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NOTES

Constitutionally Mandated Southern Hospitality: *National Solid Wastes Management Association and Chemical Waste Management, Inc. v. Alabama Department of Environmental Management*

[The Constitution] was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.¹

The United States produces over 600 billion pounds² of hazardous waste³ each year. In dealing with this ever increasing volume of waste, some states choose to export the problem to their neighbors rather than enter interstate disposal agreements or provide storage and disposal facilities within their own borders.⁴ Resistance to the latter options, borne in large measure from political expediency, gives new meaning to the idea of "swim[ming] together."⁵ States that acquiesce to the public outrage that often accompanies an attempt to site and build a hazardous waste disposal facility⁶ are making states that have en-

1. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

2. 19 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10388 (1989) (citing Environmental Protection Agency, *Environmental Progress and Challenges: EPA's Update 85* (Aug. 88) (#EPA-230-07-88-033)).

3. Congress has defined "hazardous waste" as

a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5)(A) & (B) (1988).

In other environmental legislation, Congress has defined "hazardous substance," 42 U.S.C. § 9601(14) (1988) and 33 U.S.C. § 1321(b)(2) (1988), "toxic pollutant," 33 U.S.C. § 1317 (1988), and "hazardous material," 49 U.S.C. §§ 1802(2), 1803 (1988).

4. Traditionally, the most common method of hazardous waste disposal has been land disposal, but this method currently is disfavored by the Environmental Protection Agency (EPA) because it provides only a short-term solution to the waste disposal problem. Landfilling still is popular, however, in large measure because it is a relatively inexpensive method for disposing of hazardous waste. The modern treatment techniques fall into five categories: (1) thermal treatment (incinerators); (2) immobilization (adding materials that combine with the wastes either physically or chemically, or both, to keep it from moving into groundwater or other areas where it can cause harm); (3) physical treatment (separating the waste into two or more streams with the resultant streams being effectively treated by another process, such as incineration or immobilization); (4) chemical treatment (changing the chemical makeup of the waste so that it is no longer hazardous, or pretreating the waste to make it easier to handle complex hazardous waste mixes. The products of chemical treatment generally require further processing through one of the other disposal methods); and (5) biological treatment (using microorganisms to render potentially toxic materials harmless). 19 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10388-92 (Sept. 1989).

Because of the various disposal techniques involved, and the uncertainty as to how one type of waste will act in a different setting or respond to a different disposal technique, formulating a hazardous waste site cleanup plan "is analogous to designing a complex chemical engineering process." *Id.* at 10388.

5. *Baldwin*, 294 U.S. at 523.

6. This political pressure commonly is referred to as the "Not-In-My-Back-Yard" (NIMBY)

dured the political pressure and sited a disposal facility within their borders the recipients of a steady stream of hazardous waste.⁷ Understandably, many of these states are increasingly unwilling to serve as "dumping grounds" for waste produced by those states unwilling to take the responsibility for disposing of their own hazardous byproducts. Through the Superfund Amendments and Reauthorization Act of 1986 (SARA),⁸ Congress attempted to spur development of increased disposal capacity nationwide by predicated a state's receipt of remedial Superfund money on a state's showing that it will be able to dispose of all hazardous waste generated within its borders during the next twenty years.⁹ Despite this incentive, some states remain content to export their hazardous waste.

In *National Solid Wastes Management Association and Chemical Waste Management, Inc. v. Alabama Department of Environmental Management*,¹⁰ (*ChemWaste*), the United States Court of Appeals for the Eleventh Circuit reviewed the constitutionality of an Alabama law banning the import of hazardous waste from certain states.¹¹ Relying almost exclusively on the United States Supreme Court's prior ruling in *City of Philadelphia v. New Jersey*,¹² the Eleventh Circuit held that the Alabama law violated the commerce clause of the

syndrome. See Crim, *The NIMBY Syndrome in the 1990s: Where Do You Go After Getting to "No"?*, 21 Env't Rep. (BNA) 132, 133 (May 4, 1990). North Carolina provides an example of the fervor with which citizens may oppose hazardous waste disposal facilities. On June 25 and 26, 1990, more than 300 protestors linked arms to stop surveyors from entering the two sites North Carolina had proposed as a potential permanent home for a disposal facility. 21 Env't Rep. (BNA) 442 (July 6, 1990).

7. A May 8, 1990, EPA report addressed the waste importing and exporting habits of the states in 1987. The study found that 33 states were net exporters of toxic waste in 1987, while only 17 were net importers. Louisiana, Alabama, Tennessee, Michigan, and Indiana were the top five net importers.

Ohio was both the largest importer of hazardous waste (91.6 million pounds), and the largest exporter (82.7 million pounds).

Twenty-two states each exported more than ten million pounds of waste in 1987, with Ohio, Pennsylvania, New Jersey and Mississippi ranking highest. Sixteen states imported more than ten million pounds, with Ohio, Louisiana, Indiana, and Michigan ranking highest.

Seven of the top ten exporting states were also among the top ten importing states—Ohio, Pennsylvania, New Jersey, Indiana, Illinois, Kentucky, and Michigan.

About 30% of all hazardous waste produced was exported to other states.

This study examined toxic release data reported by U.S. manufacturers to EPA's Toxic Release Inventory (TRI). The congressional Office of Technological Assessment has estimated that the total wastes reported to TRI may be less than ten percent of all wastes actually discharged into the environment. 21 Env't Rep. (BNA) 264 (May 25, 1990).

8. Pub. L. 99-499, 100 Stat. 1613 (Oct. 17, 1986) (codified in various sections of 42 U.S.C. §§ 9601-9657 (1988)). The Superfund Amendments and Reauthorization Act of 1986 (SARA) amended the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). Pub. L. No. 96-510, 94 Stat. 2767 (Dec. 11, 1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)). See *infra* notes 85-89 and accompanying text.

9. 42 U.S.C. § 9604(c)(9)(A) (1988).

10. 910 F.2d 713 (11th Cir. 1990) [hereinafter *ChemWaste*]. On August 28, 1990, the Alabama Department of Environmental Management (ADEM) filed a motion with the Eleventh Circuit for rehearing en banc. Regardless of the resolution of that motion, the ultimate loser in the Eleventh Circuit is expected to file a petition for writ of certiorari seeking Supreme Court review. Telephone interview with Ronald Farley, General Counsel to ADEM, September 18, 1990.

11. ALA. CODE § 22-30-11(b) (1990).

12. 437 U.S. 617 (1978).

United States Constitution.¹³ This Note analyzes the Eleventh Circuit's approach to the issue of the constitutionality of the Alabama statute and concludes that the Eleventh Circuit erred both in finding the Alabama statute to be protectionist legislation and in applying the rule of per se invalidity enunciated in *City of Philadelphia*. The Note explores the dormant commerce clause principles under which the Alabama law should have been analyzed and determines that the Eleventh Circuit also erred by failing to apply a strict scrutiny standard of review to the Alabama statute. The Note also examines the congressional legislation upon which the Alabama law was based to determine if there was implied congressional authorization for the Alabama action. The Note concludes that the Alabama law is constitutional under both a strict scrutiny standard of review and as a state regulation impliedly authorized by Congress.

Emelle, Alabama, a town of sixty-six inhabitants¹⁴ located in west-central Alabama near the Mississippi border,¹⁵ is home to the nation's largest, and Alabama's only, commercial hazardous waste facility.¹⁶ Owned and operated by Chemical Waste Management, Inc., the Emelle facility has grown from accepting less than 200 million pounds of hazardous waste in 1978 to accepting an estimated 1.6 billion pounds in 1989.¹⁷

In response to the growing perception that Alabama was becoming a "dumping ground" for out-of-state hazardous waste producers, and in light of SARA's capacity assurance requirements,¹⁸ the Alabama legislature enacted

13. The commerce clause states that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

14. RAND McNALLY COMMERCIAL ATLAS & MARKETING GUIDE 248 (119th ed. 1988). The population figure is based on the 1980 census. Given that Emelle was so sparsely populated in 1980, and that the town is home to the nation's largest hazardous waste incinerator, it is unlikely that the community has experienced significant population growth over the last decade.

15. *Id.* at 138.

16. *ChemWaste*, 910 F.2d at 715.

17. *National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management*, 729 F. Supp. 792, 797 (N.D. Ala.), *vacated*, *ChemWaste*, 910 F.2d 713 (11th Cir. 1990). These figures include both domestically produced and imported hazardous waste. During 1987, Alabama industries shipped approximately 57,000 tons of hazardous waste out of state for disposal, while Alabama imported approximately 500,000 tons of hazardous waste for treatment and disposal. *ChemWaste*, 910 F.2d at 717 n.6.

18. See 42 U.S.C. § 9604(c)(9) (1988). The requirements are:

(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,

(C) are acceptable to the President, and

(D) are in compliance with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C. § 6921].

Alabama Code section 22-30-11,¹⁹ popularly called the "Holley Bill."²⁰ The Holley Bill banned importation of shipments of hazardous waste²¹ generated in any state that (1) prohibits the treatment or disposal of hazardous waste within its borders and has no facility for treatment or disposal of hazardous waste; or (2) has no existing hazardous waste disposal facility, unless that state has en-

19. The Alabama House passed the legislation on April 26, 1989, and the Alabama Senate passed the bill on May 4, 1989. Governor Guy Hunt signed the bill into law on May 11, 1989. The act became effective 120 days after its passage, except for § 2(c) which became effective immediately upon enactment. National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management, 729 F. Supp. at 800 n.8., vacated, *ChemWaste*, 910 F.2d 713 (11th Cir. 1990).

20. Named for the sponsoring state legislator, the Holley Bill states, in pertinent part:

(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:

(1) 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

(2) 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. Such list shall be publicly available and set forth the reasons why each state is listed. The date on which a state is included on such list shall be provided. The list of states shall be revised monthly. The state of generation as shown on the hazardous waste manifest shall be used in determining whether a person has treated or disposed of waste in violation of this subsection, and any person who alters the state of generation on any manifest or misrepresents the state of generation of any hazardous waste for the purpose of circumventing this statute shall be punishable in accordance with section 33-30-19 herein.

(c) Subsequent to the effective date of Acts 1989, No. 89-788, 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. § 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 or 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.

...

(4) REGION(AL). Region(al) shall mean any or all of the following states: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.

(5) STATE OF GENERATION. A state of the United States in which the hazardous waste is generated in the form in which it is received by a commercial hazardous waste treatment or disposal facility located in Alabama for treatment or disposal.

ALA. CODE § 22-30-11 (1990).

21. The bill applied only to the importation of landfilled hazardous wastes. As Sue Robertson, the Chief of ADEM's Land Division noted: "The ban is against disposal or landfilling of hazardous waste. . . . [W]aste solvents from Florida are still allowed to come to Alabama to be burned or to go through [a] recycling operation or solvent recovery. . . . [The Holley Bill] only bans ultimate disposal of hazardous waste." Brief for Appellees at 21 n.6, *ChemWaste* (No. 90-7047).

tered into an interstate or regional agreement²² for the safe disposal of hazardous waste pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).²³ The Holley Bill required Alabama to be a signatory to that agreement.²⁴ The bill further prevented any commercial waste management facilities in Alabama from contracting with a state other than Alabama to satisfy the other state's capacity assurance requirements mandated by CERCLA.²⁵

Beginning September 13, 1989,²⁶ Alabama issued a list of states the Holley Bill barred from shipping hazardous waste into Alabama for disposal at the Emelle facility.²⁷ Required by law to be updated monthly,²⁸ the original list banned importation of hazardous waste from twenty-two states and the District of Columbia.²⁹ Prior to implementation of the Holley Bill, the Emelle facility accepted hazardous waste from forty-eight states, with out-of-state waste comprising eighty-five percent of the waste disposed of at Emelle.³⁰

Chemical Waste Management, Inc. (ChemWaste), along with the National Solid Wastes Management Association,³¹ filed a motion in federal district court seeking a preliminary injunction to prevent the Alabama Department of Environmental Management (ADEM) from enforcing the Holley Bill.³² ChemWaste alleged that the bill violated the commerce clause of the United States Constitution.³³ Converting the motion for a preliminary injunction into simultaneous motions for summary judgment *ex mero motu*, the district court

22. Based on the language of SARA, such interstate or regional agreements are commonly referred to as "compacts."

23. *ChemWaste*, 910 F.2d at 717.

24. *Id.*

25. *Id.*

26. The Holley Bill went into effect on this date. *Id.* at 718.

27. *Id.*

28. ALA. CODE § 22-30-11(b)(2) (1990).

29. *ChemWaste*, 910 F.2d at 718. The original "blacklist" issued September 13, 1989, included: Alaska, Arizona, Delaware, District of Columbia, Florida, Idaho, Iowa, Kansas, Maine, Mississippi, Missouri, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Oregon, South Dakota, Vermont, Virginia, Washington, West Virginia, and Wyoming. United Press International, August 30, 1989, Regional News.

An updated list issued in January 1990 included: Alaska, Arizona, Delaware, District of Columbia, Florida, Hawaii, Kansas, Maine, Mississippi, Missouri, Montana, New Hampshire, New Mexico, Oregon, Puerto Rico, South Dakota, the U.S. Virgin Islands, Vermont, Virginia, Washington, West Virginia, and Wyoming. 20 Env't Rep. (BNA) 1622 (Jan. 1, 1990).

30. *ChemWaste*, 910 F.2d at 715. The bulk of the waste shipped to the Emelle facility came from only a few states.

31. The National Solid Wastes Management Association is a trade association representing the waste management industry. *Id.*

32. *National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management*, 729 F. Supp. 792, 805 (N.D. Ala.), *vacated*, *ChemWaste*, 910 F.2d 713 (11th Cir. 1990). Leigh Pegues, Director of ADEM, and Guy Hunt, Governor of Alabama, also were named as defendants in the suit. *ChemWaste*, 910 F.2d at 715.

33. This Note will focus solely on the commerce clause challenge to the Holley Bill and the court's opinion regarding that challenge. The court, however, also addressed other issues.

In addition to the commerce clause challenge, ChemWaste challenged Alabama regulations requiring hazardous waste producers to receive the state's approval before shipping hazardous waste to Alabama hazardous waste management facilities, and the requirement that certain hazardous wastes be pretreated before disposal in Alabama. *ChemWaste*, 910 F.2d at 715.

The court invalidated the pre-approval regulations as an unconstitutional burden on interstate

found the Alabama legislature's actions constitutional and granted summary judgment in favor of ADEM.³⁴

In upholding the statute, the district court found that the Holley Bill was "directed toward a legitimate state concern."³⁵ The court stated that "[t]he ban is directed toward protection of the health and welfare of the people and preservation of the environment while encouraging compliance [by other states] with the federal legislation."³⁶ The district court distinguished the Holley Bill from the New Jersey law addressed by the Supreme Court in *City of Philadelphia*, finding the Holley Bill's impact on interstate commerce to be incidental and not excessive in relation to the local benefits.³⁷

On appeal the Eleventh Circuit Court of Appeals vacated the district court's decision and entered summary judgment for ChemWaste.³⁸ In contrast to the district court, the Eleventh Circuit applied the Supreme Court's holding in *City of Philadelphia* with a nearly blind-hand and declared the Holley Bill a per se violation³⁹ of the commerce clause. Writing for a unanimous three-judge panel, Judge Edmondson first concluded that hazardous waste is "commerce" within the meaning of the commerce clause.⁴⁰ Although it was not a contested point in the case,⁴¹ the court drew upon this conclusion to find that "[a]lthough 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."⁴²

commerce, and the court invalidated the pretreatment regulations as violations of the supremacy clause, finding EPA regulations to preempt state regulations of this activity. *Id.* at 723.

Additionally, ChemWaste alleged that the Holley Bill violated the due process, takings, and contract clauses of the Constitution. Neither the district court nor the circuit court addressed any of these claims, and this Note likewise will not venture into these areas.

34. *National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management*, 729 F. Supp. 792 (N.D. Ala.), *vacated*, *ChemWaste*, 910 F.2d 713 (1990). In a memorandum opinion that delves rather extensively into the history of congressional activity in the area of waste management and regulation, the district court chose not to apply the Supreme Court's ruling in *City of Philadelphia v. New Jersey* to the Alabama law, distinguishing *City of Philadelphia* on the grounds that unlike the New Jersey law in that case, the Alabama law did not prohibit importation of all hazardous waste. Finding the ban "directed toward protection of the health and welfare of the people and preservation of the environment while encouraging compliance with federal legislation," the district court found that the act's "impact on interstate commerce is incidental and not excessive in relation to the local benefits," and thus concluded that the legislation is constitutional. 729 F. Supp. at 804.

35. *National Solid Wastes Management Ass'n*, 729 F. Supp. at 804, *vacated*, *ChemWaste*, 910 S. Ct. 713 (1990).

36. *Id.* The court also found that the bill was designed to allow Alabama to comply with the CERCLA capacity assurance requirements.

37. *Id.* The district court found the 1.6 billion pounds of waste buried at Emelle comprised "less than three-tenths of one percent of America's toxic waste." *Id.* at 797. The district court noted that "[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.

38. *ChemWaste*, 910 F.2d at 725.

39. See *infra* text accompanying notes 95-98.

40. *ChemWaste*, 910 F.2d at 718-19.

41. Alabama never argued that hazardous waste does not constitute "commerce." In fact, *City of Philadelphia* makes it clear that "[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978).

42. *ChemWaste*, 910 F.2d at 719. The court noted that

The court recognized Supreme Court precedent allowing a state to prohibit transportation of an object across state lines "when the dangers inhering in an object's movement 'far outweigh' its worth in interstate commerce."⁴³ The court also cited Supreme Court decisions addressing state attempts to "restrict interstate movement of an object when, on account of the object's existing condition, [it] would bring in and spread disease, pestilence, and death"⁴⁴ as examples of such an allowable burden on interstate commerce. Noting that a "comprehensive scheme for regulating the management of hazardous waste"⁴⁵ has developed through federal and state legislation, the Eleventh Circuit concluded that the "dangers associated with hazardous waste movement do not outweigh the value of moving hazardous waste across state lines."⁴⁶

In finding the Holley Bill to be an unconstitutional barrier to interstate commerce, the court of appeals rejected ADEM's argument that the Alabama legislature intended that the Holley Bill protect the health and safety of the state's citizens and its environment.⁴⁷ The court noted that Alabama "did not ban the shipment of all hazardous wastes into the state, but only shipments from certain states."⁴⁸ Quoting from *City of Philadelphia*, the court determined that even if the impetus for the Holley Bill was the protection of human and environmental health, Alabama may not accomplish that purpose by "'discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.'"⁴⁹ With unquestioned certainty the Eleventh Circuit concluded that "[t]he Holley Bill plainly distinguishes among wastes based on their origin, with no other basis for the distinction."⁵⁰

In concluding its opinion on the commerce clause question, the Eleventh Circuit found no express or implied congressional authorization for the Ala-

"[t]he Supreme Court never described the waste at issue in *City of Philadelphia* as 'hazardous'; the Court [in *City of Philadelphia*] was apparently considering 'solid waste,' defined by Congress as: 'any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agriculture operations, and from community activities.'"

Id. at 719 n.9 (citation omitted).

43. *Id.* at 718 (quoting *City of Philadelphia*, 437 U.S. at 622).

44. *Id.* (citing *Bowman v. Chicago & N.W. R.R.*, 125 U.S. 465, 489 (1888) (striking down state prohibition on interstate movement of liquor)); see also *Clason v. Indiana*, 306 U.S. 439, 442 (1939) (upholding Indiana's prohibition against interstate transportation of large dead animals because "obvious purpose of the enactment [was] to prevent the spread of disease and the development of nuisances.").

45. 910 F.2d at 719.

46. *Id.*

47. See *infra* note 127 (listing the legislative findings that preface the legislation).

48. *ChemWaste*, 910 F.2d at 720. This is a rather curious conclusion given that a total ban on importation of hazardous waste would be a clear violation of the commerce clause. See *infra* text accompanying notes 150-51. Additionally, such a ban would prevent Alabama from meeting its capacity assurance requirement as mandated by Congress through SARA. The court itself had noted earlier that most states will need to enter into compact agreements with other states "because most states lack the capacity to dispose of all types of hazardous wastes within their borders." *ChemWaste*, 910 F.2d at 717.

49. *ChemWaste*, 910 F.2d at 720 (quoting *City of Philadelphia*, 437 U.S. at 626-27).

50. *Id.*

bama law.⁵¹ The court recognized the long-held principle that actions specifically authorized by Congress are not subject to commerce clause restrictions, and quoted the Supreme Court's requirement that "[s]uch congressional intent or authorization for states to affect interstate commerce . . . must be 'expressly stated' and 'unmistakably clear.'"⁵² The court held that "nothing in SARA evidences congressional authorization for each state to close its borders to wastes generated in other states,"⁵³ thereby refusing to find the Holley Bill to be a constitutionally valid manifestation of congressional will.

Any court today that addresses a commerce clause question faces a myriad of uncertainties. The court can find select Supreme Court opinions which seemingly will justify any resulting decision. The commerce clause grants to Congress the power to "regulate Commerce with Foreign Nations, and among the several states, and with the Indian Tribes."⁵⁴ "Although the [Commerce] Clause thus speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade."⁵⁵ This limit on the power of the states to regulate interstate commerce is known as the "negative" or "dormant" aspect of the commerce clause. Since 1849 the United States Supreme Court has applied the dormant commerce clause to invalidate state statutes deemed inappropriate burdens on interstate commerce.⁵⁶

51. *Id.* at 721.

52. *Id.* (quoting *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984)); see also *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 212-13 (1983) (city's requirement that local labor do certain percentage of work on public construction projects did not violate commerce clause).

53. *ChemWaste*, 910 F.2d at 721.

54. U.S. CONST. art. I, § 8, cl. 3.

55. *Maine v. Taylor*, 477 U.S. 131, 137 (1986) (quoting *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 35 (1980)).

56. See, e.g., *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951); *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849); see also Note, *The Market Participant Test in Dormant Commerce Clause Analysis—Protecting Protectionism?*, 1985 DUKE L.J. 697, 699 n.15 (giving a brief historical overview of the Supreme Court's early treatment of the dormant commerce clause).

The Supreme Court has relied on the dormant commerce clause to strike down a broad array of state laws, such as a state reciprocity requirement for the export of ground water, a state restriction on the export of hydroelectric power, a state franchise-tax credit for domestic, international-sales corporations, a state wholesale gross-receipts tax that exempted local manufacturers, a state liquor tax that excluded certain locally produced alcoholic beverages, a state law requiring that timber taken from state lands be processed within the state prior to export, a state lower-price affirmation law for certain alcoholic beverages, and a state marker fee and axle tax discriminatorily imposed on out-of-state trucks.

Kalen, *Reawakening the Dormant Commerce Clause in its First Century*, 13 U. DAYTON L. REV. 417, 418 (1988).

Professor Regan has identified the "movement-of-goods" cases that he cites as the central line of dormant commerce clause cases in the modern era. Those cases are: *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Exxon Corp. v. Maryland*, 437 U.S. 117 (1978); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977); *Baldwin v. G.A.F. Seelig, Inc.*, 426 U.S. 794 (1976); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Breard v. Alexandria*, 341 U.S. 622 (1951); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); *H.P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949). See Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1099 (1986).

During more than a century of jurisprudence on the subject,⁵⁷ the Supreme Court has applied the dormant commerce clause in a chaotic and confused fashion.⁵⁸ Despite such uncertainties, modern dormant commerce clause opinions suggest that state regulatory statutes face a two-tiered analysis.⁵⁹

The first tier of analysis addresses state statutes that on their face, in purpose, or in effect, discriminate against interstate commerce. These state regulatory statutes are subject to a "strict scrutiny" test, meaning the court will uphold them only if the state establishes (1) a legitimate state interest in the regulation, and (2) that the means adopted are the least discriminatory option available.⁶⁰ The Supreme Court fully stated the core of the strict scrutiny test in *Maine v. Taylor*,⁶¹ and later reiterated it in *New Energy Company v. Limbach*,⁶² in which

57. The origins of recognition of the dormant commerce clause can be found as far back as Chief Justice Marshall's opinions in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), and *Wilson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829). However, the doctrine did not become established fully in Supreme Court jurisprudence until the decision in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851). See Redish & Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 576-77.

58. Two of the most notable critics are Chief Justice Rehnquist and Justice Scalia. Justice Scalia has said,

The fact is that the 114 years since the doctrine of the negative Commerce Clause was formally adopted as a holding of this Court, and in the 50 years prior to that in which it was alluded to in various dicta of the Court our applications of the doctrine have, not to put too fine a point on the matter, made no sense.

Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue, 483 U.S. 232, 259-60 (1987) (Scalia, J., concurring in part and dissenting in part) (citations omitted).

Less than pleased with the majority's decision invalidating an Iowa statute prohibiting the use of certain large trucks within the state as an unconstitutional burden on interstate commerce, Justice Rehnquist lamented, "We know only that Iowa's law is invalid and that the jurisprudence of the 'negative side' of the Commerce Clause remains hopelessly confused." *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting).

Criticism is not limited to the Court's most recent decisions. In 1946 Justice Rutledge noted that the commerce clause "is not the simple, clean-cutting tool supposed. . . . [I]ts implied negative operation on state power has been uneven, at times highly variable. . . . [T]he history of the commerce clause has been one of very considerable judicial oscillation." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 418, 420 (1946).

59. Kalen, *supra* note 56, at 417.

60. *Id.* at 417-18. The leading case stating this application of the dormant commerce clause is *Maine v. Taylor*, 477 U.S. 131 (1986), in which the Supreme Court, in upholding a state ban on the importation of live bait fish, held:

The limitation imposed by the Commerce Clause on state regulatory power "is by no means absolute," and "the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." In determining whether a State has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are "clearly excessive in relation to the putative local benefits," statutes in the second group are subject to more demanding scrutiny. The Court explained in *Hughes v. Oklahoma*, that once a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.

Id. at 138 (citations omitted).

61. 477 U.S. 131 (1986).

62. 486 U.S. 269 (1988). In *Limbach*, the Court invalidated on commerce clause grounds an Ohio statute that awarded a sales tax credit for each gallon of ethanol sold by dealers if the ethanol was produced in Ohio or in a state that had a similar sales tax credit provision. *Id.* at 274.

the Court noted that "state statutes that clearly discriminate against interstate commerce are routinely struck down, *unless* the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism."⁶³

The strict scrutiny test must be viewed in light of the Supreme Court's statement that "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected."⁶⁴ Any state regulation that clearly is protectionist in nature, with its purpose being to favor local economic interests at the expense of foreign interests, likely will be struck down as *per se* invalid under the commerce clause. Nonetheless, the Supreme Court leaves open the possibility of a legitimate local purpose driving such legislation, and when such a state interest exists, and that interest is sufficiently compelling, the Court will uphold the legislation if it passes the strict scrutiny standard of review.⁶⁵

The second tier of commerce clause analysis reviews state statutes under what commonly is referred to as the *Pike v. Bruce Church*⁶⁶ balancing test. In *Pike v. Bruce Church* the Supreme Court established that when a state 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."⁶⁷

A court ordinarily will conclude its inquiry if a state law fails to pass either of these commerce clause tests. However, a state's contention that Congress has authorized the state to regulate interstate commerce in a particular manner provides the state with "another string to [its] bow."⁶⁸ The Supreme Court long has recognized the commerce clause to be an affirmative grant of power to Con-

63. *Id.* (citations omitted) (emphasis added).

64. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

65. See Note, *supra* note 56, at 703 n.31 (arguing that the qualification of the wording of the *per se* rule leaves the door open for states to pass quarantine laws). Other commentators, however, see the qualification of the *per se* invalidity rule as leaving the door open for the application of the balancing test under circumstances apart from quarantine cases. *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 62 (1978).

66. 397 U.S. 137 (1970). *Pike v. Bruce Church, Inc.* involved a challenge to a provision of the Arizona Fruit and Vegetable Standardization Act requiring that cantaloupes grown in Arizona and offered for sale meet certain packaging requirements before the cantaloupes could be shipped out of the state. *Id.* at 138. Finding only a minimal state interest in the regulations, the Supreme Court invalidated the Arizona law as an unconstitutional burden on interstate commerce. *Id.* at 146.

67. *Id.* at 142. The full text of the *Pike v. Bruce Church* test as set forth by the Supreme Court reads:

Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: 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. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. (citation omitted).

68. *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980).

gress, as well as a negative limitation on states.⁶⁹ This means that Congress may authorize the states to regulate interstate commerce in ways that would otherwise be unconstitutional under dormant commerce clause principles.⁷⁰ However, the Supreme Court has been hesitant to find congressional authorization for state action absent an unmistakably clear expression of congressional intent.⁷¹

Congress entered the field of hazardous waste regulation⁷² with the passage of the Resource Conservation and Recovery Act of 1976 (RCRA).⁷³ One of the main goals of RCRA is to establish a "cradle to grave" system for regulating hazardous waste.⁷⁴ The federal government administers the system unless a state chooses to handle those duties itself.⁷⁵ RCRA requires the Environmental Protection Agency (EPA) "to establish minimum federal standards applicable to all who generate, . . . transport, . . . treat, store or dispose . . . of hazardous wastes."⁷⁶ A state must follow these minimum standards if it chooses to administer its own hazardous waste program.⁷⁷

Unfortunately, even after the passage of RCRA, the nation's hazardous waste disposal problems continued to multiply, and "[i]n recognition of the tragic consequences of improper, negligent, and reckless hazardous waste disposal practices,"⁷⁸ and in response to the tremendous public awareness and concern generated by such environmental debacles as Love Canal,⁷⁹ Congress

69. See, e.g., *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204 (1983); *American Power & Light Co. v. Securities & Exch. Comm'n*, 329 U.S. 90 (1946); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

70. See, e.g., *Sporhase v. Nebraska*, 458 U.S. 941 (1982); *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982); *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648 (1981); *South Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945).

71. See *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984) ("There is no talismanic significance to the phrase 'expressly stated,' however; it merely states one way of meeting the requirement that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear."); see also *infra* notes 193-94 and accompanying text (discussing how Congress can meet this standard).

72. Congress first addressed solid waste disposal by passing the Solid Waste Disposal Act of 1965. Pub. L. No. 89-272, tit. II, 79 Stat. 997, 42 U.S.C. §§ 3251-3259 (Supp. V 1965). This Act provided state and local governments with the means to plan and develop waste disposal programs. 42 U.S.C. § 3255.

The Resource Recovery Act of 1970 amended the Solid Waste Disposal Act of 1965, and established the Environmental Protection Agency (EPA) which took over the functions of the Department of Health, Education, and Welfare's Bureau of Solid Waste Management. Reorg. Plan No. 3 of 1970, 3 C.F.R. 1072 (1966-1970).

This is not intended to be an exhaustive treatment of federal legislation in the hazardous waste area. For a more in-depth account see Note, *The Political Economy of Superfund Implementation*, 59 S. CAL. L. REV. 875 (1986).

73. *National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management*, 729 F. Supp. 792, 793-94 (N.D. Ala.), vacated, *ChemWaste*, 910 F.2d 713 (11th Cir 1990).

74. *Id.* at 794.

75. *Id.*

76. *Id.* (citations omitted).

77. *Id.* at 794-95.

78. Note, *Superfund Amendments and Reauthorization Act of 1986: Limiting Judicial Review to the Administrative Record in Cost Recovery Actions by the EPA*, 74 CORNELL L. REV. 1152, 1155 (1989).

79. See Note, *supra* note 72, at 877. The Hooker Chemical Company and the City of Niagara Falls used the Love Canal as a disposal site from around 1930 until 1953; the Canal was then cov-

enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)⁸⁰ in December of 1980. Popularly known as the "Superfund," because of the \$1.6 billion "Hazardous Substance Response Trust Fund"⁸¹ it established,⁸² CERCLA's main purpose is to protect public health and the environment by providing federal monetary assistance for the cleanup of leaking hazardous waste disposal sites.⁸³ Congress's failure to comprehend fully the magnitude of the hazardous waste problem⁸⁴ combined with improper political conduct by EPA officials in the hazardous waste division⁸⁵ made CERCLA an ineffective means for achieving congressional ends. In an attempt to correct CERCLA's shortcomings, Congress adopted the Superfund Amendments and Reauthorization Act of 1986 (SARA).⁸⁶

In addition to providing the EPA with much needed funds to clean up hazardous waste sites,⁸⁷ SARA attempts to ensure that safe and adequate disposal facilities will be developed in the future. SARA requires each state to demonstrate its ability to dispose of all hazardous waste generated within its borders over the next twenty years.⁸⁸ A state may meet this "capacity assurance requirement" either by developing sufficient hazardous waste treatment capacity

ered with earth, and more than 100 homes and an elementary school were built on or near the site. In 1976, unusually heavy rains raised the water table and brought chemical wastes closer to the surface. As a result, a serious health risk arose from toxic chemical leachate in the basements of area homes. President Carter declared Love Canal a disaster area in 1978. Florini, *Issues of Federalism In Hazardous Waste Control: Cooperation or Confusion?*, 6 HARV. ENVTL. L. REV. 307, 326 n.151 (1982) (citations omitted). The legislative history accompanying CERCLA makes express reference to the incidents at Love Canal. H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 19-20 (1980).

80. Pub. L. No. 95-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)).

81. The Superfund provisions originally were codified at 42 U.S.C. § 9631, but were repealed effective January 1, 1987. Pub. L. No. 99-499, tit. V, § 517 (c)(1), 100 Stat. 1774 (1986). The Superfund provisions now are codified as part of the I.R.S. code at 26 U.S.C. § 9507 (1988).

82. As initially enacted, the Superfund was to be financed primarily by a tax on petroleum products and petrochemical feedstocks, with additional funds coming from general revenues. The tax provided 87.5% of the fund's revenue, with the remaining 12.5% to come from the general treasury. The legislation provided that the taxes could not be collected after September 30, 1985. Florini, *supra* note 79, at 320 n.116.

83. *National Solid Wastes Management v. Alabama Dep't of Env'tl. Management*, 729 F. Supp. 792, 796 (N.D. Ala.) (citation omitted), *vacated*, *ChemWaste*, 910 F.2d 713 (1990).

84. In 1979, prior to the passage of CERCLA, both the EPA and Congress believed that a site could be adequately cleaned up by "scraping a few inches of soil off the ground." At the time, the EPA estimated that between 1,200 and 2,000 sites posed a serious risk to public health. The EPA also estimated that it needed between \$13.1 and \$22.1 billion to clean up all of these dangerous hazardous waste sites. . . . By 1985, however, approximately 10,000 sites required cleanup.

Note, *supra* note 78, at 1155-56 (citations omitted). The estimates regarding the cost of such cleanup ran as high as \$100 billion. *Id.*

85. Congressional investigations of EPA discovered that certain EPA officials had diverted cleanup funds from Superfund sites "in order to increase the political fortunes of Republican Senate candidates." *Id.* These discoveries led to the eventual resignation of Anne Burford, the EPA Administrator; the imprisonment of Rita Lavelle, the EPA's top hazardous waste official; and the resignation of more than 20 senior EPA officials. *Id.* at 1157 n.39 (citations omitted).

86. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. § 9604(c)(9)(1988)).

87. SARA provides EPA with \$8.5 billion over a five-year span to clean up inoperative waste sites. 42 U.S.C. § 9611. This sum is still grossly insufficient to cover the estimated \$100 billion it will take to complete the Superfund's objectives. H.R. Rep. No. 253(I), 99th Cong., 2d Sess., pt. 1, at 55 (1988).

88. 42 U.S.C. § 9604(c)(9)(A) (1988).

of its own, or by entering into an interstate or regional agreement with other states to share the burden of hazardous waste disposal.⁸⁹ If a state fails to provide adequate capacity assurances, the EPA has the authority to deny that state remedial clean-up monies from Superfund.⁹⁰

The principal Supreme Court decision addressing the commerce clause implications of waste disposal is *City of Philadelphia v. New Jersey*.⁹¹ In *City of Philadelphia*, the Supreme Court struck down a New Jersey statute prohibiting the importation of most solid or liquid waste that originated or was collected outside the territorial limits of New Jersey. The primary purpose of the New Jersey law was to preserve the state's dwindling landfill space. The Court held that the New Jersey law was an unconstitutional burden on interstate commerce and, thus, violative of the dormant commerce clause.⁹² Rejecting New Jersey's argument that the ban was intended to preserve existing landfill space in an attempt to protect the health, safety, and welfare of the state's citizens, the Supreme Court declared, "the evil of protectionism can reside in legislative means as well as legislative ends. . . . [W]hatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to

89. *Id.* § 9604(c)(9)(B). Even those states that have hazardous waste disposal facilities likely will have to enter regional disposal agreements because no state has the ability to dispose of all the different types of hazardous waste produced, and SARA requires that a state have disposal capacity for all waste.

90. *Id.* Funds may be withheld only for remedial measures. Superfund money for emergency cleanups is still available to states that fail to provide capacity assurances.

91. 437 U.S. 617 (1978). As one lower federal court has said, "any discussion of the constitutionality of a state statute that effectively bans the disposal of out-of-state waste must begin with an analysis of *City of Philadelphia v. New Jersey*." *Lefrancois v. Rhode Island*, 669 F. Supp. 1204, 1207-08 (D.R.I. 1987).

92. *City of Philadelphia*, 437 U.S. at 629.

The contested New Jersey statute in pertinent part read:

No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner [of the state Department of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in the State.

N.J. STAT. ANN. § 13:11-10 (West Supp. 1978).

Pursuant to his authority under this statute, the Commissioner issued regulations permitting four categories of waste to enter the State. No other waste from other states was allowed to enter New Jersey. The four exceptions were:

- (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 from putrescible materials and not mixed with other solid or liquid waste that is intended for a recycling or reclamation facility;
- (3) Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70 percent of the thru-put of any such facility is to be separated or processed into usable secondary materials; and
- (4) Pesticides, hazardous wastes, chemical waste, bulk liquid, bulk semiliquid, which is to be treated, processed or recovered in a solid waste disposal facility which is registered with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State.

City of Philadelphia, 437 U.S. at 618-20 nn.1-2 (quoting N.J. ADMIN. CODE tit. 7, § 1-4.2 (Supp. 1977)).

treat them differently.”⁹³ The Court determined that New Jersey’s landfill space was a natural resource and that the state “may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders.”⁹⁴ The Supreme Court, in invalidating the New Jersey legislation, established a rule of virtual per se invalidity for certain commerce clause questions:

[T]he ultimate principle [is] that one state in its dealings with another may not place itself in a position of economic isolation. . . . [W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at the state’s borders. But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach, the general contours of which are outlined in *Pike v. Bruce Church, Inc.*⁹⁵

It is against the backdrop of the *City of Philadelphia* decision that the Eleventh Circuit decided *ChemWaste*. As is necessary in dormant commerce clause analysis, the *ChemWaste* court first addressed whether the Holley Bill erected a barrier to interstate commerce that violated the *City of Philadelphia* test of per se invalidity.

The *ChemWaste* court framed the “crucial inquiry”⁹⁶ presented by this test to be “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.”⁹⁷ The *ChemWaste* court found the Holley Bill protectionist in nature and, thus, per se invalid under *City of Philadelphia*.⁹⁸ The court reached this conclusion by finding that: (1) the Holley Bill was not required for Alabama to comply with SARA’s capacity assurance requirements; (2) the bill placed the total burden of conserving Alabama’s remaining hazardous waste disposal capacity on out-of-state generators; and (3) the failure of the Alabama legislature to ban all out-of-state hazardous waste from entering the state amounted to nothing more than distinguishing hazardous waste based solely on

93. *City of Philadelphia*, 437 U.S. at 626-27.

94. *Id.* at 627.

95. *Id.* at 624.

96. *ChemWaste*, 910 F.2d at 720.

97. *Id.*

98. The district court, upon finding the Holley Bill to regulate evenhandedly and to be based on legitimate local concerns, had applied the *Pike v. Bruce Church* balancing test in finding the bill constitutional. *National Solid Wastes Management Ass’n v. Alabama Dep’t of Env’tl. Management*, 729 F. Supp. 792, 804-05 (N.D. Ala.), *vacated*, *ChemWaste*, 910 F.2d 713 (11th Cir. 1990).

City of Philadelphia speaks in terms of “economic” protectionism, but it seems that the Court is warning against other types of protectionism as well. One scholar has said that a state statute (or regulation, or local ordinance, etc.) should be labeled protectionist if and only if:

(a) the statute (or whatever) was adopted for the purpose of improving the competitive position of local (in-state) economic actors, just because they are local, vis-a-vis their foreign . . . competitors; and (b) the statute (or whatever) is analogous in form to the traditional instruments of protectionism—the tariff, the quota, or the outright embargo.

Regan, *supra* note 56, at 1094-95.

its state of origin.⁹⁹ In reaching its protectionist determination, the Eleventh Circuit failed to see several major distinctions between the New Jersey law struck down in *City of Philadelphia* and the Alabama law in question here. The first major distinction concerns the *ChemWaste* court's conclusion that "[t]he Holley Bill plainly distinguishes among wastes based on their origin, with no other basis for the distinction."¹⁰⁰ This conclusion ignores the fundamental character of each piece of legislation. The New Jersey law invalidated in *City of Philadelphia* banned *all* out-of-state waste from entering New Jersey, and thereby distinguished waste based solely on its state of origin. In contrast, the Holley Bill did not distinguish waste solely on the basis of its state of origin. Rather, any state would be welcome to use the facility if that state met federal guidelines and was willing to join a compact with Alabama. The Holley Bill's distinctions are made upon a state's willingness to comply with the express policy and statutory objectives as forwarded by Congress through SARA. Unlike the New Jersey law in *City of Philadelphia*, the Alabama law banned hazardous waste only from states that chose to avoid taking responsibility for disposal of their own hazardous waste. This distinction is demonstrated effectively by the provision in the Holley Bill requiring a monthly update of the list of states prohibited from shipping waste to Alabama.¹⁰¹ That provision allows any state which chooses both to provide disposal facilities within its borders (or otherwise comply with SARA) and to join an interstate compact with Alabama to ship hazardous waste to Emelle.

Indeed, in *City of Philadelphia* the Supreme Court stated that "whatever [a state's] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State *unless there is some reason, apart from their origin*, to treat them differently."¹⁰² Congress placed the burden on each state to demonstrate its ability to dispose of all hazardous waste produced within its borders over the next twenty years; Alabama's distinctions are based on state boundaries only to the extent that Congress chose to make states the entities responsible for compliance. It is compliance with federal guidelines, not state of origin, that drives Alabama's decisions as to whether or not to accept wastes.

The second major distinction concerns the Eleventh Circuit's finding that the Holley Bill is protectionist because it "discriminates among out-of-state generators and imposes on these generators the burden of conserving Alabama's remaining hazardous waste disposal capacity."¹⁰³ The court's language is drawn from a near-verbatim expression used by the Supreme Court in *City of Philadelphia*.¹⁰⁴ The *ChemWaste* court determined that the Holley Bill was an

99. *ChemWaste*, 910 F.2d at 720.

100. *Id.*

101. *National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management*, 729 F. Supp. 792, 800 (N.D. Ala. 1990), *vacated*, *ChemWaste*, 910 F.2d 713 (11th Cir. 1990). *See supra* notes 28-29.

102. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978) (emphasis added).

103. *ChemWaste*, 910 F.2d at 720.

104. *See City of Philadelphia*, 437 U.S. at 628 ("The New Jersey law . . . imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space.").

attempt by Alabama to hoard its disposal capacity.¹⁰⁵ Again quoting *City of Philadelphia*, the court held that through the legislation Alabama sought to "isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade."¹⁰⁶ Contrary to the court's conclusion, however, Alabama showed no signs of attempting to hoard its disposal capacity. Alabama designed the Holley Bill so that conceivably every state could enter an agreement with Alabama to use the Emelle facility.¹⁰⁷ In contrast, the New Jersey law in *City of Philadelphia* had the avowed goal of conserving the "diminished"¹⁰⁸ landfill capacity in that state by banning *all* out-of-state waste.

In striking down the New Jersey law in *City of Philadelphia* the Supreme Court held that "a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders,"¹⁰⁹ thus refusing New Jersey the right to "isolate itself from a problem common to many."¹¹⁰ The Supreme Court concluded that the landfill space in New Jersey constituted a natural resource.¹¹¹ In contrast, Alabama did not seek to give its citizens a "preferred right of access,"¹¹² nor to "isolate itself from a problem common to many."¹¹³ Alabama sought only to control the disposal capacity within the state to comply with the capacity assurance requirements of SARA. If an exporting state seeks to fulfill its capacity assurance requirement by entering into a compact agreement with another state, the importing state (Alabama) must agree to allocate disposal capacity to the exporting state.

In *ChemWaste* the Eleventh Circuit determined that "SARA places the burden of making capacity assurances . . . on the [hazardous waste] generating state."¹¹⁴ In reaching this conclusion the court failed to realize that the only way for an exporting state to meet its capacity assurance requirement through an interstate agreement is for the importing state to allocate part of the disposal capacity within its borders to the exporting state.¹¹⁵ An interstate agreement is worth little more than the paper on which it is written if the importing state cannot control its disposal capacity to guarantee the exporting state that its waste will not be turned away because a noncompact state has used all the available disposal capacity. As Senator Chaffee noted during legislative debate over SARA, "[m]erely having a plan on paper is insufficient. There must be reason to believe that the assurances are real, that the plan will work."¹¹⁶ Contrary to the court's analysis, the Holley Bill functioned merely to allow Alabama to *allocate*

105. *ChemWaste*, 910 F.2d at 720.

106. *Id.* (quoting *City of Philadelphia*, 437 U.S. at 628).

107. *See supra* note 20 (text of Holley Bill).

108. *City of Philadelphia*, 437 U.S. at 625.

109. *Id.* at 627 (citations omitted).

110. *Id.* at 628.

111. *Id.*

112. *Id.* at 627.

113. *Id.* at 628.

114. *ChemWaste*, 910 F.2d at 721.

115. Alabama unsuccessfully made this argument in its brief to the Eleventh Circuit. Brief of Appellees at 15, *ChemWaste* (No. 90-7047).

116. 132 CONG. REC. S14924 (daily ed. Oct 3, 1986) (statement of Sen. Chaffee).

its disposal capacity in the manner implicitly prescribed by Congress, not to "hoard" its disposal capacity to the detriment of all others.

Furthermore, the Eleventh Circuit's *ChemWaste* conclusion that Alabama sought to isolate itself from the rest of the hazardous waste world is difficult to understand in light of the fact that Alabama has entered a regional agreement to accept waste from other states.¹¹⁷ Alabama participates in the exact type of regional disposal plan Congress envisioned in passing SARA—a regional disposal plan that opens Alabama's hazardous disposal facilities to states that enter an agreement with Alabama. Moreover, the *ChemWaste* court's conclusion that Alabama sought to isolate itself is questionable given that the original list of states banned from shipping waste to Alabama included only twenty-two states.¹¹⁸ Alabama's willingness to accept waste from the twenty-seven remaining states, a majority of the states in the union, hardly rises to the level of "isolationist" behavior.

The Alabama law differs significantly in both purpose and effect from the New Jersey law struck down by the Supreme Court in *City of Philadelphia*. Although *City of Philadelphia* was the appropriate starting point for analysis, the Eleventh Circuit failed to recognize the crucial distinctions that prevent the dormant commerce clause principles set forth in *City of Philadelphia* from striking down the Holley Bill as per se invalid economic protectionist legislation.¹¹⁹

117. The court noted that Alabama entered a regional agreement with Kentucky, South Carolina, and Tennessee. *ChemWaste*, 910 F.2d at 717 n.5. The necessity of such agreements stems from the inability of states to dispose of all the differing types of hazardous waste generated within their borders.

118. *Id.* at 718.

119. The *ChemWaste* court's application of the *City of Philadelphia* decision is also not in keeping with the Supreme Court's subsequent uses of that same decision. The *ChemWaste* court seems to apply the *City of Philadelphia* decision much more rigidly than does the Supreme Court itself.

The Supreme Court has cited the *City of Philadelphia* opinion in 18 subsequent decisions. See *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988) ("[W]hat may appear to be a 'discriminatory' provision in the constitutionally prohibited sense—that is, a protectionist enactment—may on closer analysis not be so. However it be put, the standards for such justification are high." (citing *City of Philadelphia*, 437 U.S. 617, 624 (1978))); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987) ("The principle objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce."); *Maine v. Taylor*, 477 U.S. 131, 148 (1986) ("[S]tate laws that amount to 'simple economic protectionism' consequently have been subject to a 'virtually per se rule of invalidity.'") (quoting *City of Philadelphia*, 437 U.S. at 624); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) ("When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry."); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) ("Where simple economic protectionism is effected by state legislation, a stricter rule of invalidity has been erected."); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (applying the virtual per se invalidity rule to an Alaska law requiring trees cut from state land to be processed within the state); *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983) ("a State may not preserve solely for its own inhabitants natural resources located within its borders"); *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 394 (1983) (comparing *City of Philadelphia* with *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456 (1980), to show an example of economic protectionism); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 224 (1983) (Blackmun, J., concurring in part and dissenting in part) (Protectionist measures are "subject to the rule of virtually per se invalidity established by many of this Court's cases."); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 953 (1982) (finding Nebraska groundwater to be an object of commerce); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982) (A "State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they

The *ChemWaste* court's conclusion that the "Holley Bill discriminates against interstate commerce"¹²⁰ was based on the erroneous assumption that the law was in essence nothing more than economic protectionism ineffectively disguised as environmental protection legislation. With this erroneous assumption in mind, the Eleventh Circuit relied solely on the *City of Philadelphia* test to analyze the Holley Bill.¹²¹ The court perceived its choice to be between finding the legislation per se invalid or applying the *Pike v. Bruce Church* balancing test¹²² intended for analysis of state statutes that regulate "evenhandedly."¹²³ By narrowing the focus to a choice between the *Pike v. Bruce Church* balancing test or the per se invalidity rule, however, the *ChemWaste* court completely ignored the strict scrutiny standard of review. The strict scrutiny test is the standard of review that the Supreme Court applies to state laws that discriminate against interstate commerce but are enacted to effect a legitimate local concern.¹²⁴ Application of the "strict scrutiny" standard of review would have alleviated any need for the *ChemWaste* court to address the *Pike v. Bruce Church* balancing test, because any state law that can withstand strict scrutiny under dormant commerce clause analysis likewise will pass the more lenient *Pike v. Bruce Church* balancing test. By failing to apply the strict scrutiny standard and analyze the Holley Bill under its guidelines, the Eleventh Circuit struck down a constitutionally sound piece of legislation.

The strict scrutiny standard of review applies two questions to a challenged state law: (1) does the statute serve a legitimate and compelling state interest; and (2) could this purpose be served as well by available nondiscriminatory means.¹²⁵ In concluding that the *Pike v. Bruce Church* test should not be applied to the Holley Bill, the Eleventh Circuit gave only brief consideration to Alabama's avowed local purposes for the statute. The appellate court, however, should have taken a closer look at this first prong of the "strict scrutiny" test.

are required to satisfy local demands or because they are needed by the people of the State") (citation omitted)); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618 (1981) (citing *City of Philadelphia* as a "discrimination" case); *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652 (1981) ("Even in the absence of congressional action, the courts may decide whether state regulations challenged under the Commerce Clause impermissibly burden interstate commerce."); *Kassell v. Consolidated Freightways Corp.*, 450 U.S. 662, 686 (1981) (noting that the Court has condemned "simple . . . protectionism" in the economic area); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981) ("If a state law purporting to promote environmental purposes is in reality 'simple economic protectionism,' we have applied a 'virtually per se rule of invalidity.'") (quoting *City of Philadelphia*, 437 U.S. at 624); *Reeves, Inc. v. Stake*, 447 U.S. 429, 443 (1980) (finding cement, unlike New Jersey landfill space, not a natural resource); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980) (citing *City of Philadelphia* as an example of a case applying dormant commerce clause principles); *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (state regulation that "overtly blocks the flow of interstate commerce at [the] State's borders" is discriminatory (quoting *City of Philadelphia*, 437 U.S. at 624)).

120. *ChemWaste*, 910 F.2d at 721.

121. See *supra* notes 39-50 and accompanying text.

122. See *supra* note 67.

123. *ChemWaste*, 910 F.2d at 720.

124. *National Solid Wastes Management*, while arguing that it should not apply in this case, recognized the strict scrutiny test in its brief to the Eleventh Circuit. See Brief of Appellants at 10, *ChemWaste* (No. 90-7047). Apparently agreeing with appellant's argument, the Eleventh Circuit never addressed this test in its decision.

125. *Maine v. Taylor*, 477 U.S. 131, 138 (1986); see *supra* notes 60-65 and accompanying text.

Alabama argued that it passed the Holley Bill with two local purposes in mind: to allow the state to comply with the capacity assurance requirements of SARA and to protect public health, safety and welfare.¹²⁶ The legislative findings that prefaced the Holley Bill offered the same justifications.¹²⁷ In *ChemWaste*, however, the Eleventh Circuit determined that the Holley Bill had

126. Brief of Appellees at 16, *ChemWaste* (No. 90-7047).

127. The legislative findings that prefaced the Holley Bill read:

Sec. 1. The legislature finds that:

(1) The generation, management, and disposal of hazardous wastes is a cause of continuing concern to the citizens of this state;

(2) The State of Alabama has a responsibility to protect the public health, welfare, and safety of its citizens by and through the enactment of laws designed to protect and preserve the environment from the health risks and endangerments associated with the treatment and disposal of hazardous wastes;

(3) The United States Congress, recognizing the serious health threats and risks posed by the treatment and disposal of hazardous wastes to public health and the environment, enacted the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") 42 U.S.C. 9604(c)(9), as amended, which requires that each state by October 17, 1989, that is [sic] has adequate capacity to treat, destroy, or secure disposition of all hazardous waste reasonably expected to be generated within the state over the next 20 years through the establishment of a hazardous waste treatment or disposal facility located within its borders, or through the use of a hazardous waste treatment or disposal facility located outside the state in accordance with an interstate agreement or regional agreement authority;

(4) In enacting the capacity assurance requirements, Congress recognized that local pressures have impeded the siting of new hazardous waste treatment and disposal in the nation in the past several years, and if the Federal Resource Conservation and Recovery Act as amended ("RCRA") and CERCLA are to work properly, such additional sites must be made available. Since Alabama is already bearing far more than its fair share of the burden of managing hazardous wastes, it is only equitable that new capacity be developed in other states which have failed to assume their own obligations to sister such facilities.

(5) Both Congress and the U.S. Environmental Protection Agency have recognized that the capacity assurance provisions of CERCLA would be used to force the development of new capacity to manage hazardous wastes. 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;

(6) The State of Alabama has enacted and implemented an approved program for the handling and disposal of hazardous wastes within its borders, known as the "Hazardous Waste Management and Minimization Act," and has established regulations and guidelines for the treatment, storage, and disposal of all hazardous wastes generated within the state, and continues to evaluate and update those regulations and guidelines;

(7) The State of Alabama, since 1978, has had an adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the state over the next 20 years through their establishment and continued existence of commercial hazardous waste facilities within the state;

(8) The State of Alabama has, since 1978, accepted for treatment and disposal, disproportionate amounts of hazardous wastes generated within the borders of other states which have not taken steps to provide the assurance required by 42 U.S.C. § 9604(c)(9);

(9) 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;

(10) The State of Alabama lacks the financial resources and trained personnel necessary to cope with the serious dangers and risks associated with the transportation within this state of the ever-increasing volumes of hazardous wastes generated out of state, and, as

no direct connection to Alabama's ability to participate fully in and comply completely with the SARA capacity assurance requirements.¹²⁸ Noting that SARA provides the state with three options for satisfying its capacity assurance requirement,¹²⁹ the court surmised that "[i]f Alabama's capacity assurance plan depends on capacity provided by a commercial, privately owned management facility such as Emelle, the state should contract with the private facility for that capacity, instead of blocking the private facility from accepting wastes from other states."¹³⁰

The Eleventh Circuit adopted ChemWaste's argument that the capacity assurance requirements of SARA place the burden on the exporting state to prove to the EPA that it can accommodate adequately all the hazardous waste produced within its borders in the next twenty years.¹³¹ Extrapolating this argument a bit further, one can conclude only that while Congress has expressly authorized the states to enter regional interstate agreements for the disposal of hazardous waste, a state need not and cannot limit the amount of waste received by the facilities within its borders, nor may the importing state commit that disposal capacity to the other states in its regional agreement. The Eleventh Circuit impliedly agreed that, even though the importing state must *allocate* capacity to the exporting state in order for the exporting state to meet its capacity

a consequence, it can no longer adequately insure the safety and protection of its citizens from these hazards;

(11) While the use of landfills for the disposal of hazardous wastes is presently an approved method of hazard[ous] waste management, the federal and state governments are implementing phased bans on land disposal and CERCLA describes the landfilling of wastes as the least desirable regulatory technology;

(12) The State of Alabama has a genuine and significant interest in protecting its citizens and its environment from the unencumbered influx of hazardous waste generated in states which do not responsibly provide for the treatment, storage, and disposal of hazardous wastes within their own borders or which refuse to enter into an interstate or regional agreement to share the responsibilities of safe and effective hazardous waste management as required by CERCLA, as amended;

(13) The State of Alabama is compelled by the actions of other states which refuse to responsibly provide for hazardous waste treatment, storage, and disposal within their borders or fail to cooperate in an interstate or regional plan for hazardous waste management, to enact legislation establishing a comprehensive waste management program in compliance with CERCLA, and which safeguards against the irresponsibility of other states which do not have adequate hazardous waste management programs by prohibiting the treatment, storage, or disposal of hazardous waste in Alabama which are generated in a state which does not allow hazardous waste treatment or disposal facilities within that state or which has not entered into an interstate or regional agreement to assure availability of hazardous waste treatment or disposal facilities.

(14) 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 Congress in enacting Section 42 U.S.C. § 9604(c)(9), and will have the beneficial effect of reducing, in an orderly manner, the nation's dependency on landfilling as a methodology for disposing of hazardous wastes.

ALABAMA ACT NO. 89-788 (1989).

128. *ChemWaste*, 910 F.2d at 720.

129. *Id.* "[A]labama may satisfy its capacity assurance requirements by any combination of 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." *Id.* (citations omitted).

130. *Id.*

131. *See* Brief of Appellants at 4-10, *ChemWaste* (No. 90-7047).

assurance requirement,¹³² the importing state neither needs nor deserves to have any control over the disposal capacity within its borders. Acceptance of this argument reduces the SARA capacity assurance requirements to little more than congressional babble. Under this theory, an importing state need only "promise" to provide disposal capacity to an exporting state, but may do nothing to ensure that the disposal capacity will be available once the out-of-state hazardous waste trucks arrive at the dumping ground door.

For Alabama to participate in and comply with SARA capacity assurance requirements, it must allocate to other states a portion of its hazardous waste disposal capacity; in return that state must allocate to Alabama part of the hazardous waste disposal capacity. Only then will the states be assured that they can dispose of *all* their domestically produced hazardous waste. A state statute that seeks to allow a state to comply with the express wishes of Congress serves a legitimate local purpose and satisfies the first prong of the "strict scrutiny" test.

In addition to allowing the state to comply with SARA, Alabama offers a second compelling state interest for the Holley Bill—protection of the health and safety of its citizens and the state's environment. Courts will always look behind the stated justification for legislation and make determinations regarding a law's true purpose based on its effect.¹³³ However, the Supreme Court has voiced a deferential standard when reviewing state laws aimed at protecting the health and safety of the state's citizens.¹³⁴ The Supreme Court has held that state power to regulate commerce is greatest when the state is addressing health and safety matters:¹³⁵ "[I]f safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce. Those who would challenge such bona fide safety regulations must overcome a 'strong presumption of valid-

132. The Department of Justice concedes this much (though perhaps inadvertently) in its brief by stating that "an exporting state must obtain an importing state's agreement that it will allocate capacity." *Id.* at 8.

133. In *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), the Supreme Court recognized that it is appropriate for the Court to look behind the stated justification for legislation and to determine its true purpose based on its effect. The Court said:

[To accept] that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods.

Id. at 354.

In *Dean Milk*, the Court invalidated on commerce clause grounds a Wisconsin statute regulating the sale of milk because the statute was determined to erect an economic barrier protecting a major local industry from out-of-state competition. *Id.* at 356. Wisconsin sought to justify the statute on health and safety reasons. *Id.* at 353-54.

In *Hughes v. Oklahoma*, 441 U.S. 322 (1979), the Supreme Court said: "[W]hen considering the purpose of a challenged statute, this Court is not bound by '[t]he name, description or characterization given it by the legislature or the courts of the State,' but will determine for itself the practical impact of the law." *Id.* at 336 (quoting *Lacoste v. Louisiana Dep't of Conservation*, 263 U.S. 545, 550 (1924)). *Hughes* involved an Oklahoma law prohibiting minnows seined or procured within the waters of Oklahoma from being sold out-of-state. The law was invalidated as an unconstitutional restraint on interstate commerce. *Id.* at 325.

134. See *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 443 (1978) (holding that regulations enacted to promote public health and safety are granted particular deference).

135. *Kassel v. Consolidated Freightways, Corp.*, 450 U.S. 662, 670 (1981).

ity.'"¹³⁶ Added to this presumption of validity is the Court's recognition that:

Not all intentional barriers to interstate trade are protectionist, however, and the Commerce Clause "is not a guaranty of the right to import into a state whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community." Even overt discrimination against interstate trade may be justified where . . . out-of-state goods or services are particularly likely for some reason to threaten the health and safety of a State's citizens or the integrity of its natural resources.¹³⁷

In making its health and safety argument, Alabama called attention to the dramatic increase in the amount of hazardous waste shipped to the Emelle facility over the last ten years.¹³⁸ The Emelle facility received less than 200 million pounds of hazardous waste in 1978. By 1985 that figure had grown to 682 million pounds, and estimates projected that figure to increase to 1.6 billion pounds of hazardous waste by 1989.¹³⁹ Moreover, Alabama argued that the presence of trucks hauling hazardous waste across the state's highways has increased the risk of accidents and injury.¹⁴⁰

ChemWaste countered Alabama's contentions by arguing that out-of-state wastes and in-state wastes present identical health and safety concerns and that any attempt to justify the Holley Bill on health and safety grounds must therefore fail.¹⁴¹ This argument is drawn from the reasoning in *City of Philadelphia*, in which the Supreme Court refused to recognize any distinctions between the harms caused by domestic and foreign waste after it is placed in a landfill site.¹⁴²

There can be no disagreement about the serious threat hazardous waste poses to both humans and the environment.¹⁴³ As defined by Congress,¹⁴⁴ hazardous waste is a product that may "cause[] or significantly contribute to an increase in mortality or an increase in serious or irreversible, or incapacitating reversible, illness."¹⁴⁵ Alabama's concerns over the dangers associated with hazardous waste transportation are well grounded,¹⁴⁶ and the potential for mass disaster is ever present. Even though hazardous waste disposal facilities are gen-

136. *Id.* (citations omitted) (emphasis added).

137. *Maine v. Taylor*, 477 U.S. 131, 148 n.19 (1986) (citation omitted).

138. Brief of Appellees at 16-17, *ChemWaste* (No. 90-7047).

139. *Id.*

140. *Id.* at 29.

141. Brief of Appellants at 10-12, *ChemWaste* (No.90-7047).

142. 437 U.S. 617, 629 (1978).

143. The July 14, 1989, issue of the Environmental Law Reporter contained the results of a survey of U.S. and Canadian actuaries (who make economic, social, and statistical evaluations for the insurance industry of financial implications of future events). That survey revealed that actuaries believe chemical wastes will pose the greatest threat to public health and generate the greatest environmental cost to society by the turn of the century. 20 Env't Rep. (BNA) 539-40 (July 14, 1989).

144. See *supra* note 3.

145. 42 U.S.C. § 6903(5)(a), (b) (1988).

146. From 1980 to 1988 (including only preliminary figures for 1988) there were 106,859 accidents involving hazardous waste transportation. Those accidents (which include combined figures for all types of transport) accounted for 121 deaths and 2907 injuries. STATISTICAL ABSTRACT OF THE UNITED STATES 598 (110th ed. 1990).

erally located in rural areas,¹⁴⁷ the dangers associated with transportation are related to the number of miles hazardous waste haulers must travel and the volume of waste being shipped into any one state.¹⁴⁸

The Eleventh Circuit in *ChemWaste* ignored the deferential standard accorded state health and safety regulations and found the Holley Bill to be nothing more than a protectionist wolf wrapped in the sheep's clothing of environmental protection. The court of appeals found that the Holley Bill could not be justified on health and safety grounds because "Alabama did not ban the shipment of all hazardous wastes into the state, but only shipments from certain states."¹⁴⁹

The *ChemWaste* court suggested that the state law in question is unconstitutional because, when passing the law, Alabama failed to draft the legislation in a *clearly unconstitutional* fashion. In other words, the *ChemWaste* court implied that the Alabama law cannot be aimed at legitimate health and safety reasons because the law does not prevent *all* hazardous waste from coming into Alabama. However, such a complete ban clearly would be unconstitutional under *City of Philadelphia* and under the Supreme Court's previous decisions in various transportation cases.¹⁵⁰ Considering that the *ChemWaste* court found the

147. Emelle exemplifies this phenomenon. Location of such facilities in rural sites is seemingly a function of the lack of political clout residents in small communities possess and the obvious health and safety fears of transporting hazardous waste in more populous areas.

It has also been noted that hazardous waste sites in poor, rural counties are entering the Superfund program at only one half the rate of sites in counties nationwide. 20 Env't Rep. (BNA) 1961 (April 13, 1990). However, once a rural site is placed on the National Priorities List, cleanup work proceeds at about the same pace as cleanup at other sites. *Id.*

148. The great irony in defending the health and safety aspects of the Alabama law is that if each state would comply with the expressed wishes of Congress and site disposal facilities within its borders and/or enter into regional or interstate agreements to manage the disposal of hazardous waste, there would be no need for states (other than those in a compact agreement with Alabama) to ship waste to Alabama. The Eleventh Circuit noted that prior to release of the list of states the Holley Bill prohibited from exporting hazardous waste to Alabama, forty-eight states were shipping waste to the Emelle facility. *ChemWaste*, 910 F.2d at 715. Such irresponsibility creates a hazard not only for Alabama, but for every state that the hazardous waste must traverse before reaching Alabama. Compliance with CERCLA would make it unlikely that a state would have to go outside its region to dispose of hazardous waste, and, accordingly, no state would be exposed to any more risk than is absolutely necessary for safe disposal of these caustic byproducts.

149. *Id.* Though not cited by the court, this holding seems based largely on the reasoning offered by the Seventh Circuit in *Illinois v. General Electric Co.*, 683 F.2d 206 (7th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983). In *General Electric*, the Seventh Circuit held an Illinois statute banning importation of all spent nuclear fuel to be violative of the commerce clause. *Id.* at 214. Writing for the Seventh Circuit, Judge Posner found the Illinois transportation safety argument "unconvincing because it allows intrastate shipments, and even interstate shipments so long as they are not for the purpose of storage in Illinois." *Id.*

In its brief, *ChemWaste* sought to emphasize the reasoning of the *General Electric* decision by noting that not only does Alabama permit intrastate and interstate shipments of hazardous waste, but Alabama, unlike Illinois, will also accept waste from all states not prohibited by the Holley Bill from shipping waste to Alabama. This argument neither proves nor adds anything to *ChemWaste's* contention. Whether hazardous waste is crossing Alabama to get to the Emelle facility or crossing Alabama to get to Florida, Mississippi, South Carolina, Georgia, etc., it is still crossing Alabama. Alabama's willingness to accept waste from certain states does not prove that the Holley Bill was not promulgated partially for health and safety reasons.

150. See, e.g., *Kassell v. Consolidated Freightways Corp.*, 450 U.S. 662, 677-79 (1981) (invalidating on commerce clause grounds an Iowa law prohibiting trucks of a certain length from entering the state).

Holley Bill (with its partial ban on importation based on lack of compliance with SARA) unconstitutional, it is unlikely that same court would have upheld a state law that not only prohibited *all* other states from disposing of their hazardous waste in Alabama, but also prohibited *all* hazardous waste from even entering Alabama. To say that the Holley Bill is unconstitutional because it does not take a form that would be clearly unconstitutional, or does not have companion legislation that is clearly unconstitutional, leaves Alabama with no acceptable means for addressing its health and safety concerns. The court seems to be mandating that Alabama either attempt to pass a clearly unconstitutional law, or pass no law at all. Such a "Hobson's choice" would leave Alabama with no viable legislative alternative through which to protect Alabama citizens.

The court of appeals' reasoning is equally troubling because it fails to recognize Alabama's need to comply with SARA. The *ChemWaste* court realized that for states to comply with SARA, they must enter interstate agreements with other states; it is neither financially feasible nor necessary for every state to provide facilities for disposal of every type of hazardous waste.¹⁵¹ Despite this recognition, the court implied that the only law that could be justified by health and safety reasons would be one that bans importation of all out-of-state waste. Thus, if Alabama hopes to offer health and safety protections to its citizens, the state either must build disposal facilities to accommodate all its domestically produced hazardous waste or simply choose not to comply with SARA. This court-forced option blatantly contradicts Congress's desire that a state be able to meet its capacity assurance requirement by joining interstate or regional agreements.

The Eleventh Circuit found it untenable that Alabama could offer health and safety justifications for the Holley Bill yet still allow interstate and intrastate shipments of hazardous waste. Indeed, were there no other considerations involved, it is unlikely that Alabama could refute this argument successfully. Alabama's position, however, is sound given the other constitutional and unavoidable constraints faced by the state legislature.

First, Alabama could not ban all intrastate movement of hazardous waste. Unless every hazardous waste producer in Alabama has on-site disposal facilities, there is no solution but to allow those producers to transport their waste to a licensed disposal facility. A state must be permitted to accommodate disposal of all domestically produced hazardous waste; such disposal necessarily involves intrastate shipments of the hazardous material.

Second, in order to comply with the capacity assurance mandates of SARA, Alabama must be allowed to enter regional compacts with other states for the disposal of hazardous waste—and such compacts, by their nature, involve a mutual agreement to accommodate waste. A ban on all out-of-state waste would automatically remove Alabama from SARA compliance. For a court to require a state to fail to comply with the mandates of federal law would allow that court

151. *ChemWaste*, 910 F.2d at 717.

to substitute its policy judgment for that of Congress. The Eleventh Circuit cannot expect Alabama to ignore its obligation to comply with SARA.

Finally, the argument that continuing to allow interstate shipments of hazardous waste to cross Alabama to disposal facilities in other states negates the health and safety features of the Holley Bill may look appealing on its face, but, in reality, the argument has little relevance. It is true that Emelle was accepting waste from forty-eight states before passage of the Holley Bill,¹⁵² but most of the waste shipped to Emelle came from a very few states.¹⁵³ To ban importation of waste from states not in compliance with SARA or not in a compact with Alabama means that the waste from those states is unlikely to enter or pass through Alabama. As with any region of the country, the waste most likely to traverse Alabama on its way to another state's disposal facility is waste produced by other states in that region. Those states, if the Holley Bill is allowed to stand, are soon likely to enter a waste disposal compact with Alabama. Hazardous waste from Philadelphia is unlikely to be transported through Alabama on its way to New Jersey, and Alabama is unlikely to find waste haulers from Arizona cruising down the interstate highway on their way to California. By encouraging other states to enter interstate hazardous waste disposal agreements, the Holley Bill would have a direct and positive impact on the amount of waste that both enters Alabama and crosses Alabama headed to other disposal destinations.

In sum, Alabama, through the Holley Bill, attempted to do everything constitutionally permissible to protect the health and safety of its citizens while still meeting the SARA capacity assurance requirements set by Congress. Additionally, by accepting hazardous waste from other states in its compact, Alabama sought to protect the health and safety of its citizens by providing the state with access to disposal facilities that handle the types of hazardous waste that Alabama is presently unable to accommodate internally. The desire to comply with SARA and the health and safety factors accompanying hazardous waste disposal are sufficiently legitimate local purposes. The Holley Bill therefore satisfies the first prong of the strict scrutiny test under the dormant commerce clause.

The second prong of the strict scrutiny test examines whether a state law provides the least discriminatory method for effectuating its legitimate local concerns.¹⁵⁴ The analysis of the compelling state interest behind the law already has made it clear that the Holley Bill satisfies this second prong.

The second tier of strict scrutiny analysis does not require that the legislation be nondiscriminatory; it requires only that the state enact legislation that is the least discriminatory means available for achieving the local-purpose ends. The only way Alabama could comply with SARA while still protecting its citizens from the dangers associated with being a hazardous waste dumping ground was to close its borders to those states that are content to export their problems elsewhere while ignoring their responsibility under CERCLA. It would be impossible, impractical, and unconstitutional for Alabama to close its borders to all

152. *Id.* at 715.

153. *See infra* note 157.

154. *See supra* notes 66-67 and accompanying text.

hazardous waste.¹⁵⁵ Conversely, it would be impossible for Alabama both to comply with SARA and to protect the health and safety of its citizens without closing its borders to at least some waste. The Holley Bill represents a compromise that serves local, state, and national interests regarding hazardous waste management. It protects the health and safety of its citizens by rejecting only those states that choose to be rejected by their failure to comply with federal law.

Nothing illustrates the least-discriminatory nature of the Holley Bill more effectively than the district court's factual determination that the Holley Bill would affect only three-tenths of one percent of America's toxic waste.¹⁵⁶ Since some of that hazardous waste comes from states that have either complied with SARA or have entered a compact with Alabama, the total amount of waste impacted by the Holley Bill is less than three-tenths of one percent of all hazardous waste produced annually.¹⁵⁷ A law that ensures a state's ability to comply with federal legislation and allows that state to offer additional health and safety protections to its citizens while impacting such a small amount of the nation's total annual hazardous waste output fits well within the "least discriminatory means" test under strict scrutiny analysis.¹⁵⁸

Even if one were to concede, given the confused nature of commerce clause jurisprudence,¹⁵⁹ that the Holley Bill is protectionist or discriminatory, and therefore fails strict scrutiny analysis, Alabama still has one final "string to [its] bow"¹⁶⁰—implied Congressional authorization. It is a well-accepted commerce clause principle that Congress can authorize a state to take regulatory measures that otherwise would be unconstitutional.¹⁶¹ If Alabama passed the Holley Bill pursuant to such implied congressional authorization, then the bill is valid despite any impact it may have on interstate commerce.

155. See *supra* text accompanying notes 149-53.

156. National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management, 729 F. Supp. 792, 797 (N.D. Ala.), *vacated*, *ChemWaste*, 910 F.2d 713 (11th Cir. 1990). The Eleventh Circuit did not refute this lower court finding.

157. After passage of the Holley Bill, the impact of the legislation was downplayed by a ChemWaste spokesperson when he said:

I don't think in the long run that [the Holley Bill] will affect volumes at Emelle all that much, although that's very difficult to say with precision. . . . We're a very big operation. As a practical matter, only four states (of the 22 banned) will be affected. And the total (from all 22 states and the District of Columbia) is less than 100,000 tons a year, with the overwhelming amount coming from Florida, Mississippi, North Carolina and Virginia.

Brief of Appellees at 34, *ChemWaste* (No. 90-7047). North Carolina subsequently entered the compact. See *infra* note 167. The amount coming from Mississippi was only two percent of that state's annual total. Brief of Appellees at 34 n.12, *ChemWaste* (No. 90-7047).

158. That such a small amount of the nation's hazardous waste is affected by the Holley Bill does not lessen Alabama's justification of the bill on health and safety grounds. For purposes of the strict scrutiny test under the commerce clause, the impact of the bill on interstate commerce can be measured only by looking at its overall national impact. However, the ability of the legislation to improve health and safety conditions for Alabama residents can be determined only by looking at the amount of waste actually entering Alabama.

159. See *supra* note 58.

160. Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 44 (1980); see *supra* note 68 and accompanying text.

161. See *supra* notes 69-71 and accompanying text.

In *ChemWaste* the Eleventh Circuit recognized that "[w]here 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,"¹⁶² but the court found no such congressional authorization for the Holley Bill. Looking for an "expressly stated" and "unmistakably clear"¹⁶³ authorization by Congress, the court concluded that "[i]f Congress intended to allow the states to restrict the interstate movement of hazardous wastes as Alabama has tried to do, Congress could (and still can) plainly say so."¹⁶⁴

The primary purpose behind section 104(c)(9) of SARA is to encourage states to site new hazardous waste disposal facilities.¹⁶⁵ Prior to the passage of SARA, the states, despite producing ever increasing amounts of hazardous waste, were not siting new hazardous waste treatment and disposal facilities. The public pressure brought to bear by the "not-in-my-backyard" syndrome¹⁶⁶ makes it politically unwise for states to proceed with plans for accommodating domestically produced waste, particularly when those states can ship their hazardous waste to their more responsible neighbors.¹⁶⁷ Congress recognized that

162. *ChemWaste*, 910 F.2d at 721 (quoting *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983)). The court further acknowledged that "'Congress may redefine the distribution of power over interstate commerce by permitting the states to regulate the commerce in a manner which would otherwise not be permissible.'" *Id.* (quoting *South-Central Timber Dev. Inc. v. Wunnicke*, 467 U.S. 82, 87-88 (1984)).

163. *Id.* (quoting *Wunnicke*, 467 U.S. at 91).

164. *Id.* at 721-22.

165. See 42 U.S.C. § 9604 (1988); *infra* text accompanying notes 174-79.

166. See *supra* note 6.

167. North Carolina is an excellent case in point. A large producer of hazardous waste, North Carolina chose for years to ship most of its waste to disposal facilities in Alabama and South Carolina. It was only when those states threatened to close their borders to North Carolina waste that the state began to move toward siting its own hazardous waste disposal facility.

On October 17, 1989, the Governors of Alabama, South Carolina, Tennessee, and Kentucky entered into an interstate agreement entitled "SARA Capacity Assurance Agreement." Brief of Appellees at 4, *ChemWaste* (No. 90-7047). North Carolina entered the agreement on November 8, 1989. Mississippi, North Carolina, Florida, and Georgia were not initial signatories to the agreement, but were eligible to become members. *Id.*

Entering the interstate compact failed to solve North Carolina's problems. North Carolina agreed to build a hazardous waste incinerator as part of an interstate agreement with Alabama, Kentucky, South Carolina, and Tennessee. However, the state faced tremendous public opposition to the proposed locations for the hazardous waste incinerator. The opposition was so intense and protracted (the North Carolina legislature first created a panel charged with locating and building a hazardous waste disposal facility in the state in 1984), that the state's Hazardous Waste Management Commission finally proposed in December 1990 (just prior to the December 31, 1990 deadline the state faced for applying for a permit to build the facility pursuant to the multi-state agreement) to locate the incinerator on state-owned farmland in eastern North Carolina. *Id.*, Dec. 17, 1990, at 8A, col. 1. However, that proposal was rejected by North Carolina's Council of State, which must approve of the disposition of state property. *Id.*, Dec. 14, 1990, at 1A, col. 1. The North Carolina Council of State consists of the state's Governor, Lieutenant Governor, Attorney General, Secretary of State, Commissioner of Agriculture, Commissioner of Labor, State Auditor, State Superintendent of Public Instruction, State Treasurer, and the Commissioner of Insurance. The vote regarding siting the facility on state property was seven to two against, with only the state's Governor and Lieutenant Governor (the only two Republicans on the Council) voting in favor (the Commissioner of Insurance was absent from the vote). *Id.* at 17A, col. 1. The state legislature could override this vote, but was not scheduled to convene until after the December 31, 1990 deadline had passed.

In response to this result, North Carolina Governor James G. Martin remarked:

Who's going to have the standing to sit down with those four neighboring governors and persuade them that, even though we've never done anything responsible for our own waste

the Superfund program would not succeed unless states took steps to ensure adequate facilities for proper disposal of their hazardous waste and thereby avoid creating new sites in need of Superfund cleanup. Congress sought to effectuate creation of such disposal facilities through SARA.

The language of the SARA siting amendment expressly places upon every state the responsibility for assuring that it can safely dispose of all hazardous waste produced within its borders during the next two decades.¹⁶⁸ As noted, a state may accomplish this either by providing adequate disposal capacity independently, or by entering an interstate or regional agreement for disposal.¹⁶⁹

Additionally, the legislative history accompanying SARA leaves no questions about the intended purpose of the siting amendment.¹⁷⁰ In March 1985, a

in 10 years, that somehow if you'll just give us one more chance, we'll come up with the courage and the fortitude and the ability to meet that responsibility?

Id. at 1A, col. 4. In explaining their vote against siting the incinerator on state property, several Council members stated that the process used by the state's Hazardous Waste Management Commission to select the site was flawed, and that the proposed site had several existing problems. *Id.* at 17A, col. 1.

In response to this result, South Carolina Governor Carroll A. Campbell, Jr. announced that his state would bar the shipment of hazardous wastes from North Carolina into South Carolina if North Carolina failed to meet the December 31 deadline for siting a facility. *Id.* South Carolina notified North Carolina on December 17, 1990, that the ban would begin on January 1, 1991. *Id.*, Dec. 18, 1990, at 1A, col. 5.

On December 21, 1990, U.S. District Court Judge Matthew Perry issued a 10-day temporary restraining order barring South Carolina from closing its borders to North Carolina's hazardous waste. The temporary restraining order was sought by the Hazardous Waste Treatment Council and ThermalKEM, Inc. (owners of a hazardous waste disposal facility in Rock Hill, South Carolina). In issuing the order Judge Perry expressed concern that South Carolina's actions would violate the commerce clause. The Charlotte Observer, Dec. 22, 1990, at 1B, col. 5.

On December 31, 1990, Judge Perry extended the temporary restraining order an additional 10 days, keeping South Carolina hazardous waste disposal facilities open to North Carolina waste at least through January 10, 1991. The News and Observer (Raleigh), Jan. 3, 1991, at 3B, col. 3. South Carolina remains determined to block waste from North Carolina. As a spokesperson for South Carolina Governor Campbell said, "The lawyers are huddling. The fight is on." *Id.* at 3B, col. 4.

On December 17, 1990, Alabama notified North Carolina that the state would be barred from shipping hazardous waste to the Emelle facility beginning January 1, 1991. *Id.*, Dec. 17, 1990, at 1A, col. 1. Alabama based its authority to ban waste from North Carolina on the Holley Bill and Alabama's continuing challenge to the *ChemWaste* decision. As of January 3, 1991, Alabama had taken no steps to implement its threatened ban of North Carolina waste that was to begin on January 1, 1991. *Id.*, Jan. 3, 1991, at 3B, col. 3.

In response to these threats, North Carolina Attorney General Lacy Thornburg said that the state would consider legal action to challenge such bans. *Id.* at 1A, col. 2.

Of all the hazardous waste North Carolina industries shipped out of state in 1988, 51% went to South Carolina, 13% went to Alabama, and the remaining 36% went to 25 other states. *Id.*, Dec. 18, 1990, at 1A, col. 5.

168. 42 U.S.C. § 9604(c)(9)(A) (1988).

169. *Id.* § 9604(c)(9)(B).

170. For recent examples of scholarly works addressing the use of legislative history in statutory interpretation, see Farber & Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988); Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1 (1988); Tribe, *Judicial Interpretation of Statutes: Three Axioms*, 11 HARV. J.L. & PUB. POL'Y 51 (1988); Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U.L. REV. 277 (1990).

Judge Wald notes that the "basically sensible approach" employed by the courts when using legislative history is now "under heavy attack from the Supreme Court." Wald, *supra*, at 279. One of the sharpest critics of the current method of employing legislative history is Justice Scalia, who seems to support a "textualist" view for statutory interpretation. See *id.* at 281-82.

Senate committee noted the need for the "creation of new [hazardous waste treatment] facilities employing the most advanced waste management technologies,"¹⁷¹ and further stated the obvious requirement that "sites on which these facilities can operate must be found and made available."¹⁷² While other congressional reports offer the same rationale for the amendment,¹⁷³ the most telling statements come from the sponsor of the siting amendment, Senator Chaffee of Rhode Island. In September 1985 Senator Chaffee echoed the need for additional safe disposal facilities by commenting that "[t]he broad social need for safe hazardous waste management facilities often has not been strongly represented in the siting process. . . . [I]f the RCRA and Superfund Programs are to work—if public health and the environment are to be protected—the necessary sites must be available."¹⁷⁴ On the day the SARA amendments passed the Senate, Senator Chaffee unequivocally stated that "[t]he objective of the siting amendment is to force states to provide safe and adequate facilities for toxic and hazardous waste."¹⁷⁵

Once the congressional purpose behind SARA is established, it is incumbent upon Alabama to show that the Holley Bill serves to implement that purpose. The Holley Bill, by prohibiting importation of hazardous waste from states that do not meet SARA capacity assurance requirements or have adequate domestic disposal facilities, would force those states to take steps to site hazardous waste disposal facilities in order to participate in interstate or regional disposal agreements.¹⁷⁶ Siting such disposal facilities would serve to implement directly the legislative purpose behind SARA.

North Carolina is an excellent example of a state that began in earnest the process of siting a hazardous waste disposal facility because of the potential impact of the Holley Bill. North Carolina was on the original list of states banned by the Holley Bill from exporting waste to Alabama.¹⁷⁷ For years North Carolina, one of the larger hazardous waste producers in the nation,¹⁷⁸ had chosen to ship its waste elsewhere rather than fight the political battle of siting a facil-

171. S. REP. NO. 11, 99th Cong., 1st Sess. 22 (1985).

172. *Id.*

173. See H. REP. NO. 253(I), 99th Cong., 1st Sess. 22 (1985), reprinted in 1985 U.S. CODE CONG. & ADMIN. NEWS 2835. Issued by the House Energy and Commerce Committee, the report addresses the need for the legislation by stating: "The current reauthorization [of CERCLA], coming when it does, forces Congress to face a very fundamental policy question: how to ensure in the future that there are adequate resources, and to see that past, thoroughly repudiated, mismanagement problems are behind us." *Id.* at 55.

See also JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. 194 reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 3276, 3287 (urging the importance of assuring the availability of hazardous waste treatment or disposal facilities with adequate capacity to accommodate the wastes expected to be generated within the state).

174. 131 CONG. REC. S11568 (daily ed. Sept. 17, 1985) (comments of Senator Chaffee).

175. 132 CONG. REC. S14924 (daily ed. Oct. 3, 1986) (comments of Senator Chaffee).

176. Brief of Appellees at 15-16, *ChemWaste* (No. 90-7047).

177. See *supra* note 29.

178. In 1987 North Carolina generated 2.8 billion pounds of hazardous waste. Price, *Toxic Waste Is Big Business and Big Headaches in Mecklenburg County*, BUS. J. (CHARLOTTE), December 19, 1988, at 17.

ity.¹⁷⁹ The lack of a disposal facility had prevented North Carolina from being able to enter the original southeastern regional hazardous waste disposal agreement.¹⁸⁰ Passage of the Holley Bill spurred North Carolina to agree to site a disposal facility,¹⁸¹ and, based solely on this promise to provide a facility, North Carolina became a signatory to the regional hazardous waste disposal agreement.¹⁸²

It has been argued that, rather than having a positive impact on the siting of hazardous waste disposal facilities, state legislation like the Holley Bill will lead to a "civil war" among the states over hazardous waste disposal.¹⁸³ However, such results have failed to materialize.¹⁸⁴ In an amicus brief presented by the Hazardous Waste Treatment Council (HWTC) on behalf of ChemWaste, the HWTC cites an Executive Order issued by the Governor of South Carolina banning the importation of hazardous waste from North Carolina and certain other states¹⁸⁵ as the first shot in this impending "civil war."¹⁸⁶ Actions such as

179. See *supra* note 167.

180. The original signatories to the agreement were Alabama, South Carolina, Tennessee, and Kentucky.

181. North Carolina has faced stiff opposition to the siting of a disposal facility. See *supra* note 167.

182. Brief of Appellees at 22, *ChemWaste* (No. 90-7047).

183. See Brief of Amicus Curiae Hazardous Waste Treatment Council at 9, *ChemWaste* (No. 90-7047).

184. The current conflict between North Carolina and South Carolina and Alabama had its genesis in North Carolina's inability to site a hazardous waste disposal facility as North Carolina had promised to do when it entered the multi-state compact. The conflict is not based on anything even closely resembling a "civil war." Indeed, South Carolina and Alabama openly welcomed North Carolina into their regional hazardous waste disposal compact. See *infra* text accompanying note 190.

185. The Executive Order issued by Governor Carroll Campbell on July 6, 1989,

Bars any one state from sending more than 10,000 tons of waste per quarter, or 35,000 tons a year, to South Carolina . . . [s]tipulates that 20 percent of the 135,000 tons must be pretreated to reduce its volume and toxicity, increasing to 25 percent in 1990 and 30 percent in 1991; and . . . [f]orces GSX officials [a specific disposal facility located in Pinewood, S.C.] to reserve room every year for 54,000 tons of hazardous waste from South Carolina—or 40 percent of the waste that can be buried there annually. If, however, officials from the Department of Health and Environmental Control calculate during the last three months of any year that the state's industries will not need that much space, [the facility] can allow other states to use the capacity.

20 Env't Rep. (BNA) 542 (July 14, 1989).

This order followed a January order by Governor Campbell that closed the GSX landfill to hazardous waste from states such as North Carolina and Florida—states South Carolina felt had refused to bury the same kinds of hazardous waste within their borders. *Id.*

At the same time that the July 6 order was signed, South Carolina removed North Carolina and Florida from its list of states banned from shipping waste to South Carolina. A spokesman for Governor Campbell said that the decision to allow North Carolina to again ship waste to South Carolina was a result of North Carolina's decision to move forward with the process of opening a hazardous waste treatment facility of its own. The North Carolina legislature had passed a law in May 1989 that gave the state's Hazardous Waste Treatment Commission the power to site a hazardous waste disposal facility, and also gave the Governor the power to negotiate agreements with neighboring states to share the management of hazardous waste. *Id.* at 543.

In addition to the Executive Orders signed by South Carolina's Governor, the South Carolina legislature amended state law to provide for limits much like those imposed by the Holley Bill. The South Carolina legislature amended § 44-56-130 of the 1976 code by adding:

(4) It is unlawful for any person who owns or operates a waste treatment facility within this State to accept any hazardous waste generated in any jurisdiction which prohibits by law the treatment of that hazardous waste within that jurisdiction or which has not

those taken by the Governor of South Carolina will not serve to undermine CERCLA's goal of creating a national hazardous waste policy. Granted, legislation like the Holley Bill may inspire other "dumping ground" states to pass similar legislation, but such legislation serves to strengthen the congressional objective of seeing more hazardous waste disposal facilities sited. Again, North Carolina is by far the best example of a state that, because it could no longer ship its waste to a neighboring state, finally took long-delayed action toward accommodating its domestically produced hazardous waste.¹⁸⁷ Although North Carolina has encountered significant obstacles in getting a hazardous waste disposal facility sited,¹⁸⁸ those problems have all been internal and unrelated to any action taken by either Alabama or South Carolina.¹⁸⁹ In fact, North Carolina Governor James G. Martin stated that while the other southeastern states were establishing tough conditions to ensure that North Carolina would do its part in a regional disposal compact, they had "also demonstrated a true spirit of cooperation in working to include North Carolina rather than keep us out."¹⁹⁰

The lack of a current "civil war" is further demonstrated by the fact that three of the ten states joining Ohio in an amicus brief presented on behalf of Alabama in *ChemWaste* were on the original Holley Bill "blacklist" issued by Alabama.¹⁹¹ There simply is no evidence presented to support the contention that limited bans on importation of hazardous waste endanger the SARA

entered into an interstate or regional agreement for the safe treatment of hazardous waste pursuant to the federal Comprehensive Environmental Response, Compensation and Liability Act. Written documentation demonstrating compliance with this item must be submitted to the department before the transportation of any hazardous waste into the State for treatment.

(5) It is unlawful for any person who owns or operates a waste storage facility within this State to accept any hazardous waste generated in any jurisdiction which prohibits by law the storage of that hazardous waste within that jurisdiction or which has not entered into an interstate or regional agreement for the safe storage of hazardous waste pursuant to the federal Comprehensive Environmental Response, Compensation and Liability Act. Written documentation demonstrating compliance with this item must be submitted to the department before the transportation of any hazardous waste into the State for storage.

(6) It is unlawful for any person who owns or operates a waste disposal facility within this State to accept any hazardous waste generated in any jurisdiction which prohibits by law the disposal of that hazardous waste within that jurisdiction or which has not entered into an interstate or regional agreement for the safe disposal of hazardous waste pursuant to the federal Comprehensive Environmental Response, Compensation and Liability Act. Written documentation demonstrating compliance with this item must be submitted to the department before the transportation of any hazardous waste into the State for disposal.

S.C. CODE ANN. § 44-56-130 (Law. Co-op. Supp. 1989) (amended by 1989 S.C. ACTS 196 § 9).

186. Brief of Amicus Curiae Hazardous Waste Treatment Council at 9, *ChemWaste* (No.90-7047).

187. North Carolina officials readily admit that legislation banning export of North Carolina hazardous waste to Alabama and South Carolina was the turning point in North Carolina's decision to site its own facility. See Brief of Appellees at 22-23, *ChemWaste* (No. 90-7047).

188. See *supra* note 167 and accompanying text.

189. See *id.*

190. Brief of Appellees at 23, *ChemWaste* (No. 90-7047).

191. Ten states joined Ohio in submitting an amicus in support of Alabama. Joining Ohio were Arizona, Illinois, Indiana, Louisiana, Nebraska, Nevada, New Mexico, North Carolina, South Carolina, and Utah. See Brief of Amicus Curiae and Motion for Leave to Participate in Oral Argument Submitted By the State of Ohio, *ChemWaste* (No. 90-7047). Of these, Arizona, New Mexico, and North Carolina were on the original Alabama "blacklist." See *supra* note 29.

goals.¹⁹²

The *ChemWaste* court erred in finding that the SARA siting amendments do not impliedly authorize the Holley Bill. The court looked no further once it failed to find "expressly stated" and "unmistakably clear" congressional authorization. By terminating its analysis so quickly, the court failed to give proper consideration to the overall objective of and policy implications behind SARA.

The *ChemWaste* court was correct when it called for congressional authorization for state legislation to be "unmistakably clear," and, indeed, the Supreme Court has been slow to find congressional authorization for state regulatory activity that impacts interstate commerce. However, under the circumstances, the *ChemWaste* court applied that "expressly stated" and "unmistakably clear" standard too rigidly in determining whether SARA impliedly authorizes the Holley Bill. The Supreme Court has explained that "[t]here is no talismanic significance to the phrase 'expressly stated.'" ¹⁹³ The Court has determined that the requirement embodied by the "expressly stated" standard is that "congressional intent must be unmistakably clear."¹⁹⁴ In *ChemWaste* the Eleventh Circuit took a firm but flexible standard for determining the existence of congressional authorization and applied it rigidly, thereby frustrating the federal policy interests advanced by the Holley Bill.

The Supreme Court has said that the "unmistakably clear" standard may be met through implied congressional authorization. In *South-Central Timber Development v. Wunnicke*, the Court stated: "express authorization is not always necessary. There will be instances . . . where federal policy is so clearly delineated that a state may enact a parallel policy without explicit congressional approval, even if the purpose and effect of the state law is to favor local interests." ¹⁹⁵

A year before *South-Central*, the Supreme Court had acknowledged its acceptance of implied congressional approval in *White v. Massachusetts Council of Construction Employers, Inc.*¹⁹⁶ In *White* the Court applied a market partici-

192. The *ChemWaste* court, in a footnote, dismissed Alabama's use of North Carolina as an example of the positive effect of the Holley Bill. The court stated that "we reject defendants' argument that this activity legitimates Alabama's attempts to enforce the federal capacity assurance requirements set out in section 109(c)." *ChemWaste*, 910 F.2d at 721 n.10.

193. *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 91 (1984). In *South-Central Timber*, the Supreme Court invalidated an Alaska law requiring that all trees cut from state lands be partially processed in Alaska prior to export. *Id.* at 92-93. Alaska argued that a federal law requiring the equivalent treatment for all trees cut off federal lands had impliedly authorized a similar state action. *Id.* at 89.

194. *Id.* at 91. The full text of the Court's defining statement in *South-Central* reads:

There is no talismanic significance to the phrase "expressly stated," however; it merely states one way of meeting the requirement that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear. The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine.

Id. at 91-92.

195. *Id.* at 88 (quoting lower court opinion, *South Central Timber Dev. v. Le Resche*, 693 F.2d 890, 893 (9th Cir. 1982)).

196. 460 U.S. 204 (1983).

pant analysis¹⁹⁷ to an executive order issued by the Mayor of Boston requiring all construction projects funded in whole or in part by city funds or by funds

197. Through the market participant theory the Supreme Court has upheld state regulatory action that might otherwise have been invalid under the dormant commerce clause. The market participant theory comes into play when a state favors local or in-state interest in choosing its trading partners.

The Supreme Court first embraced the market participant theory in *Hughes v. Alexandria Scrap*, 426 U.S. 794 (1976). In *Hughes*, the Court upheld a Maryland program in which the state, to encourage the recycling of abandoned cars, provided subsidies to in-state and out-of-state scrap processors for each Maryland-titled hulk destroyed. The state had imposed stricter requirements on out-of-state scrap processors than on in-state processors. See *id.* at 800-01. The Court found that the State of Maryland "has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price." *Id.* at 806. "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 810.

The market participant theory was again applied by the Court in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). *Reeves* involved an attempt by South Dakota to limit in times of shortage sales from a state-owned cement plant solely to South Dakotans. *Id.* at 432-33. The Court upheld the selective selling by South Dakota, noting the "'long recognized right'" of private traders to choose their own trading partners. *Id.* at 438-39 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). The Court also noted the "foresight, risk, and industry" of the state in undertaking such an enterprise. *Id.* at 446.

The Court again applied the market participant theory in *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983).

In two more recent decisions the Supreme Court has declined to apply the market participant exception to state regulation. In *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82 (1984), the Court struck down an Alaska state statute that required buyers of state-owned timber to have the timber processed in Alaska prior to shipment outside the state. In *New Energy Co. v. Limbach*, 486 U.S. 269, 272 (1988), the Court invalidated an Ohio statute designed to encourage the production and use of gasohol by providing a tax credit for each gallon of ethanol sold against the fuel tax otherwise payable on gasoline and gasohol sales. Ohio refused the tax credit to producers in any state that did not afford a reciprocal tax credit to Ohio producers. *Id.* The Court held that taxing activity "cannot plausibly be analogized to the activity of a private purchaser." *Id.* at 278.

For an in-depth look at the market participant theory, see Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989).

The most salient aspect of the market participant theory in terms of the issue addressed by this Note is that the theory has been applied by some lower courts to allow states and local government entities essentially to bypass the Supreme Court's holding in *City of Philadelphia*. The *City of Philadelphia* opinion seemed to leave open this possibility through footnote six of that opinion, which stated that the Court chose not to "express [its] opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state-owned resources; or New Jersey's power to spend state funds solely on behalf of state residents and businesses." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 n.6 (1978) (citations omitted).

Four recent decisions illustrate the application of the market participant theory to state attempts to limit waste disposal at state-owned facilities. In *Lefrancois v. Rhode Island*, 669 F. Supp. 1204 (D.R.I. 1987), the district court attempted to answer the "question left unanswered in *City of Philadelphia*." *Id.* at 1208. Drawing on earlier Supreme Court decisions holding that "a State or local government is not subject to the restrictions of the Commerce Clause when it acts as a 'market participant' as opposed to a 'market regulator,'" *id.* at 1208 (citing *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976)), the district court allowed Rhode Island to prevent the dumping of out-of-state waste at a state-subsidized central landfill. *Id.* at 1212.

The court drew a distinction between a market in landfill services and landfill sites, and distinguished *City of Philadelphia* on the grounds that the New Jersey statute would have closed that state's markets in both waste processing (a service) and landfill sites (a natural resource) because it applied to both public and private landfills. *Id.* at 1211-12. The Rhode Island statute did not "preclude any party, in-state or foreign, from purchasing property upon which to construct a sanitary landfill open to all waste regardless of origin." *Id.* at 1211.

In making the service/site distinction, the *Lefrancois* court cited the Supreme Court ruling in *Reeves*. Noting that cement is "the end product of a complex process whereby a costly physical plant and human labor act on raw materials," the *Reeves* Court allowed South Dakota to give prefer-

that the city had authority to administer be performed by a work force consisting of at least half Boston residents, and found the order did not violate the commerce clause. The Supreme Court agreed with Boston's argument that the executive order was authorized by federal legislation and found the order to be "affirmatively sanctioned" by the regulations accompanying the legislation.¹⁹⁸ The Supreme Court further offered that the mayor's action "sounds a harmonious note" with the federal legislation involved.¹⁹⁹ In *ChemWaste* the court erred in failing to examine the Holley Bill in light of the policies expressly and impliedly forwarded by SARA.

By failing to look for implied congressional authorization of the Holley Bill, the *ChemWaste* court also ran afoul of the Supreme Court's stated policy against interpreting statutes in a manner that will provide unreasonable results.²⁰⁰ The Supreme Court has said that "interpretations of a statute which would produce absurd results are to be avoided if *alternative interpretations consistent with legislative purpose are available*."²⁰¹ The results that flow from the *ChemWaste*

ence to its own citizens because the state was merely a market participant and thus fit the exception to the commerce clause. *Id.* at 444-47.

Three years prior to *Lefrancois*, the Court of Appeals of Maryland had also attempted to answer the question left unanswered in footnote six of *City of Philadelphia*. In *County Commissioners v. Stevens*, 299 Md. 203, 473 A.2d 12 (1984), the Maryland court held that the county was acting as a market participant in landfill services; therefore, the dormant commerce clause did not apply. This allowed the county to ban disposal of waste generated outside the county. *Id.* at 219-20, 473 A.2d at 20-21. This court also relied heavily on the distinction between a market for disposal services and a market for disposal sites, and (as in *Lefrancois*) focused on the fact that the county only closed its landfill to outside waste, it did not close its borders to anyone wanting to build and operate a landfill.

Essentially the same question arose in *Evergreen Waste Systems v. Metropolitan Service District*, 820 F.2d 1482 (9th Cir. 1987). The court found that a county ordinance banning disposal of foreign-produced waste did not fit the paradigm of a per se violation of the commerce clause because the ordinance did not block the flow of interstate commerce at the State's borders. *Id.* at 1484. The court then proceeded to apply the *Pike v. Bruce Church* balancing test to the statute to determine if it violated the commerce clause. The court found that the statute was evenhanded, effected a legitimate local public purpose, and that the burden on interstate commerce was merely incidental and not excessive when compared with the putative local benefit. *Id.* at 1484-85.

A final example of this commerce clause exception appears in *Shayne Bros. v. District of Columbia*, 592 F. Supp. 1128 (D.D.C. 1984). Again, the same basic question was raised, and the court answered it by making the market participant distinction. The court was favorable to *County Commissioners v. Stevens*, finding the Maryland court's analysis apposite to the considerations before them. *Id.* at 1134.

The question remains whether the market participant theory will provide an exemption to state attempts to limit the disposal of foreign hazardous waste at state owned facilities. As noted earlier, see *supra* note 89, the ability of a state to provide facilities to dispose of all types of hazardous waste produced is unlikely. The cost of providing such physical plants is prohibitive in most cases; more importantly, the need to do so is obviated by the ability to enter interstate hazardous waste disposal agreements. Still, had Alabama owned the Emelle facility, the market participant theory would seem to provide an exemption and allow Alabama to limit trade to the partners of its choice.

Another question raised by the market participant theory involves quasi-public hazardous waste disposal facilities. For example, some states, like North Carolina, play a significant role in choosing and approving the site for privately owned disposal facilities. To the extent that such involvement, along with continuing regulation and oversight, makes the disposal facility quasi-public, the question arises whether the Court would apply the market-participant exemption in such situations.

198. *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 215 (1983).

199. *Id.* at 213.

200. See *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) (stating that "[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible").

201. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (emphasis added).

court's interpretation of SARA can be classified as nothing other than absurd. The *ChemWaste* court invalidated Alabama legislation that would have enabled Alabama to comply with the express statutory wishes of Congress while at the same time encouraging other states to provide hazardous waste disposal facilities. The *ChemWaste* court's conclusion means that, although Congress authorized the states to enter interstate and regional compacts for the disposal of hazardous waste, those agreements mean little because all other states not in the compact can still ship their waste. The responsible states that join a compact and site disposal facilities within their borders are left with no means to stop noncompact states from exporting hazardous waste to their disposal facilities, and thus there is no incentive for any state to site a new or additional hazardous waste disposal facility. The only option apparently left open by the *ChemWaste* court is for a state to ban importation of all hazardous waste—an option that in itself would seem to invite a commerce clause challenge,²⁰² and would also prevent that state from joining interstate disposal agreements such as those expressly authorized by Congress.²⁰³ The *ChemWaste* decision leaves Alabama with an all-or-nothing choice that directly contradicts both express and implied congressional policy.

In *ChemWaste* the Eleventh Circuit had a duty to interpret the Alabama statutes in a manner that is most compatible with the purposes of the federal legislation involved.²⁰⁴ That duty, combined with the general deference accorded state statutes aimed at health and safety,²⁰⁵ provided the court ample justification to find the Holley Bill sufficiently authorized by Congress.

The *ChemWaste* court attempts to support the determination that there is no implied congressional authorization for the Holley Bill through one footnote²⁰⁶ in which the court cites *Wisconsin Department of Industry, Labor and Human Relations v. Gould*²⁰⁷ for the proposition that states may not impose penalties on conduct already penalized under federal legislation. *Gould* involved an attempt by the state of Wisconsin to bar certain repeat violators of the National Labor Relations Act (NLRA) from doing business with the state. The Supreme Court overturned the Wisconsin statute, finding that the NLRA had largely displaced state regulation of industrial relations.²⁰⁸ The *ChemWaste* court's reliance on *Gould* is misplaced. The *Gould* Court was addressing a state attempt to regulate activity in an area in which regulatory authority had been usurped by Congress. In contrast, the Holley Bill addresses an area of regulatory activity in which Congress not only expects but requires state involvement.

202. See *supra* notes 149-50 and accompanying text.

203. 42 U.S.C. § 9604(c)(9) (1988).

204. See, e.g., *Commissioner of Internal Revenue v. Engle*, 464 U.S. 206, 217 (1984) (stating that the Supreme Court's duty in interpreting statutory language is "to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with general purposes that Congress manifested" (quoting *N.L.R.B. v. Lion Oil Co.*, 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part))).

205. See *supra* notes 134-37 and accompanying text.

206. *ChemWaste*, 910 F.2d at 721 n.10.

207. 475 U.S. 282, 286 (1986).

208. *Id.*

From its inception CERCLA has provided for state involvement in the hazardous waste regulation process. SARA also envisions an increasing role for the states in this area.²⁰⁹ Additionally, in *Gould* the Supreme Court sought to avoid conflicts between state and federal law.²¹⁰ In contrast, the Holley Bill is state legislation that parallels and seeks to coexist with federal legislation in a combined effort to reach the same end.²¹¹

The *ChemWaste* court found that SARA provides the exclusive "sanction" for states that fail to comply with SARA capacity assurance requirements, and that Alabama cannot apply the Holley Bill as an additional "sanction" on those states.²¹² The SARA sanction identified by the *ChemWaste* court is the EPA's power, upon a state's failure to meet its capacity assurance requirements, to withhold Superfund money for remedial cleanup activity within that state.²¹³ The Eleventh Circuit deemed this an effective remedy, noting that "almost every state [has] at least one site on [the Superfund National Priorities List]."²¹⁴ Whether one considers SARA to dangle a Superfund-money carrot before the states to entice them to comply, or threatens the states with a no-Superfund-money stick if they fail to comply, the reality of the *ChemWaste* court's decision is to break the carrot/stick in half.²¹⁵

Clearly, the Superfund program does not work as envisioned.²¹⁶ The *ChemWaste* court would have overstepped its authority had it found that because Congress passed a statute that provides an insufficient and ineffective sanction, the court must allow the states to provide an additional sanction. The *ChemWaste* court, however, should have found that Congress, in passing an amendment to CERCLA, did not consider withholding Superfund money for remedial measures as the exclusive method for encouraging states to comply with the goals of the amendments. Congress passed SARA because CERCLA was not working properly. Considering the tremendous amount of information

209. See 42 U.S.C. § 6926(b) (1988) (allowing a state to administer its own hazardous waste program).

210. *Gould*, 475 U.S. at 286.

211. The *ChemWaste* court noted that in the Low-Level Radioactive Waste Policy Act, 42 U.S.C. §§ 2021b-j (1982 & Supp. V 1987), Congress specifically authorized states that enter a multi-state disposal compact to ban importation of waste from noncompact states. *ChemWaste*, 910 F.2d at 722 n.12 (citing 42 U.S.C. § 2021e(e)(2), (f)(1)). Apparently the Eleventh Circuit believes this inclusion in one federal statute and absence in another to be a case of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another). However, the irrational result that follows such an interpretation seems to make this more a case of *expressio eorum quae tacite insunt nihil operatur* (the expression or express mention of those things which are tacitly implied avails nothing).

212. *ChemWaste*, 910 F.2d at 721.

213. See *supra* note 90 and accompanying text. The EPA's authority to withhold money applies only to a remedial cleanups in a state. Noncomplying states remain eligible for emergency cleanup funds. 42 U.S.C. § 9604(c)(9)(b) (1988).

214. *ChemWaste*, 910 F.2d at 721 n.11.

215. For the purpose of subsequent discussion this Note will use the *ChemWaste* court's description and refer to the SARA provisions regarding Superfund money as a "sanction."

216. A 1989 report issued by the U.S. Senate Environment and Public Works Subcommittee on Superfund, Ocean, and Water Protection stated that "EPA's implementation of Superfund has, in general, failed to meet public expectations and mandates of the law." 20 Env't Rep. (BNA) 108 (May 12, 1989).

about Superfund that is available to Congress²¹⁷ and the congressional recognition that states were not providing needed hazardous waste disposal facilities, it is unlikely that Congress, in trying to correct the deficiencies of CERCLA, contemplated that states could not likewise take action to force other states to comply with SARA.²¹⁸

The Superfund program has experienced a number of problems. Withholding Superfund money as a sanction offered very little incentive for the states to meet the capacity assurance requirements. During the first six years of the Superfund program, very few hazardous waste sites were cleaned up.²¹⁹ The program also has experienced political abuses and manipulations.²²⁰ The cleanups cost far more than was expected,²²¹ and the \$8.6 billion provided by SARA falls dismally short of the estimated \$100 billion needed to clean up all the abandoned hazardous waste sites.²²² The current NPL has targeted just over 1000 sites for cleanup,²²³ but EPA estimates place the number of potentially contaminated sites at over 30,000.²²⁴ Though SARA allows the EPA to recover money

217. Eleven House and nine Senate committees oversee the EPA, making the agency subject to review by nearly 100 separate committees and subcommittees. In 1989, EPA officials testified before Congress nearly 150 times. Additionally, Congress requests over 100 reports or studies from EPA each year. Adams & Cox, *The Environmental Shell Game and the Need for Codification*, 20 *Envtl. L. Rep. (Envtl. L. Inst.)* 10367 (September 1990).

218. CERCLA expressly provides that it does not preempt any state from imposing additional liability requirements regarding the release of hazardous substances. 42 U.S.C. § 9614(a) (1988).

Additionally, CERCLA provides that it does not affect a state's ability to redress mismanagement of hazardous waste under state law, including common law. 42 U.S.C. § 9652(d) (1988).

219. See *supra* note 216.

220. See *supra* note 85 and accompanying text.

221. A good example of the tremendous cost associated with cleaning up Superfund sites is the \$11.6 million it cost to clean up the only private residence on the National Priorities List (NPL). Completed on June 19, 1989, the residence had been contaminated by radioactivity from a college professor's radium experiments more than 40 years earlier. The final cost was more than double the \$4.5 million estimate when the Landsdowne, Pa. home property was first placed on the NPL in 1985.

The project involved tearing down the two-family house and two neighboring garages, and digging up and disposing of 4000 tons of contaminated soil. 20 *Env't Rep. (BNA)* 474 (June 23, 1989).

222. Note, *Superfund Amendments and Reauthorization Act of 1986: Limiting Judicial Review to the Administrative Record in Cost Recovery Actions by the EPA*, 74 *CORNELL L. REV.* 1152 n.3 (1989) (citing H.R. REP. NO. 253(I), 99th Cong., 2d Sess., pt. 1, at 55 (1988)). SARA required the EPA to begin new cleanup work at 175 NPL sites by October 17, 1989, and the EPA met that deadline by beginning work at 178 NPL sites. The addition of cleanup activity at 178 sites brought the total number of NPL sites being cleaned up to 254. SARA also required the EPA to begin at least 275 new cleanup studies by the same October date. EPA surpassed this requirement by beginning 318 studies. Despite meeting these increased activity deadlines, the EPA still has money problems. President Bush asked Congress to appropriate \$1.75 billion for Superfund for fiscal 1990, but that amount was cut by \$200 million. Across-the-board budget cuts that went into effect October 16, 1989, cut an additional \$77 million from Superfund. All told, the EPA expected its cleanup budget for 1990 to be 25% less than the agency's 1989 budget. 20 *Env't Rep. (BNA)* 1135-36 (Nov. 3, 1989).

The EPA's general operating budget in 1981 was \$1.95 billion and had grown to only a proposed \$2.15 billion by 1991. 20 *Env't Rep. (BNA)* 1802 (Feb. 23, 1990). Such a small increase may call into question the EPA's ability to monitor hazardous waste storage facilities and address violations with appropriate sanctions.

223. As of October 1989, the NPL was expected to contain 1194 sites when finalized. 20 *Env't Rep. (BNA)* 1015-16 (Oct. 6, 1990).

224. 19 *Envtl. L. Rep. (Envtl. L. Inst.)* 10388 (Sept. 1989) (citing *ENVIRONMENTAL PROTEC-*

spent on cleanups, the government has, to date, recovered little of the public funds spent on cleanup.²²⁵ The states themselves have varying numbers of hazardous waste sites on the national priorities clean-up list,²²⁶ and thus some states will serve to gain handsomely from the program and others will benefit only minimally if at all.²²⁷ Further, EPA may periodically remove a site from the NPL without taking action,²²⁸ or halt the process of placing additional sites on the NPL because of changing classification criteria.²²⁹ Having a site listed does not guarantee a state that the site will remain on the list, that the EPA will have enough money to clean up the site once it finally gets to it, or that there will not be additional costs continuing long after the initial clean-up work has been completed.²³⁰ Additionally, many states face major expenditures for cleanup of dangerous hazardous waste sites, whether or not they meet their capacity assurance requirement. North Carolina, for example, has approximately 900 abandoned hazardous and toxic waste disposal sites in need of treatment,²³¹ but has only twenty-three sites on EPA's National Priorities List.²³² Also, many states have

TION AGENCY, ENVIRONMENTAL PROGRESS AND CHALLENGES: EPA'S UPDATE 93-94 (Aug. 1988) (#EPA-230-07-88-033).

225. Since passage of SARA in 1986, EPA has referred to the Justice Department only three unilateral suits against responsible parties to compel them to pay for the cleanup. At the end of January 1989, EPA had recovered a total of \$126 million, or only 2.9% of the total amount spent under Superfund to that date. 20 Env't Rep. (BNA) 108 (May 12, 1989).

226. See 40 C.F.R. Part 300, App. B (1989).

227. The *ChemWaste* court notes that withholding Superfund remedial money seems to work because "almost every state had at least one site on the [National Priorities] list." *ChemWaste*, 910 F.2d at 721 n.11.

An EPA report released May 12, 1989, found that the top 50 hazardous waste generators in the United States, out of a total of 21,728 hazardous waste generators, produce 80% of all hazardous waste produced annually. Thus, less than 5% of hazardous waste generators accounted for almost all the nation's annual hazardous waste production. The report only discussed RCRA-regulated hazardous waste. Another 300 million metric tons of hazardous waste are generated annually, but are exempt from RCRA and are regulated under the Clean Water Act. 20 Env't Rep. (BNA) 149 (May 19, 1989).

228. For example, a Pennsylvania landfill site that had been placed on the National Priorities List in July 1987 was removed from the NPL in March 1990 without any cleanup having occurred. The site had been placed on the list because of its potential effects on the area's drinking water, but the EPA subsequently decided that the landfill posed no immediate threat to human health or the environment. 20 Env't Rep. (BNA) 1868 (Mar. 16, 1990).

On September 29, 1989, the EPA, in announcing the addition of 93 hazardous waste sites to the NPL, also announced that it was removing 31 sites from the NPL because they did not score high enough under the agency's new hazard ranking system. 20 Env't Rep. (BNA) 1015-16 (Oct. 6, 1989).

229. In June of 1990, the EPA's program for listing new NPL sites "stopped in its tracks" until the Office of Management and Budget cleared a new system for ranking sites. At that time the EPA had not listed any new sites since October 1989, and then only a small number of sites had been listed. 21 Env't Rep. (BNA) 416-17 (June 29, 1990).

230. Several states and chemical manufacturers have filed challenges to the SARA national contingency plan. The dispute centers on the question of who should pay for the long-term operation and maintenance of treatment facilities once the remedial cleanup at a Superfund site is completed. The states contend that CERCLA obligates the federal government to pay for 90% of the costs during the first 10 years of cleanup, leaving the remaining 10% to the states. However, the states contend that the EPA's revised national contingency plan excludes some types of operation and maintenance costs from the cost-sharing policy, thus requiring the states to bear those costs. 21 Env't Rep. (BNA) 340 (June 15, 1990).

231. The News and Observer (Raleigh), Oct. 4, 1990, at 1B, col. 5.

232. See 40 C.F.R. Part 300, App. B (1989) (listing the North Carolina sites on the NPL at the time of the *ChemWaste* decision).

their own "mini-Superfunds" to address clean-up needs within their borders,²³³ and thus are already preparing to bear some of the financial burden of hazardous waste cleanup. If a state can continue to ship its hazardous waste to any other state with a disposal facility, that exporting state may very well choose to do so, preferring to handle the hazardous waste clean-up problem on its own and avoiding the political tensions that accompany attempts to site a disposal facility. Because the sanction provided for in SARA does not limit a state's ability to receive Superfund money for emergency cleanup,²³⁴ exporting states have little incentive to clean up their acts and accommodate their own waste. Finally, Superfund money is designated only for hazardous waste sites that pose a threat to human health,²³⁵ leaving cleanup of the numerous abandoned sites in the country that pose a threat to natural resources to the states, further removing a state's incentive to comply with SARA solely to get Superfund money.

In short, Superfund is a program that to date has not worked properly, and Congress is well aware of the problem.²³⁶ Because Congress has recognized and attempted to address these problems; it is inconceivable that Congress would have considered the program itself to be sufficient incentive to the states to meet their capacity assurance requirement. Congress, by denying Superfund money for remedial cleanups to the states that fail to meet their capacity assurance requirement, did not intend to preclude all state action designed to encourage other states to comply with SARA. The threatened cutoff of Superfund money failed to offer sufficient incentive for the states to comply, and also failed in its attempt to serve as an effective sanction. In *ChemWaste* the Eleventh Circuit Court of Appeals erred in holding that Congress intended to provide the exclusive sanction, and the court should have upheld the Holley Bill as an impliedly authorized and permissible attempt by Alabama to help achieve the will of Congress.

The decision in *National Solid Wastes Management Association v. Alabama Department of Environmental Management* does nothing to dispel the assertion by Justice Scalia that commerce clause jurisprudence "make[s] no sense."²³⁷ This decision serves to make the state of Alabama the "dumping ground" for any other state that prefers to export its hazardous waste problems rather than

233. For example, Pennsylvania has established a Hazardous Sites Cleanup Fund. PA. STAT. ANN. tit. 35, § 6020.901 (Purdon Supp. 1990). Unlike CERCLA, the Pennsylvania statute also authorizes money from the fund to go toward cleanup of sites that pose a threat to natural resources. *Id.* § 6020.902(a)(7); see also Brief of Amicus Curiae and Motion for Leave to Participate in Oral Argument Submitted by the State of Ohio at 22, *ChemWaste* (No. 90-7047) ("many states now have huge multi-million dollar funds which allow them to conduct site cleanups independent of financing from the federal Superfund").

234. See *supra* note 90.

235. Under the EPA's current scoring method used to evaluate a potential Superfund site, no site may be placed on the NPL solely because it threatens an ecological system. 20 Env't Rep. (BNA) 1372 (Dec. 8, 1989). A June 1989 study released by the EPA's Office of Policy, Planning and Evaluation noted that the agency lacks a clear policy on managing ecological risks from Superfund sites. The study found that up to 5300 hazardous waste sites awaiting action under Superfund may pose significant environmental threats. *Id.*

236. See *supra* note 217.

237. *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232, 259-60 (1987) (Scalia, J., concurring in part and dissenting in part).

deal with them in a forthright and expedient manner. In the process, the decision completely undermines the attempt by Congress to rectify this problem through the SARA amendments. Surely a constitution that will allow the state of Maine to ban totally the importation of out-of-state live bait fish for health and safety reasons²³⁸ will also allow the state of Alabama to place a limited ban on out-of-state hazardous waste, when that ban serves to protect the health and safety of the state's citizens while also helping to effectuate clear congressional policy regarding hazardous waste. Rather than being forced to swim alone in a pool filled with the hazardous waste of its neighbors, Alabama should be allowed to do those things necessary to ensure that in the long run every state's pool is equally full, that every state is taking a swim, that every state bears its share of the health and safety burden, and that prosperity and salvation indeed do come to all.

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238. *Maine v. Taylor*, 477 U.S. 131 (1986). Alabama Attorney General Don Siegelman used this summation in his brief to the federal district court. Brief of Attorney General Don Siegelman in Support of Defendants' Motion for Summary Judgment, *National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management*, 729 F. Supp. 792 (N.D. Ala. 1990) (No. CV89-G-1722W).