sorrell II, 272 F.3d at 112. Further, the Second Circuit conceded that the scope of conflict required to state a dormant Commerce Clause claim is somewhat unclear. Id.
Moreover, there may be substantial conflicts even if other states enact legislation similar to Vermont's.\textsuperscript{140} According to NEMA, even minor variations in labeling requirements will cause NEMA members to incur substantial costs given their lamp production and packaging methods.\textsuperscript{141} Thus, the Vermont statute does expose NEMA members to the risk of inconsistent interstate regulations.\textsuperscript{142}

\section*{2. Local Putative Benefits Conferred By The Statute}

The Vermont statute burdens interstate commerce.\textsuperscript{143} It is unclear, however, whether these burdens clearly outweigh the statute's local benefits.\textsuperscript{144} The Second Circuit concluded that the statute provided local benefits simply because the statute's purpose of reducing mercury in Vermont's waterways furthered a legitimate local health interest.\textsuperscript{145} The court's analysis, however, was incomplete.\textsuperscript{146}

A court cannot determine that a statute's burdens do not clearly outweigh the statute's local benefits simply because the statute's purpose is to promote an important local health interest.\textsuperscript{147} A court must also find the statute, as a practical matter, is likely to significantly advance this state interest.\textsuperscript{148} For example, in \textit{Kassel}, the Court stated, "[r]egulations designed [to promote public health or safety] nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid...".

\begin{itemize}
\item \textsuperscript{140} See \textit{Sorrell I}, 72 F. Supp. 2d 449, 452 (D. Vt. 1999). Given the way in which the lamps are produced, even minor variations in state labeling requirements will cause NEMA members to incur great costs. \textit{Id}.
\item \textsuperscript{141} See \textit{id}. (explaining lamp production methods).
\item \textsuperscript{142} For a discussion of the Second Circuit's reasoning in \textit{Sorrell II}, see \textit{supra} notes 72-98 and accompanying text.
\item \textsuperscript{143} For a discussion of the burdens imposed by the Vermont statute, see \textit{supra} notes 123-42 and accompanying text.
\item \textsuperscript{144} For a discussion of the Second Circuit's reasoning, see \textit{supra} notes 72-98 and accompanying text.
\item \textsuperscript{145} See \textit{Sorrell I}, 272 F. Supp. 2d at 450 (noting neither Sorrell nor NEMA disputed that mercury is toxic substance, exposure to which can lead to serious impacts on human health and environment); see also The National Association of Attorneys General, \textit{Toxic Substances}, 15 NAT'L ENVT'L ENF'J. 1, 1-21 (2000) (stating, "[t]here was also no dispute whether Vermont had an interest in reducing the amount of mercury introduced into the environment.").
\item \textsuperscript{146} For a discussion of the incompleteness of the Second Circuit's analysis in \textit{Sorrell II}, see \textit{supra} notes 105-22 and accompanying text.
\item \textsuperscript{147} See \textit{May & Ides}, \textit{supra} note 48, at 323-24 (stating that under \textit{Pike} test, courts must first determine statutory purpose and then determine extent to which law actually promotes this purpose).
\item \textsuperscript{148} \textit{Id}. (explaining that courts must determine actual extent to which law furthers purpose).
\end{itemize}
under the Commerce Clause." If the regulation furthers the state purpose only marginally, it is not a valid safety regulation and therefore not entitled to the "strongest presumption of validity against Commerce Clause challenges."

The Vermont statute may only marginally reduce mercury in Vermont's waterways. For example, NEMA asserted that the statute would not create awareness among lamp consumers of the proper method of lamp disposal because these consumers will not see the label when disposing of it. NEMA assumed that consumers would not see the label on the packaging at the time of lamp disposal because consumers generally dispose of the lamp's packaging immediately after opening the lamp, not when it is time to dispose of the lamp itself. Further, NEMA argued that consumers would not see the label on the lamp itself because the label will disappear after many hours of lamp use.

The Second Circuit, however, failed to address these issues. As a result, the court did not determine as a practical matter, whether the statute would significantly or only marginally advance its purpose. Therefore, it remains unclear whether the statutory burdens clearly outweigh the statutory benefits.

3. Least Burdensome Alternative

The Second Circuit's analysis was incomplete because it failed to address whether there are means of achieving a greater or equal reduction of the amount of mercury in Vermont's waterways, but


150. Kassel, 450 U.S. at 693 (noting safety regulations are entitled to highest presumption of validity unless clear that statute does not further purpose at all).


152. See id. at 454. Here, the court recapped NEMA's arguments that (1) the symbol "Hg" together with any explanatory note on the packaging, will be ignored on already cluttered bulb packaging at the time of purchase, (2) at the end of the lamp's life, and (3) the symbol "Hg" without the packaging will be irrelevant and that the "Hg" may wear out after long hours of lamp use. Id.

153. Id. NEMA argued that the lamp's packaging will have been thrown out years before the lamp itself is disposed of. Id.

154. Id. at 453; see also Fluorescent Lamps, supra note 1, at 24 (stating "[a] four foot fluorescent lamp has an average rated life of at least 20,000 hours.").

155. For a discussion of the Second Circuit's analysis, see supra notes 72-98 and accompanying text.

156. See Sorrell II, 272 F.3d 104, 104-16 (2d Cir. 2001) (failing to address whether Vermont statute has practical effect of furthering purpose).

157. See May & Ides, supra note 48, at 341 (explaining Court must consider all effects of statute including practical effects).
with fewer burdens on interstate commerce than the Vermont statute.\textsuperscript{158} Even if the Vermont statute imposes burdens, clearly excessive in relation to the local benefits, the statute is still unconstitutional if Vermont could achieve the statutory purpose through less burdensome means.\textsuperscript{159} For example, in \textit{Pike} the Court stated, "the extent of the burden [on interstate commerce] that will be tolerated will . . . depend . . . on whether [the local interest] could be promoted as well with a lesser impact on interstate activities."\textsuperscript{160}

First, statutes directed at other sources of mercury production may achieve greater reduction in mercury and impose fewer burdens on interstate commerce.\textsuperscript{161} For example, coal-fired electric utilities emit the greatest amount of mercury into the air, but are not regulated under an emissions control plan.\textsuperscript{162} Conversely, mercury-containing lamps emit only a fraction of the mercury into the air.\textsuperscript{163} In essence, Vermont may get more "bang for its' buck" if it regulates coal-fired electric utilities instead of mercury-containing lamps.\textsuperscript{164}

Further, the Vermont statute may be more effective and at the same time, regulate through means less burdensome to interstate

\textsuperscript{158} For a discussion of the importance of considering whether statutory purpose can be promoted with lesser impact on interstate activities see \textit{Pike}, 397 U.S. 137, 142 (1970).

\textsuperscript{159} For a discussion of alternative, less burdensome means, see infra notes 158-68 and accompanying text.

\textsuperscript{160} \textit{Pike}, 397 U.S. at 142. \textit{See also May \& Ides, supra} note 48, at 326 (stating Supreme Court has suggested that law may be unconstitutional if local interest could be promoted as well with lesser impact on interstate commerce).


\textsuperscript{162} \textit{See New York Product Labeling}, \textit{supra} note 161 at 7 (stating "[t]he greatest source of mercury emissions is power plants, and they have never been required to control these emissions.")

\textsuperscript{163} \textit{See Sorrell I}, 72 F. Supp. 2d 449, 454 (D. Vt. 1999) (explaining that even if Vermont statute was to operate as envisioned, it only addresses, at great cost to manufacturers, very small portion of problem of mercury entering environment).

\textsuperscript{164} \textit{See New York Product Labeling}, \textit{supra} note 161, at 7 (stating power plants produce greatest amount of mercury entering our environment).
For example, reduction of the amount of mercury in waterways produced by lamps may be achieved through a public relations campaign directed toward lamp consumers. Theoretically, a campaign would influence the consumer's decision of how to dispose at the time of disposal and thus be more effective than labeling requirements. Moreover, a public relations campaign would not burden interstate commerce at all because it would not impose requirements on out-of-state lamp manufacturers.

C. RCRA

The Second Circuit reasoned that the Vermont statute did not violate the dormant Commerce Clause because RCRA "expressly leaves individual states with flexibility to adopt [hazardous waste disposal] regulations more stringent than those imposed by the federal government" and that this "confers upon [the state regulations], if not a shield, at least a sturdy buffer against [a] Commerce Clause [challenge]." RCRA does in fact, explicitly allow states to adopt standards stricter than that of the federal government. However, nowhere in RCRA does Congress explicitly or implicitly allow states to adopt hazardous waste disposal standards that create barriers to interstate commerce. Thus, RCRA does not provide a sturdy buffer against dormant Commerce Clause when the state statute creates barriers to interstate commerce.

The Second Circuit's analysis was incomplete because it failed to address whether the statute's purposes could be achieved.

165. See Sorrell I, 72 F. Supp. 2d at 455 (explaining that Vermont could meet goal without burdening interstate commerce by focusing efforts on educating consumers).

166. See id. (arguing that public relations campaign is more effective than labeling lamps and their packaging).

167. See id. at 453. NEMA asserted that a public relations campaign would reduce the amount of mercury in Vermont's waterways with equal or greater effectiveness than that of the statutory labeling provisions, while imposing much less of a burden on interstate commerce. Id.

168. See id. (discussing burden on NEMA).

169. See Sorrell II, 272 F.3d 104, 113 (2d Cir. 2001) (finding persuasive that RCRA explicitly allows individual states to adopt hazardous waste standards stricter than that of federal government).

170. For a discussion of RCRA, see supra notes 169-175 and accompanying text.

171. See Hazardous Waste Treatment Council v. South Carolina, 766 F. Supp. 431, 440 (D. S.C. 1991) (holding that "[w]hile Congress can authorize States to erect barriers to interstate commerce, such congressional authorization must be 'expressly stated' and 'unmistakably clear.'").

172. For a discussion of RCRA and congressional intent, see supra notes 169-175 and accompanying text.
through means less burdensome on interstate commerce. The court also misinterpreted congressional intent behind RCRA. Thus, it remains unclear whether the Vermont statute is constitutional.

VI. IMPACT

The Second Circuit's holding that state mandated labeling of mercury-containing lamps does not violate the dormant Commerce Clause may have adverse short-term and long-term effects on the environment. The decision may have the short-term effect of discouraging NEMA members to sell mercury-containing lamps to Vermont. This may reduce the overall amount of mercury in Vermont's waterways, but affect other areas of Vermont's environment negatively in the long-term. For example, Vermont consumers may be forced to purchase the less energy efficient non-mercury containing incandescent lamps, which would significantly increase the number of lamps disposed of by generators and increase the amount of coal, oil and gas burned at power plants.

The Second Circuit's holding may have the long-term effect of encouraging other states to adopt legislation similar to that of Vermont without considering other alternatives. This may or may not reduce the overall amount of mercury in United States waterways. After Sorrell II, it remains unclear whether labeling of

173. See Pike, 397 U.S. 137, 142 (1970) (explaining that state statute may still be constitutional if statutory purpose could be promoted with lesser impact on interstate activities).
174. For a discussion of RCRA, see supra notes 66-71 and accompanying text.
175. For a discussion of the Second Circuit's reasoning see supra notes 72-98 and accompanying text.
176. For a discussion of the impact on the environment of the Second Circuit's decision, see infra notes 176-185 and accompanying text.
178. See Fluorescent Lamps, supra note 1, at 5 (stating "[t]he use of energy efficient mercury-containing lamps can play a significant role in the nation's energy consumption.").
179. Id. (finding that use of mercury-containing bulbs reduces amount of coal, oil and gas burned in power plants, as well as amount of air pollutants released from these plants); see also id. at 4 (stating "[t]he National Electrical Manufacturers Association (NEMA), whose members include virtually all of the lamp manufacturers in the United States.").
180. See Sorrell I, 72 F. Supp. 2d at 452 (noting that currently, only electric utilities in Minnesota provide recycling services for mercury-containing bulbs).
181. See CNN Article, supra note 161 (noting mercury-containing lamps represent only fraction of mercury that enters water supplies compared to coal-fired plants).
lamps is effective. The Second Circuit did not require Vermont to prove how effective if at all, the statute would be in reducing the overall levels of mercury in Vermont's waterways. Further, even assuming the statute is effective in reducing the amount of mercury in waterways, the court did not require Vermont to prove that it could not achieve the same or greater results using means less burdensome to interstate commerce. Because states do not have to prove the effectiveness of their actions, it is questionable whether they will examine other alternatives to reduce mercury.

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182. For a discussion of NEMA's arguments that the Vermont statute will not be effective, see supra notes 158-168 and accompanying text.

183. See Sorrell I, 72 F. Supp. 2d at 454 (stating that Vermont's labeling law will have no effect on mercury originating in other states).

184. For a discussion on whether the court of appeals considered whether the statutory purposes could be promoted with lesser impact on interstate activities, see supra notes 99-175 and accompanying text.
