Hazardous Waste and Partial Import Bans: An Environmentally Sound Exception to the Commerce Clause

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HAZARDOUS WASTE AND PARTIAL IMPORT BANS: AN ENVIRONMENTALLY SOUND EXCEPTION TO THE COMMERCE CLAUSE

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I. INTRODUCTION

In recent years, environmental concerns regarding the inadequate treatment of hazardous waste have escalated. State governments' general laissez faire approach to the problem, coupled with the public's "NIMBYistic" attitude, have resulted in increas-

1. The NIMBY or "not in my backyard" attitude often abrogates government attempts to implement hazardous waste management facilities. Generally, the public fear is motivated by a lack of full understanding of the underlying
ing levels of illegally disposed hazardous waste thus prompting the need for harsher federal legislation.

In 1986, Congress responded to this situation by enacting amendments to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Specifically, section 104(c)(9) of the Superfund Reauthorization Act (SARA) is intended to force states to aggressively assume a greater responsibility in hazardous waste clean-up efforts. This section mandates that each state establish the capability to meet a capacity assurance plan (CAP) for a twenty year period.

While the amended statute constitutes a positive step toward addressing the growing problems associated with hazardous waste, confusion exists about how much leeway section 104(c)(9) actually accords to the states. For instance, in an effort to achieve the individual capacity in accordance with CERCLA, some states have recently imposed waste import bans. Such state action has raised the issue of the Commerce Clause as that clause seeks to guarantee free movement among states. In the general context of waste import bans, section 104(c)(9)'s laudable goal may conflict with the purposes of the Commerce Clause.

Many recent cases addressing this difficult issue have relied upon the 1978 Supreme Court decision in *The City of Philadelphia v. New Jersey* which struck down a total state-imposed disposal ban. This Comment discusses *City of Philadelphia*’s broad impact on Commerce Clause challenges arising subsequent to the promulgation of section 104(c)(9). Particular emphasis will be placed on the more specific issue of whether a partial ban on the importation of hazardous waste violates the Commerce Clause. It will be argued that partial waste bans are consistent with the spirit of SARA section 104(c)(9) and are distinguishable from the total

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4. Id.

5. U.S. Const. art. I, § 8, cl. 3. Specifically, the Commerce Clause provides as follows: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . . ." Id.


7. For further discussion of *City of Philadelphia*, see infra notes 32-43 and accompanying text.
waste bans at issue in the leading Supreme Court decision, *City of Philadelphia*. To support this argument, primary focus will be placed on a recent Alabama case, *National Solid Waste Management Ass'n v. Alabama Dep't of Envtl. Protection*, (NSWMA II), in which the Eleventh Circuit struck down a partial ban on hazardous waste.

Part II of this Comment considers the historical background of SARA section 104(c)(9). Part III outlines the scope of the dormant Commerce Clause and some relevant exceptions. Part IV discusses the background of the recent Alabama case and the reasoning employed by the district and circuit courts respectively. Finally, Part V will analyze and critique the Eleventh Circuit’s holding in an effort to bolster the basic thesis of this Comment supporting the legality of partial, hazardous waste import bans.

**II. BACKGROUND OF CERCLA SECTION 104(c)(9)**

CERCLA was enacted in 1980 in order to implement plans for the more efficient clean-up of hazardous waste. CERCLA's directives, designed to establish more efficient disposal programs, were, however, impeded by political pressures and public opposition. The "broader social need for (more) hazardous waste management facilities" was significantly ignored by most state and local governments. Consequently, there was no increase in hazardous waste disposal capacity. As a result, Section 104(c)(9) of SARA was promulgated with the intent to stimulate development of hazardous waste facilities and to encourage states to assume greater responsibility in clean-up efforts. Beginning October 17, 1989, each state has been required to establish ade-

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10. See S. REP. No. 11, 99th Cong., 1st Sess., at 23 (1985) (number of obstacles to siting new hazardous waste management facilities).

11. Id. at 22.

12. This date followed the enactment of the provision by three years so that states would have adequate time to comply with the statute. See EPA Draft Hazardous Waste Capacity Assurance Guidance, 53 Fed. Reg. 33,651-52 (1988) (noted in Jonathan R. Stone, *Supremacy and Commerce Clause Issues Regarding State Hazardous Waste Import Bans*, 15 COLUM. J. ENVTL. L. 1, 5 (1990)[hereinafter *Stone*]). (This article describes new ideas for how to best implement § 104(c)(9)).
quate capacity to dispose of endogenous waste for the next twenty years. In the event that a state lacks the individual capacity to handle its domestic waste, section 104(c)(9) provides that the state must, through interstate agreements, secure the disposition of waste it is unable to treat. Those states which fail to satisfy capacity assurance requirements will be ineligible to receive funds for "remedial actions" provided for by the Superfund.

Section 104(c)(9) suggests that greater deference will be given to alternate methods for implementation had been drafted by the National Governors Association (NGA) which suggests that interstate or regional agreements be implemented over a four-year adjustment period. The EPA's CAP submissions were more substantially finalized plans. The NGA guidelines would monitor states who were exporting a significant amount of waste. The NGA approach to high volume exports is as follows:

High exports would be unreasonable, if the state had neither increased any feasible interstate disposal facilities nor entered into any interstate export agreements. If the state was still unreasonably exporting at the end of the four-year adjustment period, then EPA would allow its counterpart importing state to bar those imports, without penalty. However, the exporting state's CAP [capacity assurance plans] would be disproved, thereby incurring the Section 104(c)(9) remedial cleanup funding sanctions.

Alternate methods for implementation had been drafted by the National Governors Association (NGA) which suggests that interstate or regional agreements be implemented over a four-year adjustment period. The EPA's CAP submissions were more substantially finalized plans. Id. at 6. The NGA guidelines would monitor states who were exporting a significant amount of waste. The NGA approach to high volume exports is as follows:

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Id. at 6 (citation omitted).


14. Most, if not all, states lack the individual capacity to handle all of their hazardous waste.

15. See H.R. REP. No. 253, 99th Cong., 1st Sess., pt. 5, at 9 (1985). This report states that the purpose of long-term provisions is "to ensure the continued effectiveness of response actions to be taken over an extended period within a state insofar as response activities paid for out of the Fund are concerned." Id.

16. "CERCLA provides for two types of cleanup actions: remedial actions, which are generally long-term or permanent containment or disposal programs, 42 U.S.C. § 9601(24); and removal efforts, which are usually short-term cleanup arrangements of a more immediate nature, 42 U.S.C. § 9601(23)." NSWMA II, 910 F.2d at 716 (emphasis added).

17. Section 104(c)(9) states as follows:

(9) Siting - Effective 3 years after October 17, 1986, the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which -

(A) have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agreement and to be disposed of, treated, or destroyed,

(B) are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority,
given to states in the area of hazardous waste management. Not all state actions in response to section 104(c)(9), however, have been welcomed with open arms. A problematic area, for example, has arisen in the implementation of waste import bans. Such actions have been challenged as violations of the Supremacy Clause and the Commerce Clause. The debate over whether

(C) are acceptable to the President, and
(D) are in compliance with the requirement of subtitle C of the Solid Waste Disposal Act.


18. Former EPA Administrator Lee Thomas articulated the importance of the role of states in the success of Superfund.

19. Challenges to state bans under the Supremacy Clause often are made concurrently with Commerce Clause claims. Although not specifically considered in this Comment, it is important to briefly consider whether waste disposal bans are preempted by federal legislation, namely The Resource Conservation and Recovery Act of 1976 [hereinafter RCRA], Pub. L. No. 94-580, 90 Stat. 2795 (codified in 42 U.S.C. §§ 6901-6987 (West Supp. 1988)) and CERCLA.

An initial question to be considered in a preemption context is whether the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Hines v. Davidowitz, 312 U.S. 52, 67 (1941). In fields where federal and state law conflict, the Supremacy Clause directs that state law be preempted. U.S. Const. art. VI, cl. 2.

In the context of hazardous waste, the Supreme Court has recognized that there exists “no 'clear [or] manifest purpose of Congress' to preempt the entire field of interstate waste management or transportation, either by express statutory command or by implicit legislative design.” City of Philadelphia, supra note 6, at 620 n.4. Moreover, legislative history clearly suggests that states may impose “more stringent requirements in the field of waste management.” RCRA, 42 U.S.C. §§ 6901-91, 6929 (1982 & Supp. V 1987), as amended by Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, § 14. According to Senator Bumpers, who is a proponent of active state involvement, the “more stringent” state requirement was added to RCRA in 1980 since the original version did “not give states the opportunity to set standards more stringent than those provided by Federal authorities in establishing sites for waste disposal facilities.” 125 CONG. REC. 13248 (1978).

The legislative history, however, does not clearly reflect how far a state may go to meet the requirements of federal mandates. The regulations suggest that there are limitations on state interference with interstate commerce. See Requirements for Authorization of State Hazardous Waste Programs, 40 C.F.R. § 271, 4(a); see also Stone, supra note 13, at 8-14; see also Jonathan T. Cain, Routes and Roadblocks: State Controls on Hazardous Waste Imports, 25 NAT. RESOURCES J. 767 (1983)[hereinafter Cain].

The Eighth Circuit, in Ensco, Inc. v. Dumas, 807 F.2d 743 (8th Cir. 1986) recently refused to allow a county to enact an ordinance which abrogated the incineration of a particular hazardous waste in the county. Id. The court stated that the savings clause only permits local governments to “make good-faith adaptations of federal policy to local conditions.” Id. at 745.

In Ogden Envtl. Servs. v. City of San Diego, 687 F. Supp. 1436 (S.D. Cal. 1988) another federal court rejected the argument that the local ban was preempted. One author, commenting on these two recent cases, noted as follows: [the] RCRA Section 3009 savings clause did not save local waste import bans from preemption when such bans would impair the objectives of special federal programs. For instance, in Ensco a local ban on incinerators would have thwarted EPA's determination that . . . wastes are best
section 104(c)(9) accords states the authority to interfere with exogenous waste has thus far not been definitively resolved by Congress, the Courts or EPA.

III. THE SCOPE OF THE DORMANT COMMERCE CLAUSE

Justice Cardozo, addressing the rationale of the dormant Commerce Clause, once opined that "the peoples of the several states must sink or swim together." According to Cardozo's analysis, the rationale for the Commerce Clause is to prevent economic balkanization by the states. Generally, states may not restrict the free flow of commerce for economic purposes. In the context of exogenous waste, Lawrence Tribe, borrowing one of Cardozo's often-quoted lines, stated that the states must "sink or swim together even in their collective garbage."

The implicit constitutional limitations upon a state's ability to interfere with interstate commerce have evolved expressly from several Supreme Court decisions. A two step test has emerged which determines whether challenged legislation violates the Commerce Clause.

Courts first focus on whether the challenged state legislation is evenhanded in its application and "rationally related to a le-

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21. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 803 (1976). Specifically, "[s]tate lines cannot be made barriers to the free flow of...[goods]...in response to the economic laws of supply and demand." Id. However, the above case is distinguishable on the basis of the market participant exception. For a brief discussion of the market participant exception, see infra note 50.
23. The Constitution grants an affirmative power for Congress "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8. The implicit negative limitations on states have generally been set forth through Supreme Court case law. This implicit nature also leaves the Supreme Court's analysis open to Congressional revision. TRIBE, supra note 22.
24. Once challenged legislation is found to be evenhanded in application, it will generally be less severely scrutinized under a balancing test articulated in the leading case, Pike v. Bruce Church, Inc. 397 U.S. 137, 142-46 (1970). Under the Pike balancing test, "[f]acially evenhanded legislation" may be found to have a "discriminatory effect only where the state law advantages in-state business in
fitimate state [interest]." If the statute withstands this primary analysis, the courts will then apply a less burdensome balancing test. Under this balancing test, the court must consider whether the local benefits derived from the statute exceed the burden placed upon interstate commerce as a result of the statute. If so, the statute is likely to pass constitutional muster.

A. Strict Per Se Discrimination Rule

The Supreme Court has consistently struck down legislation which facially discriminates against out-of-state business in order to serve parochial, economic interests. To that end, a facially discriminatory statute will be held unconstitutional as a per se violation of the Commerce Clause if it serves a protectionist purpose. In order to withstand constitutional attack, relation to out-of-state business in the same market." Norfolk Southern Corp. v. Oberly, 822 F.2d 388, 402 (3d Cir. 1987) (cited in J. Filiberto Sanitation v. New Jersey Dep't of Envtl. Protection, 857 F.2d 913, 921 (3d Cir. 1988)). See also New Energy Co. v. Limbach, 486 U.S. 269 (1988). See generally Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091, 1095 (1986) ("[N]ot just any purpose to advantage local economic actors at the expense of foreign actors is protectionist. The purpose must be to advantage local actors at the expense of their foreign competitors."). Id.

25. If this test fails, the challenged state action will most likely be struck down as a per se violation. Tribe, supra note 22, at 408. See generally Roger W. Andersen, The Resource Conservation and Recovery Act of 1976: Closing the Gap, 3 Wis. L. Rev. 635, 707 (1978).


28. Id. It is important to note that the mere fact that a state regulation may burden some interstate companies is not, in and of itself, sufficient to establish a Commerce Clause claim. In Exxon, the Court upheld a Maryland statute which precluded producers or refiners of petroleum from operating retail service stations within Maryland. Lawrence Tribe, in analyzing the Exxon holding, noted that "the negative implications of the commerce clause derive principally from a political theory of union, not from an economic theory of free trade. The function of the clause is to ensure national solidarity, not economic efficiency." Tribe, supra note 22, at 417 (footnote omitted). Id.

29. See Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. at 573, 579 (1986)(statute which favors local economic interest "generally struck down . . . without further inquiry").

30. See Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935). In Baldwin, the Court determined that New York's attempt to protect its dairy farmers by enjoining out-of-state producers from undercutting New York dairy farmers' prices was intended as economic discrimination and was, thus, invalid. Id. Accordingly, the Court reasoned that "[i]f New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." Id. at 522.
such facial discrimination must advance a nonprotectionist purpose that cannot adequately be served by nondiscriminatory alternatives. Moreover, a statute's discriminatory means as well as its goals are subject to the Court's heightened scrutiny.

The leading case addressing discriminatory waste import bans under the purview of the Commerce Clause is The City of Philadelphia v. New Jersey. In that case, a New Jersey statute which banned the importation of solid waste destined for New Jersey landfills was challenged as violative of the Commerce Clause. The New Jersey Supreme Court held that the challenged act satisfied the Commerce Clause test since it was motivated by a legitimate public interest in protecting the environment.

The United States Supreme Court then reversed on the grounds that the statute was, in fact, discriminatory. Since the


32. City of Philadelphia, 437 U.S. at 626 ("[T]he evil of protectionism can reside in legislative means as well as legislative ends"). Id. For discussion of City of Philadelphia, see infra notes 33-43 and accompanying text.


34. The New Jersey statute provides in pertinent part:
   (a) No person shall bring into this state, or accept for disposal on this state, any solid or liquid waste which originated or was collected outside the territorial limits of this state. This section shall not apply to:
   1) Garbage to be fed to swine in the State of New Jersey;
   2) Any separated waste material, including newsprint, paper, glass and metals, that is free form . . . and not mixed with other solid or liquid waste that is intended for a recycling or reclamation facility; . . . destined for a waste recycling facility.
   3) Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility . . .
   4) Pesticides, hazardous waste, chemical waste . . . which is to be treated, processed or received in a solid waste disposal facility which is registered with the Department for such treatment, processing or recovery, other than disposal on or in the lands of this state.


35. N.J. STAT. ANN. § 13:11-9 (West 1979). The New Jersey Supreme Court relied on the following relevant language in the Act:
   [T]he environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside the State be prohibited.

   Id. See also City of Philadelphia, supra note 6, at 625.

court found that the statute was protectionist in nature, the statute was invalidated.

Writing for the majority, Justice Stewart focused exclusively on the initial Commerce Clause inquiry: whether the act was "a protectionist measure, or whether it . . . [was] . . . viewed as a law directed to legitimate local concerns." In holding that the latter description applied, he decided that the "ultimate legislative purpose" would be irrelevant to a Commerce Clause analysis of a discriminatory statute. Justice Stewart's memorable holding stated that "the evil of protectionism can reside in legislative means as well as legislative ends."

In a dissenting opinion, Justice Rehnquist sharply disagreed with the majority's classification of solid waste as an ordinary object of commerce. Instead he stated that the quarantine exception was applicable to solid waste imports. Rehnquist labeled the majority's distinction between certain "inherently dangerous" articles and those which "simply pile up in an ever increasing danger to the public's health and safety . . . [a] pointless distinction." Moreover, he rejected the majority's belief that the

37. Id. Justice Stewart, writing for the majority, stated that the waste disposal law was not preempted and that garbage was to be treated as an article of commerce which is thus entitled to commerce clause protection. The Supreme Court, 1977 Term - Leading Cases, 92 Harv. L. Rev. 57, 58 (1978).

38. City of Philadelphia, 437 U.S. at 626. Justice Stewart suggested that economic and environmental concerns were among the objectives of the Commerce Clause. Id. He was not particularly alarmed with the possibility of economic protectionism stating that "New Jersey has every right to protect its residents' pocketbooks as well as their environment." Id.

39. Id. (emphasis added). It is interesting to note that City of Philadelphia was the "first decision to find 'protectionism' without also finding impermissible economic motivation." The Supreme Court, 1977 Term - Leading Cases, 92 Harv. L. Rev. at 61 (1978).

For cases finding a legitimate aim of legislation as an acceptable means, see Baldwin, 294 U.S. at 522-24 (to assure steady supply of milk); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10 (1928)(to create jobs by keeping industry within state); Edwards v. California, 314 U.S. 160, 173-74 (1941)(to preserve state's financial resources from depletion by fencing out indigent immigrants).


41. For discussion of quarantine exception, see infra notes 55-59 and accompanying text. Justice Rehnquist specifically described the potential hazards which arise from waste deposits. First, in New Jersey, "virtually all sanitary landfills can be expected to produce leachate, a noxious and highly polluted liquid which is seldom visible and frequently pollutes . . . ground and surface waters. The natural decomposition process which occurs in landfills also produces large quantities of methane and thereby presents a significant explosion hazard. Landfills can also generate 'health hazards caused by rodents, fires and scavenger birds' and, 'needless to say, do not help New Jersey's aesthetic appearance nor New Jersey's noise or water or air pollution problems.'" Id. at 630.

42. City of Philadelphia, 437 U.S. at 633. The distinction between solid and
continued availability of state landfills for endogenous waste proves that the hazardous waste is not inherently harmful.\textsuperscript{43}

B. The \textit{Pike} “Balancing Test”

Once challenged legislation is deemed to be evenhanded, an inquiry is made into the extent of the statute’s burden on interstate commerce. The United States Supreme Court in the seminal case of \textit{Pike v. Bruce Church},\textsuperscript{44} set forth a “balancing test” [the \textit{Pike} balancing test] to be applied to legislation which, although burdening commerce, regulates evenhandedly. Under the \textit{Pike} balancing test, legislation which regulates evenhandedly will be upheld so long as the state’s regulatory interest outweighs the interference with interstate commerce.\textsuperscript{45} Generally, the Court will take into account the nature of the local interest at issue when determining the extent of the burden on interstate commerce.\textsuperscript{46}

C. Exceptions to the Per Se Discrimination Rule

In \textit{Dean Milk Co. v. City of Madison},\textsuperscript{47} the Supreme Court noted that there may be instances where a state’s legislation, although discriminatory in nature, is nonetheless, valid.\textsuperscript{48} Specifically, the hazardous waste has not yet been recognized by the courts. There is perhaps a much stronger argument that hazardous wastes are, in fact, more inherently dangerous than solid waste.

\textsuperscript{43} \textit{City of Philadelphia}, 437 U.S. at 633. Specifically, Rehnquist noted that “[t]he fact that New Jersey has left its landfill sites open for domestic waste does not . . . mean that solid waste is not innately harmful.” \textit{Id.}

\textsuperscript{44} 397 U.S. 137, 142 (1970). With respect to the balancing test the Court states in pertinent part:

Where 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. \textit{Id. (quoting Huron Cement Co. v. Detroit, 362 U.S. 440, 443 (1960)).} Notably, \textit{Huron} is the leading Supreme Court decision addressing an environmental protection provision which is juxtaposed with the Commerce Clause. Ira Steven Lefton, \textit{Constitutional Law-Commerce Clause: Local Discrimination in Environmental Protection Regulation}, 55 N.C. L. REV. 461, 466 (1977).

\textsuperscript{45} Under the \textit{Pike v. Bruce Church} balancing test, the regulation must not be excessively burdensome on interstate commerce.

\textsuperscript{46} \textit{Pike}, 397 U.S. at 142.

\textsuperscript{47} 340 U.S. 349 (1951). In \textit{Dean Milk}, the Court reviewed a city ordinance which limited the importation of milk into the city. \textit{Id.} Specifically, the ordinance required that any milk sold in the city be pasteurized within a five mile radius of the city. \textit{Id.} at 350. Although the Court recognized the legitimate police power interest in providing the city with healthy milk, it eventually struck down the statute on the grounds that there were less discriminatory means available. \textit{Id.}

\textsuperscript{48} \textit{Id.}
Court noted that discriminatory state legislation may be upheld if it acts as a legitimate police power or if there are no less discriminatory alternatives. Armed with this principle, the Court has carved out a number of exceptions to the general treatment of discriminatory legislation under the Commerce Clause.

Generally, the courts seem to give greater deference to discriminatory legislation predicated on health and environmental concerns. For example, in Mintz v. Baldwin, the Supreme Court upheld a state requirement that imported cattle be certified in order to prove that they did not carry a particular contagious disease. The Mintz case exemplifies the Court's apparent willingness to tolerate legislative measures which are motivated by local interests as opposed to economic interests.

In an environmental context, the Supreme Court has consistently refused to designate municipal solid waste as being "inherently dangerous" at the time of importation. Under the "quarantine exception," the presumption of per se invalidity

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50. An example of a well-recognized Commerce Clause exception which has been successfully applied to waste import bans is the market participant exception.

The leading waste import ban case which applied the market participant exception is Lefrancois v. Rhode Island, 669 F. Supp. 1204 (D.R.I. 1987). Lefrancois involved a state subsidized central landfill, which was the only landfill in the state which accepted certain types of solid waste. Id. The district court held that a state, as a "market participant," may prohibit the disposal of exogenous waste at a state-subsidized sanitary landfill where there were no privately-owned alternative disposal sites. Id. The court reasoned that "[i]n operating the Central Landfill, Rhode Island has done nothing more than purchase a natural resource, i.e., the landfill site, and offer to its customers the service of waste processing." Id. at 1211. See also County Comm'rs of Charles County v. Stevens, 473 A.2d 12 (Md. Ct. App. 1984)(county owned public landfill exemplified market participant rather than market regulator role and thus was free from Commerce Clause scrutiny).

For a discussion of the market participation exception in the waste import context, see generally William L. Kovacs & Anthony A. Anderson, States as Market Participants in Solid Waste Disposal Services - Fair Competition or the Destruction of the Private Sector?, 18 ENVTL. L. 779 (1988).

51. See TRIBE, supra note 22, at 415.

52. 289 U.S. 346 (1933).

53. Id. at 347. The state was concerned with Bang's disease.

54. TRIBE, supra note 22, at 415. See also American Can Co. v. Oregon Liquor Control Comm'n, 517 P.2d 691, 697 (Or. App. 1973) (Oregon Bottle Bill requiring all soft drinks and beer sold in Oregon to be packaged in returnable containers).


56. For a discussion of the quarantine exception, see infra notes 161-67.
may be overcome if it can be shown that the article of commerce was “inherently dangerous.” In Maine v. Taylor, the Supreme Court upheld the discriminatory legislation at issue, focusing on the “inherently dangerous” nature of the objects of commerce. Thus far, the Court has not similarly reviewed the possibility that the degree of harm associated with hazardous waste may be distinguished from that of municipal solid waste. If this distinction were recognized by the Court, hazardous waste would then be designated an “inherently dangerous” category.

D. State-Imposed Import Bans

In response to the unequal distribution of hazardous waste disposal among the states, several states have imposed blockades to the free flow of solid and hazardous wastes within their borders. This section will address hazardous waste bans imposed by state and local governments which are distinguishable from the total import ban on solid waste at issue in the City of Philadelphia holding. Specifically, this section will address: (1) local ordinances, (2) differential fees and (3) black list reciprocity laws.

1. Local Ordinances

Recently, many courts have questioned whether local ordinances should be considered under the less stringent Pike test.

57. 477 U.S. 131, on remand, United States v. Taylor, 802 F.2d 441 (1st Cir. 1986).
58. Id.
59. For a discussion of the possible distinction between solid and hazardous waste, see infra notes 157-60 and accompanying text.
60. Examples of states which have pending or enacted legislation involving waste disposal restrictions are South Carolina, Mississippi, Utah and Alabama. In 1988, the Hazardous Waste Treatment Council provided a list of twenty states which have restrictive siting laws. 19 Env'tl Rep. (BNA) 739 (Aug. 26, 1988)(noted in Stone at 3).


which balances the burden that the regulation places on interstate commerce against the particular regulatory interest of the state.\textsuperscript{62} In addition, the courts have not resolved the issue of whether a distinction between a partial or total ban by a political subdivision is dispositive in determining a discriminatory or evenhanded application.\textsuperscript{63}

In the context of waste management, court decisions have generally clung to the \textit{City of Philadelphia} holding and classified most local bans as discriminatory.\textsuperscript{64} However, the Ninth Circuit in \textit{Evergreen Waste Systems, Inc. v. Metropolitan Service District}\textsuperscript{65} ignored this precedent and applied the less stringent \textit{Pike} balancing test.\textsuperscript{66} The court reasoned that "'evenhandedness' simply requires that out-of-state waste be treated no differently from most

\begin{itemize}
  \item \textsuperscript{62} 397 U.S. 137 (1970). For a further discussion of the \textit{Pike} balancing test, see \textit{supra} notes 44-46 and accompanying text.
  \item \textsuperscript{63} If such a distinction exists, the less stringent \textit{Pike} balancing test would be applied to partial import bans and thus exempt local legislation from a heightened scrutiny analysis. 397 U.S. 137 (1970). For a discussion of the recent case history of local waste disposal bans, see \textit{Meltz, supra} note 31. This article generally discusses solid waste import bans. Although hazardous wastes are discussed in this article, no distinction is made between hazardous and solid waste.
  \item \textsuperscript{64} See Shayne Bros. v. District of Columbia, 592 F. Supp. 1128 (D.D.C. 1984)(local ordinance enjoining importation of exogenous waste was found to be valid); Browning-Ferris, Inc. v. Anne Arundel County, 438 A.2d 269 (1980)(local ban which controlled transportation and depositing of various hazardous and toxic wastes and radioactive materials within county held to impermissibly discriminate against articles in interstate commerce). \textit{But see Monroe-Livingston Sanitary Landfill v. Town of Caledonia, Inc.}, 417 N.E.2d 78 (1980)(local ordinance distinguishable since landfill operator provided evidence that it had not and would not accept exogenous waste).
  \item \textsuperscript{65} 820 F.2d 1482 (9th Cir. 1987).
  \item \textsuperscript{66} Even if the court had found the ban to be discriminatory on its face, the balancing test would still have been applied because the state was a market participant. The Eleventh Circuit, however, did not dwell on this fact, but instead, emphasized the evenhandedness of such legislation.
  \item In the context of solid waste, a plaintiff in a case before a Michigan district court urged that the court should not have relied on \textit{Evergreen}. Bill Kettlewell Excavating, Inc. v. Michigan Dep't of Natural Resources, 732 F. Supp. 761 (E.D. Mich. 1990). The plaintiff argued that \textit{Evergreen} is of "marginal precedential value . . . in light of the district court's finding that the defendant acted as a market participant . . . , and was therefore exempt from commerce clause coverage [anyway]." \textit{Id.} at 766, n.2. Yet, the Sixth Circuit, affirmed the district court's \textit{Bill Kettlewell} holding by finding that the ordinance regulated evenhandedly, and that its burdens on interstate commerce were not clearly excessive in relation to the putative local benefits. Bill Kettlewell Excavating, Inc. v. Michigan Dep't of Natural Resources, 931 F.2d 413 (6th Cir. 1991), 732 F. Supp. 761 (E.D. Mich. 1990). \textit{See also}, Omni Group Farms, Inc. v. County of Cayuga, 766 F. Supp. 69 (1991)(district court held that local law banning importation of solid waste from outside county withstood Commerce Clause attack); County of Washington v. Casella Waste Management, Inc., 1990 WL 208709 (N.D.N.Y. 1990)(local restriction on importation of solid waste from outside county upheld).
\end{itemize}
Accordingly, the court held that the challenged ordinance did not "fit the Court's paradigm of a per se violation" since it also applied to in-state waste. The Evergreen rationale was subsequently applied to a similar Commerce Clause challenge.

2. Differential Tipping Fees and Taxes

Recently, a federal district court struck down a tipping fee imposed by an Ohio statute on out-of-state waste as a violation of the Commerce Clause. The statute imposed an assessed variable fee determined by the cost that would have been charged if the trash had been deposited in its state of origin. The Ohio statute applied to solid waste.

In addition to the partial ban on hazardous waste discussed in the section below, the state of Alabama has also recently imposed a higher tax on all out-of-state waste coming into the state. Specifically, the state imposes a $72/ton fee on all out-of-state waste. On July 11, 1991, the Supreme Court of Alabama upheld the statute as a valid way to protect state resources and reduce the risks of waste transport. On January 27, 1992, the United States Supreme Court agreed to review the Alabama tax on exogenous waste. The Court is expected to decide on the

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67. Evergreen, 820 F.2d at 1484.
68. The Evergreen court defined a "per se violation" as "a law that overtly blocks the flow of interstate commerce at a State's borders." Id.
69. Id.
70. See Bill Kettlewell Excavating, Inc. v. Michigan Dep't of Natural Resources, 931 F.2d 413 (6th Cir. 1991), 732 F. Supp. 761 (E.D. Mich. 1990). A political subdivision had imposed a ban on intrastate and interstate waste. Id. at 762. The court, citing Evergreen, similarly held that the ordinance was evenhanded. Id. at 765-66. District Judge James Harvey's opinion considered the implications of Maine v. Taylor upon the case before the court. 477 U.S. 131, on remand, 802 F.2d 441 (1st Cir. 1986).
71. OHIo REV. CODE § 3734.131 and § 3734.57.
73. Id.
77. Chemical Waste Management Inc. v. Hunt, cert. granted (U.S. Jan. 27, 1992) (No. 91-471). It is interesting to note that if the Alabama Supreme Court decision is overturned in the United States Supreme Court, the waste management industry users of the Emelle facility may receive a refund of over $30 million in tax payments from the state of Alabama. CHEMICAL WEEK (July 24, 1991). Moreover, the Supreme Court's ruling could have a significant impact on other states such as "New York, Louisiana, and South Carolina, along with a host of
issue by the summer of 1992.

At a recent meeting in August, 1991, the National Governors Association (NGA) expressed their support for the imposition of differential fees as a way to decrease the amount of hazardous waste transported across state lines. The NGA proposed that there be a five-year transition period for capping differential fees in order to prevent states from imposing a de facto import ban. They suggested that the federal government set forth a formula for a maximum allowable fee during this transition period.

3. Blacklist Reciprocity Laws

State-imposed reciprocity requirements which burden interstate trade pose similar potential conflicts with the Commerce Clause. Challenges often arise about whether reciprocity requirements will survive the "strictest scrutiny" which is applied to facially discriminatory laws. Outside the context of waste management, traditional Commerce Clause jurisprudence has generally struck down such legislation as per se invalid. For example, the Court rejected as discriminatory a state regulation which enjoined the importation of milk from those states which did not reciprocally import its milk. More recently, the Supreme Court


79. Id.

80. Id. "After the five years, the governors oppose limiting fees charged by one state for accepting another state's waste." Id.

81. For a discussion of the impacts of reciprocity agreements which present blockades to interstate trade, see Meltz, supra note 31.

82. See supra notes 27-32 and accompanying text.


84. Great Atlantic, 424 U.S. 366. In Great Atlantic, the Supreme Court refused to accept the argument that the regulation at issue maintained the state of Mississippi's health standards. The Court noted that even if another state's health standards were inferior to Mississippi's standards, the other state's milk would still have to be imported by Mississippi so long as the other state had entered into a reciprocity agreement. See Hardage v. Atkins, 582 F.2d 1264, 1266 (10th Cir. 1978).
rejected an Ohio statute awarding a sales tax credit for ethanol gas "sold by dealers if it was produced in Ohio or in a state according similar tax treatment." 85

Although the Supreme Court has not yet wrestled with a reciprocity issue as it applies to waste management, 86 a few lower courts have considered the issue. 87 In *Hardage v. Atkins*, 88 the Tenth Circuit analyzed an Oklahoma reciprocity statute and struck it down as violative of the Commerce Clause. 89 Specifically, the Oklahoma law precluded the importation of any industr-


86. It is interesting to note that the European Economic Community's (EEC) waste initiatives will require that waste be disposed of at the closest site to its origin. For a discussion of the new EEC initiatives and the "proximity principle" which they are based on, see generally Paul Luik, *European Community Waste Policy: At the Brink of a New Era*, International Environment Daily (BNA) (July 30, 1991).


88. 582 F.2d 1264 (10th Cir. 1978). See also *Hardage v. Atkins*, 619 F.2d 871 (10th Cir. 1980) (subsequent decision).


[Implicit, however, is an argument that any attempt to reshape the incentives surrounding other states' legislative decisions is illegitimate. The Tenth Circuit appears to have been moved by this argument in striking down an Oklahoma law excluding hazardous industrial wastes originating in states that had not enacted 'substantially similar standards' for their disposal. This argument makes no sense in the modern legal universe that gives the states power to decide whether to adopt a free market or regulatory approach. Every regulation and every regulatory vacuum shapes the incentives affecting other political entities. Oklahoma's neighbors could as easily be accused of enacting laissez-faire standards for hazardous waste disposal that 'reach[] out and seek[] to force the enactment' by Oklahoma of a statute with low standards similar to their own. Given this relativity, to label a state as an aggressor solely because it is the first to move from laissez-faire to regulation is to turn the commerce clause back into a tool for exposing state governments to the efficiency-maximizing wind stirred by the mobility of capital. *Pomper* at 1344 (citations omitted).]
trial waste from "[another state], unless the state of origin . . . has enacted substantially similar standards\textsuperscript{90} for controlled industrial waste disposal . . . , and has entered into a reciprocity agreement with the State of Oklahoma."\textsuperscript{91}

In contrast, the New Jersey Supreme Court recently upheld a similar waste disposal reciprocity requirement. In response to the waning capacities of a local landfill and the failure to complete replacement landfills, the state of New Jersey enjoined the landfill from receiving waste\textsuperscript{92} from any area except neighboring towns and those towns with reciprocity agreements.\textsuperscript{93} The state supreme court held that the statute passed constitutional muster since it was determined to be "balanced and fair" and thus did not rise to the level of impermissible protectionism.\textsuperscript{94}

Recently, the state of Alabama enacted a reciprocity requirement which was reviewed by the Eleventh Circuit Court of Appeals in \textit{National Solid Waste Management Ass'n v. Alabama Dep't of Envtl. Protection}.\textsuperscript{95} Unlike the Oklahoma statute at issue in \textit{Hardage} which had imposed specific state standards, the Alabama law was predicated on federally enacted legislation regarding capacity assurance requirements.\textsuperscript{96} Breaking the limited precedential treatment of reciprocity requirements, the Alabama district court

\textsuperscript{90} The legitimacy of this requirement has been questioned. "Even if Texas had higher standards than Oklahoma for the disposal of controlled industrial waste, such waste could not be shipped into Oklahoma unless Texas entered into a reciprocal agreement." \textit{Hardage} 582 F.2d at 1266.

\textsuperscript{91} \textit{OKLA. STAT. ANN. tit. 63, § 2764 (West 1978)} (noted in \textit{Hardage} 582 F.2d at 1265).

\textsuperscript{92} As in \textit{City of Philadelphia}, the regulation in \textit{Glassboro v. Gloucester County Bd. of Chosen Freeholders} similarly pertained to solid waste. For consideration of the distinctions between solid and hazardous waste, see infra note 157-60.

\textsuperscript{93} See generally, \textit{Stone}, 15 \textit{COLUM. J. ENVTL. L.} at 18.

\textsuperscript{94} \textit{Glassboro}, 485 A.2d at 303.

\textsuperscript{95} \textit{NSWMA I}, 729 F. Supp. 792 (N.D. Ala. 1990). For a discussion of the reciprocity requirement as it applies to the district court analysis, see \textit{Meltz}, supra note 31.

\textsuperscript{96} For a discussion of § 104(c)(9) of SARA's capacity assurance requirements, see \textit{supra} notes 12-19 and accompanying text.

In 1989, South Carolina passed a law which precluded the importation of waste for disposal from states which "refused to take steps to dispose of it itself, thus effectively banning thirty-two states and Puerto Rico." \textit{South Carolina Bars 32 States on Disposal of Hazardous Waste}, \textit{Washington Post}, March 1, 1989, at A7, col. 5. See \textit{Stone}, 15 \textit{COLUM. J. ENVTL. L.} at 2. South Carolina's actions are distinguishable from other states. Generally, the state was provoked to take action by a recent North Carolina law which, in effect, prohibited siting of commercial treatment facilities in the southern part of the state. North Carolina's action was "really rooted in local opposition to accepting 'large amounts of waste from a nearby [South Carolina] superfund site.'" \textit{Stone}, at 2. See also 18 Envtl. Rep. (BNA 1757) (Nov. 20, 1987).
upheld the statute. Subsequently, the Eleventh Circuit reversed, confining itself to the traditional Commerce Clause “highly scrutinized” analysis. The following sections will consider the reasoning which prompted both courts’ decisions.

IV. The Alabama Case

A. Case History

Owners of the nation’s largest hazardous waste facility where toxic waste is buried for a fee, Chemical Waste Management, Inc. [“Chem Waste”], brought a joint action with National Solid Waste Management Association [“NSWMA”] in an Alabama district court challenging the constitutionality of a newly enacted statute. At issue was the amended section 22-30-11 of the Alabama Code which was popularly labeled the Holley

97. NSWMA I, supra note 8.
98. NSWMA II, supra note 8.
99. NSWMA I, supra note 8, at 797.

100. For a discussion of the Supremacy Clause challenge, see supra note 19. The plaintiffs raised several issues. Appellants in NSWMA II not only challenged the constitutionality of the Holley Bill, but they also challenged the state imposed emergency preapproval regulations and land disposal restriction regulations. NSWMA II, supra note 8, at 722-25.

101. Section 22-30-11 provides in pertinent part:
(a) The department, acting through the commission, is authorized to promulgate, and may revise when appropriate, rules and regulations, guidelines, criteria and standards for all hazardous waste management practices.
(b) It is unlawful for any person who owns or operates a commercial hazardous waste treatment or disposal facility within this state to dispose or treat any hazardous wastes generated in any state outside the state of Alabama which:
(i) Prohibits by law or regulation the treatment or disposal of hazardous wastes within that state and which has no facility permitted or existing within that state for the treatment or disposal of hazardous wastes; or
(ii) Has no facility permitted or existing within that state for the treatment or disposal of hazardous wastes; unless that state has entered into an interstate or regional agreement for the safe disposal of hazardous wastes pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act. The department shall establish and maintain a list of states from which hazardous wastes cannot be accepted for treatment or disposal pursuant to this paragraph and there shall be no liability under the paragraph for disposal of wastes from a state until 15 days after a state has been listed by the department.
(c) Subsequent to the effective date of [this Act], no commercial hazardous waste treatment or disposal facility operating in this state may contract with states other than the state of Alabama in order to satisfy the capacity assurance programs required by 42 U.S.C.

Unlike those state import bans which completely abrogate the influx of articles of commerce, the Alabama ban imposed only a partial ban affecting those states which do not meet the federally mandated capacity assurance guidelines under CERCLA section 104(c)(9). Specifically, the Holley Bill enjoins Alabama's commercial facilities from receiving hazardous waste from states which lack their own facility designated for the treatment or disposal of hazardous waste, or states which have not entered into a

§ 9604(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended.

(d) For the purpose of this section, the following additional terms are defined:

(1) AGREEMENT. Any interstate or regional contract agreement made pursuant to capacity assurance requirements of Section 42 U.S.C. § 9604 (c)(9) of CERCLA and which one of the signatories to such contract or agreement is the state of Alabama.

(2) COMMERCIAL HAZARDOUS WASTE TREATMENT OR DISPOSAL FACILITY. A facility which receives for disposal only, or for treatment and disposal, hazardous wastes that are not generated on-site and to which facility a fee is paid or other consideration given for such treatment or disposal.

**ALA. CODE** § 22-30-11 (1975).

102. The Holley Bill, named after Alabama State Representative Holley, was intended to apply only to landfilled hazardous wastes. It is important to note that this form of waste disposal, landfills, has been described by Congress as the "most threatening to human health and the environment, and represents the least desirable hazardous waste management technology." H.R. REP. No. 98-198, pt. I, reprinted in 1984 U.S.C.C.A.N. 5576, 5591. Addressing the uncertain dangers associated with land disposal, Congress, in House Report 98-198, states in pertinent part:

The Committee intends the Administrator to consider the lack of knowledge of how hazardous wastes behave when land disposal, the uncertainties regarding the period of time the waste may remain hazardous, the design and management uncertainties involving the long-term inability of liners and leachate collection systems to prevent waste migration from the facility, the uncertainties associated with ground water monitoring, and the institutional uncertainties associated with isolating the waste from the environment for as long as the waste remains hazardous. The extensive record this Committee and others have developed on the deficiencies of present land disposal practices and standards substantiates the Committee's action to restrict land disposal as provided in this section.

*Id.*

103. **ALA. CODE** § 22-30-11 (1975). The Holley Bill prohibitions are only applicable to landfilled hazardous wastes. Thus, for example, "waste solvents from Florida are still allowed to come to Alabama to be burned or to go through [a] recycling operation or solvent recovery." Brief for Appellee at 21, n.6, *NSWMA II*, *supra* note 8 (No. 90-7047)(quoting Sue Robertson, the Chief of ADEM's Land Division).
CERCLA agreement with the state of Alabama.104

The language of section 22-30-11, as amended by the Holley Bill, reveals that environmental105 and fairness106 considerations were instrumental in its enactment. Addressing the latter concern, the Holley Bill states that Alabama has been accepting a significant amount of hazardous waste from states which have not been doing their fair share under CERCLA.107

In enacting the Holley Bill, the Alabama legislature reasoned that the bill would motivate affected states to assume greater responsibility in the management of their exogenous hazardous waste. The legislature, reconciling the stricter state action with applicable federal law, noted the following in section 1(5):

Implicit in the CERCLA capacity-assurance procedure is a recognition that an importing state might refuse to enter into an agreement with an exporting state, requiring the exporting state to create available capacity through waste reduction or through siting new facilities, or enter into an agreement with another state to manage these wastes.108

Opponents of the Holley Bill reject this reasoning, claiming that such action by a state actually violates federal goals enunciated in the Commerce Clause and the Supremacy Clause.109 The following two sections consider the holdings of the federal district court.

104. NSWMA I 729 F. Supp. at 800. The district court pointed out that although twenty-two states and the District of Columbia were adversely affected by the Holley Bill, 3/10 of 1% of the waste previously disposed of in Alabama was affected. Id.

105. ALA. CODE § 22-30-11 § 1(2).

106. ALA. CODE § 22-30-11 § 1(4).

107. The Holley Bill, 1975 Ala. Act 89-788, § 1(9) provides as follows: The constant influx of large volumes of hazardous wastes entering this state over and through congested state, county, and municipal highways and roads, coupled with the ever-increasing potential for traffic accidents and mishaps involving hazardous waste transporters, and the likelihood of leaks, spills, and/or explosions of said hazardous wastes resulting therefrom, altogether pose an unreasonable and unjustifiable risk to the health, safety, and welfare of Alabama's citizens; Id.

108. Id. at § 1(5).

109. As an example, in NSWMA II, the plaintiffs included in their complaint challenges that the Alabama law violated the "due process, takings, and contract clauses of the Constitution." NSWMA II, 910 F.2d at 715 n.1. Neither the district court nor the Eleventh Circuit addressed these claims in their opinions. The Eleventh Circuit reasoned that there was no need to consider these claims since they were not discussed in the court below. Therefore, the circuit court was able to "grant . . . [the] requested relief on other grounds." Id.
court and the Eleventh Circuit Court of Appeals with respect to the Commerce Clause issue.

In reviewing the legality of the Alabama ban, the federal district court\(^\text{110}\) upheld the Holley Bill as valid while the Eleventh Circuit\(^\text{111}\) subsequently struck down the bill as a violation of the Commerce Clause. The Eleventh Circuit decision, however, did not take immediate effect upon its August 1990 decision. Instead, Alabama continued to enforce the ban while the state sought a rehearing. On May 10, 1991, the Eleventh Circuit\(^\text{112}\) refused to rehear the case. About one month later, the United States Supreme Court\(^\text{113}\) then refused to review the circuit court decision.\(^\text{114}\) The following two sections will specifically focus on the reasoning employed by the Alabama district court and the Eleventh Circuit.

B. Federal District Court Decision - No Commerce Clause Violation

The district court, in reviewing the constitutionality of the Holley Bill, applied the less stringent \textit{Pike} balancing test\(^\text{115}\) which weighs a state's regulatory interest in the legislation against the amount of interference with interstate commerce. In selecting the \textit{Pike} test, the court distinguished itself from the controlling \textit{City of Philadelphia}\(^\text{116}\) decision. Unlike the total ban imposed in \textit{City of Philadelphia}, the Alabama ban did "not have the effect of closing its borders to all out-of-state waste."\(^\text{117}\)

Moreover, the Alabama ban was not created with the intent to hoard a natural resource. The court reasoned that such a ban "has not forbidden either the passage of out-of-state waste across its borders or the deposit of such waste . . . except for waste coming from nonconforming states."\(^\text{118}\) Since the Holley Bill differed

\(^{111}\) NSWMA II, 910 F.2d 713 (11th Cir. 1990).
\(^{112}\) 924 F.2d 1001 (11th Cir. 1991).
\(^{114}\) The Supreme Court refused to review the case despite the fact that it has not yet reviewed the issue regarding a state's ability to restrict imports of hazardous waste. \textit{Environment, Decision Rejecting Alabama Waste Law Will Not Be Reviewed, Supreme Court Says, Daily Reports for Executives} (BNA) No. 112 at A-10 (June 11, 1991).
\(^{115}\) For a discussion of the \textit{Pike} balancing test, see supra notes 44-46 and accompanying text.
\(^{116}\) \textit{City of Philadelphia}, supra note 6.
\(^{117}\) NSWMA I, supra note 8, at 804-05 (emphasis added).
\(^{118}\) NSWMA I, supra note 8 at 804.
from the statute involved in *City of Philadelphia* in this respect, it was distinguishably nondiscriminatory. Weighing Alabama’s interest against the interest in the impact of the legislation on interstate commerce, the district court’s analysis centered upon the following three factors: public welfare, the environment and fairness.

Initially, the Alabama hazardous waste ban was intended to protect the health and welfare of the people. These concerns probably elevated in proportion to the sharp increases in the exogenous waste imported by the Emelle facility. Emelle was and remains the largest landfill site for toxic waste in the United States.

Second, and tangentially related to the court’s concerns for the safety of Alabama citizens, are the environmental concerns which exist on a state and national level respectively. At the state level, the court was once again concerned with the dangers posed to the environment as a result of the increase in imported waste. The court recognized the need for an increase in disposal capacity nationwide in order to ensure environmentally sound treatment of the growing levels of hazardous waste.

Finally the district court noted that environmental motiva-

119. For a discussion of public welfare, see infra notes 122-24 and accompanying text.

120. For a discussion of environmental concerns, see infra notes 125-26 and accompanying text.

121. For a discussion of fairness argument, see infra notes 128-30 and accompanying text.

122. *NSWMA I*, supra note 8 at 804. The court exhibited a concern for Alabama citizens with respect to the large amount of hazardous waste being dumped in Alabama. *Id.*


124. *Id.*


126. *Id.* at 799. The Alabama district court noted that the state was, in effect, compelled to impose such a ban in response to other states which ignore their responsibility to similarly provide for hazardous waste treatment. *Id.*

127. See *The Holley Bill*, 1975 Ala. Act 89-788, § 1(14) which provides in pertinent part:

The imposition of the requirements contained in this legislation will encourage the development of new waste disposal facilities in other states in accord with the intentions of the Congress in enacting Section 42 U.S.C. § 9604(c)(9), and will have the beneficial effect of reducing,
tions for states to "clean-up their act" are premised not only on federal standards, but also upon basic principles of fairness and justice. The Alabama district court reasoned that since Alabama itself was bearing a significant burden of managing hazardous wastes from so many other states, equity required that those states which did not similarly bear this burden should develop new capacity to handle some of their own waste. To that end, one of the district court's aims was to prevent Alabama from becoming "the dumping ground" of irresponsible states.

C. Eleventh Circuit - Holley Bill Violated Commerce Clause

On August 8, 1990, the Eleventh Circuit Court of Appeals reversed the district court decision, holding that the Alabama Holley Bill was a per se violation of the Commerce Clause. The court relied heavily on the City of Philadelphia decision in concluding that Alabama had "attempted to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." Writing for the court, Circuit Judge Edmondson stated that the district court incorrectly applied the less stringent Pike balancing test in its analysis. The Eleventh Circuit's opinion focused on three basic inquiries: articles of commerce, interference with interstate commerce and congressional intent.

First, the court concluded that hazardous wastes are, in an orderly manner, the nation's dependence on landfilling as a methodology for disposing of hazardous wastes.

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129. The Holley Bill, 1975 Ala. Act No. 89-788, § 1(4) (emphasis added). The court concurred with the fairness rationale set forth in the Holley Bill.
130. NSWMA I, 910 F. Supp. at 804.
133. NSWMA II, 910 F.2d at 720.
134. For a discussion of the Pike balancing test, see supra notes 44-46 and accompanying text.
135. NSWMA II, 910 F.2d at 718-19.
136. Id. at 719-21.
137. Id. at 721-22.
138. RCRA defines "hazardous waste" as follows:
   [A] solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may —
   (A) cause, or significantly contribute to an increase in mortality
fact, articles of commerce and, accordingly, merit Commerce Clause protection. The court noted that a state may justifiably impose restrictions on exogenous articles when the "dangers... 'far outweigh'... [an object's] worth in interstate commerce." However, the circuit court refused to weigh the dangers of hazardous waste more heavily than those associated with solid waste. Although the court agreed that hazardous waste may indeed be "innately more dangerous" than solid waste, the court nonetheless followed case law of the Eleventh and Tenth

or an increase in serious irreversible, or incapacitating reversible, illness; or
(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or otherwise managed.


139. NSWMA II, 910 F.2d at 719. This question was not addressed in the district court's opinion. It is likely that the Eleventh Circuit Court chose to devote significant attention to this issue for two reasons. First, in doing so, the court's analysis more clearly resembled the pattern undertaken in City of Philadelphia. Relying on the City of Philadelphia as precedent, the Eleventh Circuit probably rationalized that such approach would lend credibility to its decision.

Second, the appellee's brief places a great deal of emphasis on the premise that hazardous waste can be characterized "inherently dangerous." As such, it would be exempt from Commerce Clause constraints.

140. NSWMA II, 910 F.2d at 718 (quoting City of Philadelphia, supra note 6, at 622). Generally, a state may restrict importation when an object's "existing condition... would bring in and spread disease, pestilence, and death." Bowman v. Chicago & Northwestern R. Co., 125 U.S. 465, 489 (1888). For example, the Supreme Court has held that a state act which enjoined the transportation of "large dead animals" in order to "prevent the spread of disease" was constitutional. Clason v. State of Indiana, 306 U.S. 439, 442 (1939).

141. NSWMA II, 910 F.2d at 719. Once again aligning itself with the landmark Supreme Court decision, Judge Edmondson reasoned that "although the hazardous waste involved in this case may be innately more dangerous than the solid and liquid waste involved in City of Philadelphia, we cannot say that the dangers of hazardous waste outweigh its worth in interstate commerce." Id. In a footnote, the Circuit Court's comparison to City of Philadelphia employed a process of elimination in order to make the point that the Supreme Court intended to encompass hazardous wastes within the scope of its holding. Since the Alabama court had explicated "four narrow categories of waste, including garbage fed to swine and municipal solid waste processed into fuel," all other categories of waste were impliedly to be considered as articles of commerce. Id. at 719 n.9 (citing City of Philadelphia, supra note 6, at 619 n.2).

142. NSWMA II, 910 F.2d at 719.

143. Id. at 719. The court relied on another recent Eleventh Circuit decision, Alabama v. United States EPA, 871 F.2d 1548, 1555 n.3 (11th Cir. 1989), cert. denied, Alabama ex. rel. Siegelman v. United States EPA, 110 S. Ct. 538 (1989). Reliance on this case for a definitive answer, however, is questionable. With respect to the Commerce Clause issue, Alabama v. United States EPA merely regurgitated what the Supreme Court had already enunciated in City of Philadelphia. Thus, the court's reliance on this case is dubious since it appears to have simply applied the Supreme Court's conclusions concerning solid waste without

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Circuits and chose to recognize no inherent danger in hazardous wastes. Moreover, Judge Edmondson argued in dicta that the Holley Bill itself impliedly concurred with the court's decision since it did not consider the hazardous waste at issue "hazardous enough" to impose a total ban on all states.

Concluding that hazardous wastes are within the purview of the Commerce Clause, the Eleventh Circuit next considered whether the Alabama ban created a protectionist barrier to interstate commerce. First, the court rejected the argument that such bans were necessary to comply with the SARA capacity assurance requirements. It noted that there were other less restrictive ways for Alabama to comply with section 104(c)(9). Second, the selective banning of waste from only some states was held to be a violative means to effectuate a perhaps legitimate purpose. Finally, the court rejected the applicability of the quarantine exception. Noting that the quarantine exception prevents the traffic of "noxious articles, whatever their origin," even considering the potential distinguishing features of hazardous waste which may have existed.

144. In Hardage, the Tenth Circuit ruled that "[the] industrial waste [which was] defined in the Oklahoma statute as refuse products that are toxic to human, animal, aquatic, or plant life is within [the] purview of the commerce clause." Id. at 1266, (noted in NSWMA II, 910 F.2d at 719). Cf. Meliz, supra note 31.

145. NSWMA II, 910 F.2d at 719.

146. Under this more scrutinizing analysis, the "crucial inquiry . . . is whether the Holley Bill is basically a protectionist measure, or whether it is based on legitimate local concerns with effects on interstate commerce that are only incidental." NSWMA II, 910 F.2d at 720 (noting Pike, 397 U.S. at 142).


148. According to the EPA Guidance Doctrine, Alabama may comply with § 104(c)(9) by any combination of the following three measures:

(1) creating new disposal capacity within the state, (2) entering into interstate or regional agreements allowing Alabama to use capacity located in other states, and (3) contracting with private waste management facilities.

(S. REP. No. 11, 99th Cong., 1st Sess. 22 (1985)) (noted in NSWMA II, 910 F.2d at 720). The court presented another alternative for complying with § 104(c)(9) other than imposing a ban, which was for the state to contract with the private facility for that capacity. NSWMA II, supra note 8, at 720.

149. Once again, the court quoted the famous City of Philadelphia language: "the evil of protectionism can reside in legislative means as well as legislative ends." NSWMA II, 910 F.2d at 720 (quoting City of Philadelphia, supra note 6, at 626). With respect to "purpose," the court acknowledged that valid concerns for human health and the environment may have actually existed in Alabama, however, such end or purpose did not justify the means.

150. Id. at 720.

151. Id. at 721 (quoting City of Philadelphia, supra note 6, at 629).
Judge Edmondson held that the Holley Bill did not contain a similar purpose since it distinguished on the basis of the state of origin as opposed to on the basis of the level of danger presented by the waste.  

Generally, a discriminatory barrier to interstate trade may be upheld by direct congressional authorization; but the circuit court also held that Congress did not intend to authorize states to impose potentially discriminatory waste disposal bans when it enacted CERCLA and SARA section 104(c)(9). Rejecting the appellee’s argument that the SARA amendments evinced such congressional intent, Judge Edmondson recognized that section 104 (c)(9) empowered states with greater responsibility to handle waste disposal. He argued that although SARA did, in fact, strongly encourage states to assume greater authority, SARA did not specifically contemplate states closing their borders to interstate commerce in order to meet federal hazardous waste management requirements.

V. Analysis

Several recent Commerce Clause challenges to state-imposed waste bans have significantly relied upon City of Philadelphia. However, City of Philadelphia’s application has been interpreted too broadly in the waste management field.

Two distinguishable areas in which City of Philadelphia is arguably not dispositive recently arose in the Alabama Holley Bill dispute. This section will separately address the Commerce Clause challenges arising in the Alabama case with respect to the following areas: (1) hazardous waste in interstate commerce, and

152. Id. at 721.
153. Id. See White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204, 213 (1983) (“Where [a] state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce”) Id. See also South-Central Timber Dev., Inc. v. Wunnnicke, 467 U.S. 82, 87, on remand, 746 F.2d 1393 (9th Cir. 1984)(“Congress may redefine the distribution of power over interstate commerce”). Id.
154. Id. at 721-22.
155. NSWMA II, supra note 8.
156. NSWMA II, 910 F.2d at 721. Defendants argued that the bans in Alabama were actually having a positive effect in enforcing federal regulations. This argument was determined to be irrelevant so long as there was, in fact, no congressional intent to impose the restrictions. Moreover, the court relied on a Supreme Court holding which denied states the right to “impose penalties on conduct already penalized under federal statutory scheme.” Id. at 721 n.10 (noting Wisconsin Dep’t of Indus., Labor & Human Relations v. Gould, Inc., 475 U.S. 282 (1986)).
(2) partial waste disposal bans. It is suggested that in subsequent court holdings, these rather specific issues should be independently considered as distinguishable from the City of Philadelphia holding. In addition, a third part of this section will consider the congressional intent of section 104(c)(9) and the argument that this section runs concurrent with the Alabama Holley Bill.

A. The Object of Commerce Inquiry

The Eleventh Circuit in NSWMA II completely relied on City of Philadelphia when analyzing Alabama’s Holley Bill under the strictest Commerce Clause scrutiny. However, the circuit court failed to distinguish the municipal solid waste at issue in the City of Philadelphia from the hazardous waste involved in the NSWMA cases. Accordingly, the circuit court failed to adequately explore the implications of the quarantine exception.

1. The Solid-Hazardous Waste Distinction

The major distinction between solid waste and hazardous waste\(^\text{157}\) is the degree of danger each presents. It is well established that hazardous waste may “cause . . . an increase in mortality or an increase in serious . . . illness.”\(^\text{158}\) Therefore, the harmful effects of disposed hazardous waste have become increasingly evident in every state.\(^\text{159}\) For example, contamination of groundwater from hazardous wastes has “led to higher rates of miscarriage and birth defects, respiratory problems, urinary tract disease, cancer, or central nervous system disorders in surrounding populations.”\(^\text{160}\)

\(^\text{157}\) For a listing of hazardous wastes, see 40 C.F.R. § 261.20-4 (1987).
\(^\text{159}\) Hazardous wastes in leaking land disposal sites “have contaminated groundwater supplies with toxic, carcinogenic or otherwise hazardous chemicals.” Cain, supra note 19, at 770-71.
\(^\text{160}\) Cain, supra note 19, at 771. For example, in the Love Canal incident, studies revealed the following statistics:

- [m]iscarriages in women moving into the area rose from 8.5% to 25%.
- Children born to families closest to the site suffered birth defects 20% of the time as opposed to 6.8% of the time in removed areas. Urinary disease incidence increased by a factor of 2.8, and asthma increased by a factor of 3.8.

Cain, supra note 19, at 771 n.23 (noting Hazardous and Toxic Waste Disposal: Hearings Before the Subcomms. on Environmental Pollution and Resource Protection of the Senate Comm. on Environment and Public Works, 96th Cong., 1st Sess. 140-61 (1979)(statement of Dr. B. Paigen)).
2. Quarantine Exception

Against this background, it is suggested that hazardous wastes are more likely to fit into the quarantine exception than solid wastes. Although the Supreme Court has not yet had the opportunity to apply the exception to hazardous waste, compelling reasons exist for exempting such articles from Commerce Clause scrutiny.

Historically, the Supreme Court has upheld the quarantine exception in order to prevent the introduction of diseased cattle\textsuperscript{161} or baitfish\textsuperscript{162} into the state economy. Similarly, there exists a need to protect the lives of humans who are threatened by a hazardous substance which may cause mortality as well as other substantial present and future adverse affects on human health.\textsuperscript{163}

According to the Supreme Court, a necessary component of the quarantine exception is that the object be inherently dangerous at the time of importation.\textsuperscript{164} This “pointless distinction” adopted by the City of Philadelphia holding merely hinges upon the timing of the danger, not the danger itself.\textsuperscript{165}

Moreover, the credibility of such reasoning is questionable from the standpoint that the substances at issue are intrinsically harmful. Accordingly, Justice Rehnquist’s famous dissent in City of Philadelphia, in which he frankly disagreed with the “timing” of the danger reasoning, is particularly compelling in the context of hazardous waste.\textsuperscript{166} Such waste may be handled safely through

\textsuperscript{161} Reid v. Colorado, 187 U.S. 137 (1902). Reid involved a statute which, at certain time periods, precluded the importation of uncertified cattle which had not spent ninety days in quarantine. \textit{Id.} The statute was upheld as a legitimate police power. \textit{Id.} The court allowed Colorado to discriminate against cattle on the basis of their origin from certain states below the thirty-sixth parallel since the purpose of the statute was aimed at preventing the spread of disease.

\textsuperscript{162} Maine v. Taylor, 477 U.S. 131, \textit{on remand}, United States v. Taylor, 802 F.2d 441 (1st Cir. 1986).

\textsuperscript{163} City of Philadelphia, 437 U.S. at 632 (Rehnquist, J. dissenting). Justice Rehnquist, addressing the majority’s treatment of hazardous wastes, stated that he saw “no way to distinguish solid waste, . . ., from germ-infected rags, diseased meat, and other noxious items.” \textit{Id.}

\textsuperscript{164} \textit{Id.} at 622. Justice Stewart stated that “because the articles’ worth in interstate commerce was far outweighed by the dangers inhering in their very movement, States could prohibit their transportation across state lines.” \textit{Id.} (emphasis added).

\textsuperscript{165} \textit{Id.} at 633 (Rehnquist, J. dissenting) (emphasis added).

\textsuperscript{166} \textit{Id.} Thus far, the Supreme Court has not revisited City of Philadelphia in the context of hazardous waste. It is interesting to note that future decisions in waste management may be affected by the fact that Justice Stewart (who wrote the majority opinion in City of Philadelphia) is no longer on the Court and Justice Rehnquist remains as a strong influence.
treatment or safe transportation; however, it remains inherently dangerous.\textsuperscript{167}

\section*{B. Partial Waste Bans Under Commerce Clause Scrutiny}

Assuming that the quarantine exception does not exempt hazardous waste from constitutional analysis, \textit{City of Philadelphia} is distinguishable from partial hazardous waste bans on other grounds. The issue before the 1978 Supreme Court in \textit{City of Philadelphia} involved a total import ban.\textsuperscript{168} The issue before the Eleventh Circuit, however, involved only a partial ban on exogenous waste effectuated by a reciprocity requirement.\textsuperscript{169} It is argued that the broad holding in \textit{City of Philadelphia} does not apply to the narrower factual context present in the Alabama cases.

The Eleventh Circuit erred in holding that Alabama had intended to "isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade."\textsuperscript{170} Alabama did not erect a complete barrier, but only a "bypass mechanism."\textsuperscript{171} Thus, the Eleventh Circuit erred in its automatic reliance on \textit{City of Philadelphia}\textsuperscript{172} as a basis for holding that the Alabama's partial ban violated the Commerce Clause. The E-

\textsuperscript{167} No state could completely confine itself from the hazardous waste market. While a state may achieve total disposal efficiency for one waste, the need to export other hazardous waste for disposal would remain in most instances.

Additionally, this author recognizes that the invocation of the quarantine exception with respect to hazardous waste bans may not be the appropriate alternative. This response may run counter to the stated purpose § 104(c)(9) which is to maximize national hazardous waste disposal efficiency.

\textsuperscript{168} For a discussion of \textit{City of Philadelphia}, see supra note 32-43 and accompanying text.

\textsuperscript{169} National Solid Waste Management Ass'n v. Alabama Dep't of Envtl. Protection, 910 F.2d 713 (11th Cir. 1990).

\textsuperscript{170} \textit{Id.} at 720 (quoting \textit{City of Philadelphia}, supra note 6, at 628). It is also submitted that the promulgation of the Holley Bill was not actually a reaction to "a problem common to many." \textit{Id.} On the contrary, Alabama was bearing a large brunt of the burden (in the area of commercial hazardous waste disposal) on its own. Statistics indicate not only that Alabama was the largest importer of such waste, but also that much of this imported waste originated in states which chose not to deal with the problem.

\textsuperscript{171} It may be argued that exporting states had control over their ability to export to Alabama. If they failed to take control of the situation by heeding federal requirements, they gave up their right to export to Alabama.

\textsuperscript{172} City of Philadelphia v. New Jersey, 437 U.S. 617 (1978). Reversing the district court opinion, the Eleventh Circuit applied a more narrow analysis in its review of the constitutionality of the Holley Bill. \textit{NSWMA II}, 910 F.2d at 715. Judge Edmondson stated that his "job [was] not to make policy." \textit{Id.} Stating that he could "only apply the law", Edmondson divorced himself from the "serious problems associated with hazardous waste management [which] plague our nation." \textit{Id.} at 715-16.
enth Circuit Court of Appeals completely sidestepped the district court’s emphasis on health, environment, and fairness.173

Generally, reciprocity requirements have been struck down as impermissible burdens on commerce.174 The rationale is that they are enacted to promote economic, protectionist purposes.175 However, it is evident from the facts of both Alabama decisions that the enactment of the Holley Bill was not predicated upon economic interests. Thus, it is suggested that the Alabama Holley Bill was not an economic measure and accordingly, should not have been subjected to the strict scrutiny Commerce Clause analysis. Moreover, if the court had used the Pike balancing test,176 the minimal effects of the partial ban177 clearly would not have outweighed the pressing state concerns.178

C. Congressional Intent Under Section 104(c)(9)

Perhaps the most compelling argument for upholding a hazardous waste ban, similar in nature to the Alabama Holley Bill, lies with the Congressional intent in enacting CERCLA section 104(c)(9).179 The Supreme Court has upheld state laws which

173. For a discussion of these three justifications, see supra notes 115-130 and accompanying text.
174. See supra notes 81-98 and accompanying text for a discussion of the historical judicial treatment of reciprocity agreements.
175. See supra notes 44-46.
176. See New Hampshire Motor Transp. Ass’n v. Flynn, No. 84-1226 (1st Cir. 1984). Applying the balancing test to state-imposed hazardous waste regulations, the First Circuit found that the requirement that hazardous waste transporters obtain a license was not excessive in relation to costs. The court, in its balancing analysis, noted the significant number of hazardous material spills.
177. The district court opinion noted that on a national level, “less than three-tenths of one percent of America’s toxic waste gets buried at Emelle.” NSWMA I, supra note 8, at 797. Moreover, “[s]ome of this percentage comes from states that have complied with federal legislation . . . . The court, therefore, is being asked to decide whether a partial ban on less than three-tenths of one percent is an onerous burden on interstate commerce.” Id. at 797 n.7.
178. For discussion of the legitimate “pressing state concerns” for the public welfare, the environment, and standards of fairness present in NSWMA, see discussion of the district court opinion supra notes 117-130 and accompanying text.
179. Moreover, the “Congressional intent” justification for upholding a statute would present less problems than an argument posited under the quarantine exception. Generally, the latter argument would involve a more complicated analysis including consideration of the burdens imposed on industry. Under the quarantine exception, subsequent difficult questions regarding treatment of endogenous, hazardous waste would likely arise. Accordingly, a state would be compelled to justify its ability to treat its own waste and its simultaneous rejection of imported waste. This burden of proof, however, would not be required upon a showing of congressional intent.
further a federal legislative purpose. The Court has recognized that even when Congress has explicitly legislated in a particular area, states are not foreclosed from enacting laws promoting that federal purpose.\textsuperscript{180}

Congress promulgated section 104(c)(9) with the intent to stimulate greater self sufficiency among states.\textsuperscript{181} Alabama's Holley Bill seems to be consistent with this goal since it, in effect, forces states to comply with the capacity assurance requirements in section 104(c)(9). If the implementation of such reciprocity requirements is deemed to effectuate an impermissible burden on commerce,\textsuperscript{182} the state action must still arguably be permissible if Congress intended to authorize it.\textsuperscript{183}

VI. Conclusion

The framers of the Constitution wrote the Commerce Clause in order to promote interstate trade.\textsuperscript{184} The negative implications of the Commerce Clause have been construed by the United States Supreme Court as an effort to prevent economic protectionism.\textsuperscript{185} Under the Commerce Clause, the federal government is required to intervene in state affairs in order to prevent economic, protectionist regulation.

In contrast, the authors of SARA section 104(c)(9) intended to promote state self-sufficiency in the area of hazardous waste disposal.\textsuperscript{186} They were motivated by non-economic, environmental and safety concerns. Under section 104(c)(9), states themselves are encouraged to take more sedulous roles in implementing new disposal programs and facilities.

\textsuperscript{180} Decanas v. Bica, 115 Cal. Rptr. 444 (1974), cert. granted 422 U.S. 1040 (1975), rev'd 424 U.S. 351 (1976). Although this case involved a labor issue, it is analogous to states' response to the congressional enactment of § 104(c)(9). State legislation mirroring § 104(c)(9) may actually be even more convincing than the Decanas case since the specific purpose of section § 104(c)(9) was to promote state action.

\textsuperscript{181} Former EPA Administrator, Lee Thomas, specifically stated that "states would become increasingly active partners in making Superfund work." See supra notes 17-18 and accompanying text.

\textsuperscript{182} Despite the apparent infringement on interstate commerce, the Supreme Court in dicta has stated that "sanitation" is a "traditional governmental function." National League of Cities v. Usery, 426 U.S. 833, 851-52 (1976).

\textsuperscript{183} The underlying premise of the Commerce Clause is that Congress may expressly refuse to apply it to a particular state statute which would otherwise be struck down in violation of the Clause.

\textsuperscript{184} See supra notes 21-23 and accompanying text.

\textsuperscript{185} Id.

\textsuperscript{186} See supra note 17 and accompanying text.
These two goals have recently clashed in the context of partial hazardous waste bans. It is suggested that the Eleventh Circuit, in reviewing this conflict, failed to properly reconcile the two legitimate goals.

Generally, lower courts have been striking down state-imposed barriers to hazardous waste under the Commerce Clause. The Supreme Court has refused to review the area of partial import bans on hazardous waste.\textsuperscript{187} However, the Supreme Court has recently agreed to review the related issue regarding the constitutionality of state taxes on exogenous waste.\textsuperscript{188} The basic rationale supporting the legality of partial waste impost bans also applies to taxes on exogenous waste imposed by importer states. A Supreme Court ruling on such states taxes will likely influence the outcome of future decisions regarding partial waste import bans. Without the partial waste ban option, importer states such as Alabama, which are unfairly overburdened, will eventually "drown" in their "collective" hazardous garbage.

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