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"NO HAZARDOUS WASTE ALLOWED": A REVIEW OF THE CONSTITUTIONAL ISSUES RAISED BY SOUTH CAROLINA'S RESTRICTIONS ON OUT-OF-STATE HAZARDOUS WASTE

By ETHAN R. WARE[1]

Several years ago South Carolina undertook a campaign to restrict or ban out-of-state hazardous wastes from crossing state lines. The State used a variety of statutes, regulations, and executive orders to accomplish its objectives. The United States District Court for the District of South Carolina struck down these restrictions on constitutional grounds in *Hazardous Waste Treatment Council v. South Carolina.*[2]

This article addresses the constitutional law issues raised by the South Carolina restrictions on out-of-state hazardous waste. The objective is to define the scope of the hazardous waste program in South Carolina, analyze the restrictions on outside hazardous waste in light of six substantive provisions of the United States Constitution, and set forth the boundaries of legitimate restraints on interstate transportation, treatment, storage, and disposal of hazardous waste.

I. INTRODUCTION

Hazardous waste is a part of the American way of life. The United States Environmental Protection Agency (EPA) has stated that on average every family in the United States generates about 3.5 tons of hazardous waste each year.[3] Additionally, United States industries generate between 229 and 280 metric tons of hazardous waste per year and spend about $11 billion annually to treat, store, and dispose of those

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[2] 766 F. Supp. 431 (D.S.C.), *aff'd in part, remanded in part*, 945 F.2d 781 (4th Cir. 1991) (the Fourth Circuit upheld the District Court's opinion with respect to all provisions of the South Carolina hazardous waste restrictions, except the needs requirement).

[3] Despite this figure, "household wastes" are expressly exempt from the definition of hazardous waste under South Carolina and federal regulations. S.C. CODE REGS. 61-79-261.4(b)(1) (1989). This is true even though household wastes may contain the same or greater concentrations of hazardous constituents as industrial wastes.

hazardous wastes.[4]

This abundance of hazardous waste has caused one of the great concerns of the 1990s: the proper place to treat or dispose of hazardous waste. No state wants to be labeled the nation's hazardous waste dumping ground, and some are aggressively fighting that label.[5] South Carolina is no exception.

Three facilities in South Carolina have permits to commercially treat, store, or dispose of hazardous waste. The largest facility is Laidlaw Environmental Services, Inc. (Laidlaw) in Pinewood, South Carolina. Laidlaw is one of the few permitted commercial hazardous waste landfills in the United States.[6] The other two South Carolina facilities, ThermalKEM, Inc. and Thermal Oxidation Corporation, are hazardous waste incinerators.[7] All three facilities presently treat, store, and dispose of hazardous waste from other states, and much of the out-of-state hazardous wastes are soils and debris from the cleanup of contaminated sites.[8]

In 1988 the amount of outside hazardous waste entering South Carolina began to cause some concern among state officials, and the following steps were taken to restrict hazardous waste imports:

1. "Needs Requirement" -- In 1988, the South Carolina Department of Health and Environmental Control (DHEC) promulgated regulations prohibiting any hazardous waste facility from expanding or being constructed absent a demonstration that in-state generators "need the capacity offered by the expansion or construction."[9]
2. "Blacklisting Laws" -- In 1989, the South Carolina General Assembly enacted legislation that prohibited South Carolina facilities from accepting hazardous waste "generated in any jurisdiction which prohibits by law the treatment of that hazardous waste or which has not entered into an interstate or

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[4] United States Congress Congressional Budget Office, *Hazardous Waste Management: Recent Changes and Policy Alternatives*, at xii (May 1985) (estimating the amount and cost of hazardous waste during the years 1985 to 1990).

[5] For example, Alabama recently promulgated legislation that prohibited the importation of hazardous waste from states that had not adequately arranged for hazardous waste treatment and disposal capacities for wastes generated within their own borders. ALA. CODE § 22-30-11 (1989). Before the restrictions, Alabama annually exported about 57,000 tons of hazardous waste per year, but imported about 500,000 tons. The Eleventh Circuit Court of Appeals ruled Alabama's legislation unconstitutional. National Solid Wastes Management Ass'n v. Alabama Dep't of Envt'l Management, 910 F.2d 713 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 2800 (1991).

[6] The author's law firm has represented Laidlaw in selected environmental matters.

[7] The author's law firm has represented Thermal Oxidation Corp. in selected environmental matters.

[8] *Hazardous Waste Treatment Council*, 766 F. Supp. at 436.

[9] S.C. CODE REGS. 61-99 (1990).

regional agreement for the safe treatment of hazardous waste."[10] This caused generators in "nearly half the states in the nation" to be blacklisted from sending hazardous waste for treatment or disposal in South Carolina.[11]

3. "Discriminatory Orders" -- Shortly after the blacklisting statute was adopted, Governor Carroll A. Campbell, Jr. issued Executive Order No. 89-25 limiting the amount of out-of-state hazardous waste South Carolina hazardous waste disposal facilities could receive.[12] This later became a statutory prohibition.[13]

Collectively, these are referred to as the "South Carolina laws" throughout this article. The South Carolina laws are presently under legal attack as economic protectionist measures that violate the United States Constitution.[14] South Carolina, however, is not the only state to adopt restrictions on out-of-state hazardous wastes. According to one author, as many as thirty-four states have considered or are considering similar prohibitions.[15]

According to evidence in the *Hazardous Waste Treatment Council* case, South Carolina attempted to ban hazardous waste imports for two reasons. First, the State wanted to be sure it could comply with the Federal Capacity Assurance Plan (CAP) promulgated under the Superfund Amendments and Reauthorization Act of 1986 (SARA).[16] Pursuant to CAP, each state must demonstrate it has sufficient capacity to treat or dispose of hazardous wastes generated within its borders during the next twenty years. The deadline for complying with CAP was October 17, 1989.[17]

Second, South Carolina entered into a hazardous waste compact with several other states in the Southeast. The states have agreed to maintain jointly adequate hazardous waste treatment and disposal capacities for hazardous waste generated within the compact states. None of the twenty-five states blacklisted by the South Carolina laws are members of the compact agreement.[18] While hazardous waste import restrictions may be justified from a policy perspective, they are fraught with constitutional problems. Arguably, these laws violate the following United States Constitutional provisions: the

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[10] S.C. CODE ANN. § 44-56-130(4) (Law. Co-op. Supp. 1990).

[11] *Hazardous Waste Treatment Council*, 766 F. Supp. at 437.

[12] Laidlaw operates the only hazardous waste disposal facility in the state. Therefore, the Governor's Order was directed at Laidlaw.

[13] *See* S.C. CODE ANN. §·44-56-60 (Law. Co-op. Supp. 1990).

[14] *See Hazardous Waste Treatment Council*, 766 F. Supp. 431. This case contains a lengthy discussion on the history behind the South Carolina legislation and administrative actions.

[15] Mark Greenwood, *Not in My Back Yard*, 3 NAT. RESOURCES & ENV'T 33-35 (Fall 1988).

[16] 42 U.S.C. §§ 9601-9675 (1988).

[17] 42 U.S.C. § 9604(c)(9) (1988).

[18] *Hazardous Waste Treatment Council*, 766 F. Supp. at 437.

Commence Clause,[19] the Supremacy Clause,[20] the Due Process Clause,[21] the Takings Clause,[22] the Obligation of Contracts Clause,[23] and the Equal Protection Clause.[24]

A. Hazardous Waste Defined

The Resource Conservation and Recovery Act of 1976 (RCRA)[25] governs the generation, transportation, treatment, storage, and disposal of hazardous waste in the United States. During the early 1970's Congress enacted comprehensive air pollution[26] and water pollution laws.[27] RCRA was adopted to close "the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous waste."[28]

Pursuant to RCRA, in 1980 EPA promulgated a comprehensive hazardous waste program that provides for the management of hazardous waste from "cradle to grave."[29] The RCRA regulations apply only to "hazardous wastes," however, and a material must meet two criteria before being labled as a hazardous waste.

First, the material must be considered a solid waste.[30] By definition, a "solid waste" is any liquid, solid, semi-solid, or contained gaseous material that is being stored or abandoned.[31] A material may be "abandoned" by being disposed of, burned, or

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[19] U.S. CONST. art. I, § 8, cl. 3.

[20] U.S. CONST. art. VI, cl. 2.

[21] U.S. CONST. amend. XIV, § 1.

[22] U.S. CONST. amend. XIV, § 1.

[23] U.S. CONST. art. I, § 10.

[24] U.S. CONST. amend. XIV.

[25] 42 U.S.C. §§ 6901-6991 (1988).

[26] The Clean Air Act, 42 U.S.C. §§ 7401-7142 (1988).

[27] The Clean Water Act, 33 U.S.C §§ 1251-1376 (1988).

[28] H.R. Rep. No. 1491, 94th Cong., 2d Sess., pt. 1, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6241.

[29] 40 C.F.R. §§ 260-270 (1991).

[30] 42 U.S.C. § 6903(5) (1988) ("The term 'hazardous waste' means a solid waste, or combination of solid wastes . . . ."); *see also*, 40 C.F.R. § 261.3(a) (1990) (identifying hazardous wastes as a subcategory of solid wastes). As discussed later in this article, South Carolina has its own RCRA program. The program was developed under authority of the South Carolina Hazardous Waste Management Act. S.C. CODE ANN. § 44-56-10 to 840 (Law. Co-op. 1976). Where the text of federal and South Carolina regulations are identical, the federal citation is given in this article.

[31] 42 U.S.C. § 6903(27) (1988) (limiting RCRA "solid wastes" to liquids, solids, semi-solids, or contained gases). This limitation allows many otherwise toxic or hazardous process wastes to escape RCRA regulation. For example, uncontainerized process emissions are not subject to RCRA regardless of their toxicity. *See, In re* BP Chemicals of America, Inc., RCRA Appeal No. 89-4 (E.P.A. August 20, 1991).

incinerated.[32] The term also applies if solid waste is accumulated, stored, or treated before, or instead of, being disposed of, burned, or incinerated.[33]

Second, the substance must be identified as a hazardous waste by EPA. EPA regulations recognize two categories of hazardous wastes: listed hazardous wastes and characteristic hazardous wastes. In order to be a "listed hazardous waste," a solid waste must be specifically identified or described by EPA as hazardous.[34] EPA defines "characteristic hazardous wastes" as solid wastes that are not listed as hazardous, but exhibit one of the following characteristics of a listed hazardous waste: ignitability, corrosivity, reactivity, or toxicity.[35]

A generator discarding solid waste has an obligation to determine whether the material is a listed or characteristic hazardous waste.[36] If the waste is either type, the RCRA hazardous waste regulatory program is triggered, and the South Carolina laws may apply to the interstate transportation, treatment, or disposal of the material.

B. The RCRA Regulatory Program

Title 40 of the Code of Federal Regulations, sections 260 through 270, contains the RCRA regulatory program. The regulations are broken down into two groups: hazardous waste management standards and state authorization standards. Both apply in South Carolina.

First, hazardous wastes are subject to specific waste management standards from their point of generation through treatment, storage, or disposal.[37] Generators are required to package and label hazardous waste according to specific criteria and to track all hazardous waste to the place of treatment, storage, or disposal by a detailed paperwork system known as "manifesting."[38] Treatment, storage, or disposal facilities (TSDs) are required to qualify for "interim status" or obtain an operating permit from EPA and the state.[39] "Interim status" allows TSDs that were already in existence in

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[32] 40 C.F.R. § 261.3(a)(b) (1990).

[33] *Id.*

[34] 40 C.F.R. §§ 261.30-33 (1990) (listing various solid wastes as hazardous wastes).

[35] 40 C.F.R. § 261.20-24 (1990) (setting forth hazardous waste characteristics and the tests applicable to each).

[36] 40 C.F.R. § 264.1 (1990).

[37] *See* 40 C.F.R. § 262 (1990) (hazardous waste generator standards); 40 C.F.R. § 263 (1990) (hazardous waste transporter standards); 40 C.F.R. §§ 264-65 (1990) (hazardous waste treatment, storage, and disposal facility regulations).

[38] 40 C.F.R. § 262.20-23 (1990). A "manifest" identifies the generator, type of hazardous waste, and the designated treatment, storage, or disposal facility for each shipment of hazardous waste.

[39] 40 C.F.R. §§ 264-65 (1990).

1980 when RCRA permit standards were promulgated to continue to operate until their permit application receives a final administrative disposition from either the EPA or the responsible state agency.[40]

Second, the hazardous waste regulations explain how a state may receive authorization to implement the RCRA program in lieu of the EPA. A state agency may run the RCRA program if the state program is as stringent, or more stringent, than the federal RCRA program.[41] To determine whether an approved state hazardous waste program is consistent with the federal regulations, EPA drafted specific regulatory criteria.[42] These regulations stem from Congress' intention that state programs receiving final EPA authorization become "fully part of an integrated national program to control hazardous waste."[43]

South Carolina received final authorization from EPA to operate the RCRA program in 1985.[44] Except for the South Carolina laws that attempt to ban out-of-state hazardous wastes, the South Carolina program generally tracks the federal RCRA scheme and is consistent with other state programs.

II. CONSTITUTIONAL LAW QUESTIONS RAISED BY STATE RESTRICTIONS ON OUT-OF-STATE HAZARDOUS WASTE

State restrictions on out-of-state RCRA hazardous wastes, such as the South Carolina laws discussed above, may violate six substantive provisions of the United States Constitution.

A. The Commerce Clause

The Commerce Clause provides that Congress shall have power "[t]o regulate Commerce . . . among the several States."[45] This clause is both a positive grant of power to Congress and an implied restraint on the power of states to interfere with

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[40] 42 U.S.C. § 6925(e) (1988).

[41] 42 U.S.C. § 6926(b) (1988); *see Hazardous Waste Treatment Council*, 766 F. Supp. at 438 ("RCRA envisaged that administrative and enforcement activities would primarily be performed by the states").

[42] 40 C.F.R. 271 (1990).

[43] *Hazardous Waste Treatment Council*, 766 F. Supp. at 435 (citing 45 Fed. Reg 33593 (1980)).

[44] 50 Fed. Reg. 46437 (1985).

[45] U.S. CONST. art. I, § 8, cl. 3.

interstate commerce.[46] This implied power is sometimes referred to as the "dormant commerce clause."

The positive grant of power gives Congress authority to specifically regulate trade between the states by enacting specific legislation, occupying a particular field of commerce, or prohibiting state regulation outright in a specific area affected by interstate commerce. When Congress has acted in one of these ways, conflicting state laws are pre-empted or nullified through the Constitution's Supremacy Clause.[47] In the absence of express federal legislation, the dormant powers of the Commerce Clause work to strike down state regulation that unduly burdens the flow of interstate commerce.[48] As the Supreme Court explained, "although the [Commerce] Clause . . . 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."[49]

These two aspects of the Commerce Clause prevent states from becoming economic isolationists. Justice Jackson explained the concept this way:

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control the economy . . . has as its corollary that the states are not separable economic units. . . . "[W]hat is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation."[50]

The Supreme Court has used a three-step analysis to determine if a state law, regulation, or executive order violates the Commerce Clause.[51] First, the state action must be examined to see if, in fact, it regulates an article in interstate commerce. Second, a finding that the state is regulating an article in interstate commerce triggers a

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[46] When analyzing particular state or local restrictions under the Commerce Clause, the Supreme Court has differentiated between a state's police powers and its tax powers. The state's police powers are the subject of this article. While South Carolina imposes higher taxes on non-resident hazardous waste than on resident hazardous waste disposed of in the State, the constitutionality of that fee system is not addressed here. *See* S.C. CODE ANN. § 44-56-170(e) (Law. Co-op. 1976 & Supp. 1990).

[47] U.S. CONST. art. VI, cl. 2 (The applicability of the Supremacy Clause to state restrictions on hazardous waste is discussed later in this article.); *see* Escanaba v. Chicago, 107 U.S. 678 (1882) (holding that the Supremacy Clause makes congressional legislation controlling over state laws).

[48] *E.g.*, New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988); Maine v. Taylor, 477 U.S. 131 (1986); Hughes v. Oklahoma, 441 U.S. 322 (1979).

[49] Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35 (1980).

[50] H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 537-38 (1949) (quoting Baldwin v. G.A.F. Seelig, 294 U.S. 511, 527 (1935).

[51] *See, e.g.*, Sporhase v. Nebraska, 458 U.S. 941 (1982); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

two-part judicial standard. Absolute state prohibitions on out-of-state commerce undergo a strict scrutiny analysis or are per se invalid. Incidental state burdens on out-of-state interstate commerce are analyzed with a balancing test. Third, the state law, regulation, or executive order must be reviewed to determine if it fits into one of two exceptions to the Commerce Clause: the express congressional authorization exception or the market participation exception.

1. Step One: Articles in Commerce

On its face, the Commerce Clause applies only to "commerce . . . among the several States."[52] The Supreme Court has broadly defined interstate commerce as every species of commercial intercourse which concerns more states than one.[53] This expansive definition necessitates that the Supreme Court evaluate materials claimed to be protected articles of commerce on a case-by-case basis.

The Supreme Court analyzed the status of hazardous and non-hazardous waste as commerce in *City of Philadelphia v. New Jersey*.[54] There, New Jersey had adopted legislation similar to the South Carolina laws. The legislation prohibited the disposal of out-of-state wastes in New Jersey. New Jersey argued that the Commerce Clause did not apply, since "valueless" liquid and solid waste shipped into the State for disposal was not a form of commerce. The Court flatly rejected the argument, however, and commented that "all objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset."[55]

Other courts have followed suit. In *National Solid Wastes Management Ass'n v. Alabama Department of Environmental Management*[56] the Eleventh Circuit Court of Appeals agreed with *City of Philadelphia* and concluded that "hazardous waste is not inherently too dangerous to be a product in commerce."[57] The United States District

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[52] U.S. CONST. art. I, § 8, cl. 3.

[53] *See* Gibbons v. Ogden, 22 U.S. 1 (1824).

[54] 437 U.S. 617 (1978). It is important to note that the New Jersey regulations at issue were broadly applicable to all wastes, hazardous and non-hazardous. Therefore, in ruling that all waste is commerce, the Court implicitly held that hazardous waste is an article in commerce.

[55] *Id.* at 622.

[56] 910 F.2d 713 (11th Cir. 1990).

[57] 910 F.2d at 719. The Eleventh Circuit apparently tried to establish a test to determine when dangerous goods such as hazardous waste may be considered an "article in commerce." Referring to the Supreme Court's opinion in *City of Philadelphia*, the court commented that hazardous waste should only be considered "commerce" if the dangers inherent in the waste do not "far outweigh" its worth in interstate commerce. *Id.* at 718. That was not the holding in *City of Philadelphia*, however. The Supreme Court expressly rejected the balancing test asserted by the Eleventh Circuit. The Court pointed out that any previous opinions that suggested "harmful objects" could not be "legitimate subjects of trade and commerce" were announcing a conclusion about

Court for the District of South Carolina drew the same conclusion in *Hazardous Wastes Treatment Council.*[58] The general rule, then, is that RCRA regulated hazardous waste is subject to Commerce Clause protection when it is transported into South Carolina.

2. Step Two: The Two-Tiered Test

The limitations imposed on a state's powers by the Commerce Clause are not absolute, however. States retain some authority under their "general police powers" to regulate local matters, even though interstate commerce may be affected.[59] The Supreme Court has adopted a two-tiered test to analyze whether a state has overstepped the boundaries of local controls and imposed an impermissible burden on interstate commerce.[60] If a state law, regulation, or executive order fails either prong of the test, the state action will be struck down.

a. Facially Discriminatory State Restrictions On Interstate Commerce: Strict Scrutiny Versus the Rule of Virtually Per Se Invalidity

The first tier of the two-part test is clearly more stringent than the second. It applies when "a state statute or regulation directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests."[61] In these cases the discrimination must be obvious on the face of the statute. State actions of this kind have routinely been held unconstitutional, unless there are overriding public health concerns behind the law. Facially discriminatory restrictions are examined under one of two standards: strict scrutiny or virtually per se invalidity.

The strict scrutiny standard is a weighted balancing test. It applies when state regulations are overtly discriminatory against outside interests, but the state can proffer some justification for the regulation.[62] Initially, the party challenging the state action has the burden to demonstrate the state law favors in-state interests over out-of-state

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the substances' validity under the Commerce Clause balancing test, not its nature as commerce. 437 U.S. at 622. Therefore, the Eleventh Circuit's "inherently dangerous" test is probably not credible.

[58] 766 F. Supp. at 438 (applying the Commerce Clause to hazardous waste without expressly stating that it qualifies as commerce).

[59] Maine v. Taylor, 477 U.S. 131, 138 (1986) (quoting Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 36 (1980)).

[60] Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 578-79 (1986) (invalidating a New York law that regulated out-of-state liquor sales because the law had the "practical effect" of regulating trade in other states and New York's rationale for the liquor sales restrictions was not based on a legitimate local interest).

[61] *Id.* at 579.

[62] *City of Philadelphia*, 437 U.S. at 626-27.

interests. This burden is satisfied by showing that the state law is expressly discriminatory,[63] or by showing a neutral statute or regulation is discriminatory in intent or practical effect.[64]

The burden then shifts to the state to justify the legislation. A Court will consider two factors in determining whether legislation is constitutional: (1) the presence of legitimate local purposes behind the restrictions and (2) the lack of available, less discriminatory alternatives.[65] The state's justifications are subjected to "the strictest scrutiny,"[66] and the legislation is rarely upheld.[67] In other words, the scales in this balancing test are heavily weighted in favor of invalidating the state action.

Whether a legitimate local concern is capable of sustaining strict scrutiny involves a case-by-case determination, and the cases do not seem to follow a logical pattern. The Supreme Court has repeatedly found, however, that protection of public health and safety is the type of local objective that may survive the strict scrutiny test.[68] This is known as the quarantine doctrine.

The Supreme Court recently applied the quarantine doctrine in *Maine v. Taylor*,[69] upholding a Maine law that expressly prohibited the importation of live baitfish from other states. The law's intent was to prevent live baitfish from introducing parasites into Maine's fresh fish supplies. The statute blatantly interfered with interstate trade, but the Court found the statute passed strict scrutiny. The Court ruled that states have "a legitimate interest in guarding against imperfectly understood environmental risks . . . ."[70] The Court also noted that the state's motivations were not simply "post hoc

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[63] *See Id.* at 624.

[64] Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 352 (1977) (striking down a North Carolina law restricting apple growers from shipping fruit in certain packaging because the law had the effect of discriminating against Washington growers and packers).

[65] Hughes v. Oklahoma, 441 U.S. 322, 336 (1979). These are the same factors applicable to the second tier balancing test for state laws that are facially neutral, but burden interstate commerce incidentally. The difference between the two tests is that the burden of proof is on the plaintiff in the second test, and the state action is not subject to strict scrutiny.

[66] *Id.* at 337.

[67] 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 . . . [it is] generally struck down . . . .").

[68] *City of Philadelphia*, 437 U.S. at 623-24 ("The opinions of the Court through the years have reflected an alertness to the evils of 'economic isolation' and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a state legislates to safeguard the health and safety of its people."); *Accord* Maine v. Taylor, 477 U.S. 131, 148-49 (1986).

[69] 477 U.S. 131, 148-49 (1986) (the threat recognized by the Court was that deceased baitfish would infect pristine Maine fisheries).

[70] *Id.* at 148.

rationalizations" for an illegitimate state objective.[71] Therefore, the guiding principle behind the quarantine doctrine is that states may legitimately act to protect public health and safety. The strict scrutiny balancing test is not easy to satisfy unless the quarantine doctrine applies.

When state action amounts to simple economic protectionism, the Court adopts a rule of "virtually per se invalidity."[72] This standard is reserved for those situations in which the state has no legitimate local purpose for the challenged legislation. Several courts have struck down state waste import restrictions which overtly discriminate against wastes from other states.[73] The seminal case is *City of Philadelphia*, where the Supreme Court stated:

> [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 treat them differently. Both on its face and in its plain effect, [the New Jersey statute] violates this principle of non-discrimination.[74]

The future of the virtually per se invalidity rule is not clear. In recent opinions the Court has shied away from relying exclusively on this rule.[75] In *Maine v. Taylor*, for example, the rule was not mentioned at all, despite a lengthy discussion of the Commerce Clause standard as applied to facially discriminatory statutes.[76] This trend is inconsistent with Supreme Court precedent,[77] and the per se invalidity rule has been

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[71] *Id.* at 149.

[72] *City of Philadelphia*, 437 U.S. at 624 (citing Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)).

[73] *See National Solid Wastes Management Ass'n*, 910 F.2d 713; Hardage v. Atkins, 582 F.2d 1264 (10th Cir. 1978); *Hazardous Waste Treatment Council*, 766 F. Supp. 431 (D.S.C.), *aff'd in part, remanded in part*, 945 F.2d 781 (4th Cir. 1991).

[74] 437 U.S. at 626-27.

[75] *See* Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) ("[F]acial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of 'available' alternatives").

[76] 477 U.S. at 138 ("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. . . . [S]tatutes in the second category are subject to more demanding scrutiny.").

[77] Brown-Forman Distillers, Inc. v. New York State Liquor Auth., 476 U.S. 573, 578-580 (1986) (referring to the "virtually per se" rule and stating that "[w]hen a state statute directly regulates or discriminates against interstate commerce . . . [it is] generally struck down . . . without further inquiry.").

cited recently where state action was challenged under the Commerce Clause.[78]

b. State Restrictions That Are Incidental Burdens to Interstate Commerce: The Balancing Test

The second tier of the Supreme Court's Commerce Clause test is much more flexible than the first. It is a simple balancing test, and the burden is on the plaintiff, not the state, to prove its case.[79] The second tier balancing test applies to state laws that do not facially block interstate commerce, but somehow impede it. It applies when state laws regulate evenhandedly, burdening out-of-state commerce only incidentally.

In *Pike v. Bruce Church, Inc.*[80] the Supreme Court set forth the appropriate balancing test for this category of state laws: "Where [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 [interstate] commerce is clearly excessive in relation to the putative local benefits."[81]

Like the decisions reviewing state actions under the strict scrutiny test, there is no set pattern that demonstrates when a neutral state law or regulation so excessively burdens interstate trade that it must be struck down.[82] Safety on public highways, for example, was found to be a legitimate local interest in *South Carolina State Highway Department v. Barnwell Brothers, Inc.*,[83] but was not enough to override the burden caused by similar legislation in *Kassel v. Consolidated Freightways Corp.*[84]

Language in *Kassel* suggests that the Court may be prepared to adopt a rule of per

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[78] *National Solid Wastes Management Ass'n*, 910 F.2d at 720-21 (rejecting arguments that state restrictions on out-of-state hazardous waste were based on health and environmental concerns and applying the virtually per se invalidity rule).

[79] *Hughes v. Oklahoma*, 441 U.S. at 336.

[80] 397 U.S. 137 (1970).

[81] *Id.* at 142.

[82] Notably, a recent Supreme Court opinion implies that the balancing test may be undergoing re-evaluation. In CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987), the Supreme Court reviewed a state statute and determined it did not violate the Commerce Clause because it advanced certain legitimate local interests. There is some criticism of the *Pike v. Bruce Church, Inc.* balancing test, and one commentator writes that the case indicates a balancing test is not required once legitimate local interests are demonstrated. *See* Regan, *CTS Corp. v. Dynamics Corp. of America and the Dormant Commerce Clause Doctrine*, 85 MICH. L. REV. 1865 (1987). An alternative interpretation is that the Court simply decided (without stating) that the state law at issue posed no barrier to interstate commerce; hence, the balancing approach was not necessary.

[83] 303 U.S. 177 (1938).

[84] 450 U.S. 662 (1981) (striking down an Iowa statute that prohibited tractor trailers longer than sixty feet within its borders despite public safety being the purported purpose of the law).

se validity for state laws designed to protect public health or safety.[85] *Kassel* was a plurality decision, and Justices Brennan and Marshall's concurrence stated that if the intended safety benefit is not illusory, the Court should defer to the state's lawmakers on the appropriate balance to be struck against other interests.[86] Similarly, Chief Justice Burger and Justices Rehnquist and Stewart indicated that the Court should defer to the judgment of the states unless the public safety assertions were a mere pretext for discrimination.[87] If Justices Souter and Thomas follow Rehnquist's lead, a per se validity rule could be adopted.

c. Application of the Two-Tiered Analysis to South Carolina Laws

The South Carolina laws restricting hazardous waste imports fail the Commerce Clause analysis. First, the South Carolina laws are facially discriminatory. The blacklisting laws prohibit hazardous waste shipments solely on their basis of origin. No public health or environmental protection reasons were the basis for the statute. Moreover, discriminatory orders give express preference to in-state hazardous waste generators over nonresident generators. Therefore, the virtually per se invalidity rule of *City of Philadelphia* applies, and the South Carolina laws should be struck down.

Second, the blacklisting laws and discriminatory orders are unable to survive review under the strict scrutiny standard because the state has not drafted the laws to satisfy a legitimate local interest. South Carolina adopted the laws to ensure compliance with SARA's CAP program and to fulfill commitments under a regional hazardous waste compact agreement.[88] These are not local interests. Every state must wrestle with ways to comply with the CAP requirements, and many states are members of interstate compacts to accomplish this goal. Less discriminatory ways exist to limit the hazardous waste managed within the state. For example, the state could adopt stringent transportation, treatment, and disposal requirements that apply to all hazardous waste generators regardless of location making it more economical and efficient to send hazardous waste elsewhere.

Third, the quarantine doctrine does not apply. As discussed, local laws that are based on a need to protect health and safety are generally upheld even if the laws are facially discriminatory. However, there is no indication that health concerns are behind the South Carolina laws. The South Carolina laws do not distinguish among hazardous wastes on the basis of toxicity or dangerousness. In the words of the Eleventh Circuit,

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[85] *Id.* at 670.

[86] *Id.* at 686-87.

[87] *Id.* at 698-99.

[88] *See supra* text accompanying notes 9-16.

a "selective ban on out-of-state hazardous waste is no quarantine law."[89] If South Carolina were to ban all hazardous wastes outright or ban certain types of hazardous waste regardless of origin, the quarantine doctrine could be used. In that situation, it would be legitimate to argue that the laws should survive the strict scrutiny standard.

An argument may be made that the needs requirement should not be subject to strict scrutiny or the per se invalidity rule. Those regulations do not block commerce outright; they limit the expansion of local hazardous waste facilities and reduce the amount of outside hazardous waste permitted into the state indirectly through limits on the growth of hazardous waste operations. Assuming the the two-tiered balancing test governs the needs requirement, the regulations may still fail commerce clause scrutiny. While the regulations are applicable only to South Carolina facilities, they may place an excessive burden on out-of-state generators by denying those generators the option to use South Carolina facilities for treatment and disposal of hazardous waste. Notably, the South Carolina facilities are three of only a limited number of hazardous waste facilities permitted to operate in the United States, and the needs requirement, like the other South Carolina laws, may have been promulgated to keep hazardous waste out of the State.

The South Carolina laws focus on the wrong objectives for purposes of the Commerce Clause. They must be amended to pass constitutional scrutiny.

3. Step Three: Exceptions to the Commerce Clause Scrutiny

The final step in the analysis is determining whether the South Carolina laws fit into one of the two exceptions to the Commerce Clause: (1) the express congressional authorization exception or (2) the market participation exception. Even though the laws are facially discriminatory, they must be upheld if either exception applies.

The first exception to the Commerce Clause applies when Congress expressly authorizes the barrier to interstate trade. Since RCRA allows states to run their own hazardous waste programs, South Carolina argued this is express congressional direction to exclude interstate transportation of hazardous waste from Commerce Clause power.[90] Likewise, Alabama suggested the CAP program under SARA impliedly authorizes Commerce Clause exemption.[91]

The key decision interpreting this exception to the Commerce Clause is *White v. Massachusetts Council Constr. Employers, Inc.*[92] In *White* the Court stated, "Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce. . . . The

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[89] *National Solid Wastes Management Ass'n*, 910 F.2d at 721; *accord Hazardous Waste Treatment Council*, 766 F. Supp. at 434-36.

[90] *Hazardous Waste Treatment Council*, 766 F. Supp. at 439.

[91] *National Solid Wastes Management Ass'n*, 910 F.2d at 721-22.

[92] 460 U.S. 204 (1983).

Commerce Clause is a grant of authority to Congress, and not a restriction on the authority of that body."[93]

There is, however, a limitation to this exception. The Court has found congressional authorization only where it is "expressly stated" and "unmistakably clear."[94] Therefore, to determine if the South Carolina laws fit within the exception, the following question must be answered: Has Congress clearly authorized South Carolina to erect barriers to the free movement of hazardous wastes? The answer to that question is no.

First, SARA's CAP program does not authorize states to impair the free movement of hazardous wastes. While the CAP program gives the states greater responsibility in managing hazardous waste treatment and disposal capacities within their own borders, it is not the kind of express, unmistakable power envisioned by this exception to the Commerce Clause. As the Eleventh Circuit stated in *National Solid Wastes Management Ass'n*, "nothing in SARA evidences congressional authorization for each state to close its borders to wastes generated in other states to force those other states to meet federally mandated hazardous waste management requirements."[95] Through the CAP program, Congress placed the burden on the state generating hazardous waste to meet the capacity assurance standards. States receiving hazardous waste were not directed to restructure hazardous waste programs in other states by limiting their treatment and disposal options.

Second, authority placed in a state to operate a RCRA hazardous waste program is not authority to restrict hazardous waste imports. To obtain RCRA authorization, a state program must be consistent with other state programs. EPA regulations governing state authorizations expressly provide: "Any aspect of the state program which unreasonably restricts, impedes, or operates as a ban on the free movement across the state border of hazardous waste from or to other states for treatment, storage, or disposal . . . shall [invalidate the authorization]."[96] Nothing in RCRA suggests states may act to exclude

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[93] *Id.* at 213. (citing American Power & Light Co. v. SEC, 329 U.S. 90 (1946) and Gibbons v. Ogden, 9 Wheat 1 (1824)); *accord*, South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87-88 (1984) ("Congress may 'redefine the distribution of power over interstate commerce' by permit[ting] the states to regulate the commerce in a manner which would otherwise not be permissible.") (quoting Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945)).

[94] *South-Central Timber Dev., Inc.*, 467 U.S. at 91 (a city requirement that local labor be hired to perform a significant percentage of all projects was allowed under the express congressional authorization exception because federal urban development programs sanctioned improved opportunities for minorities).

[95] 910 F.2d at 721.

[96] 40 C.F.R. § 271.4(a); *see* 42 U.S.C. § 6926(b). As noted earlier, to obtain approval for a RCRA program, a state must demonstrate to the EPA that the hazardous waste program is consistent and equivalent with the federal program. By regulation, restrictions on the free movement of hazardous waste are inconsistent with the federal program; *see also Hazardous Waste Treatment Council*, 766 F. Supp. at 440 ("But nothing is contained in either statute, RCRA, CERCLA, or SARA that has 'expressly stated' in 'unmistakably clear' language congressional authorization for South Carolina to take action in the management of its hazardous waste program that adversely affects interstate commerce.").

hazardous waste imports. Congress did not authorize state hazardous waste blockades under RCRA or SARA's CAP program, and South Carolina may not rely on either as express congressional authorization to do so.

The second exception to Commerce Clause scrutiny is the market participation doctrine. South Carolina would have to restructure its hazardous waste program to take advantage of this exception.

The market participation exception has its origin in *Hughes v. Alexandria Scrap Corp.*[97] In *Alexandria Scrap Corp.* Maryland offered money for every Maryland titled automobile converted into scrap. This reduced the interstate trade in automobile hulks, and Maryland scrap dealers indirectly obtained an economic advantage over out-of-state dealers. Out-of-state scrap dealers challenged the Maryland law on Commerce Clause grounds.

The Supreme Court upheld the Maryland statute.[98] The Court carved out an exception to the Commerce Clause when states act as market participants instead of regulators. The Court explained, "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."[99]

The Court affirmed the market participation exception in *Reeves, Inc. v. Stake.*[100] There, the Court ruled that a state-owned cement operation could limit its services to in-state residents and commented that "[t]here is no indication of a constitutional plan to limit the ability of the states themselves to operate freely in the free market."[101]

White v. Massachusetts Council Construction Employers, Inc.[102] expanded further the market participation exception to encompass services financed, but not owned or operated, by a government entity. In *White* the Court applied the market participation exception to uphold a city ordinance which discriminated against non-resident workers in construction projects funded, but not contracted, by a city government.

The market participation exception could enable South Carolina to limit hazardous waste traffic into the State, but it would require some changes to the State's approach to regulating hazardous waste. First, the state would have to own, operate, or finance the hazardous waste treatment and disposal services in South Carolina. The State could restrict hazardous waste imports at that point, but only to the extent the import restrictions effected the treatment and disposal services the State offered.

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[97] 426 U.S. 794 (1976).

[98] *Id.* at 810.

[99] *Id.*

[100] 447 U.S. 429 (1980).

[101] *Id.* at 437.

[102] 460 U.S. 204 (1983)

B. The Supremacy Clause

The Supremacy Clause is the second provision of the United States Constitution that may apply to state restrictions on out-of-state hazardous waste. The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.[103]

In effect, the Supremacy Clause gives Congress power to pre-empt state or local laws that frustrate federal statutory objectives.

According to the Supreme Court pre-emption is not appropriate unless Congress expressly states it intends to pre-empt state laws in the field, unless pre-emption can be clearly implied through the legislative history, or unless there is direct conflict between the state and federal laws:

> Federal law may pre-empt state laws in any of three ways. First, in enacting the federal law, Congress may explicitly define the extent to which it intends to pre-empt state law. Second, even in the absence of express preemptive language, Congress may indicate an intent to occupy an entire field of regulation, in which case the States must leave all regulatory activity in that area to the Federal Government. Finally, if Congress has not displaced state regulation entirely, it may nonetheless pre-empt state law to the extent that the state law actually conflicts with federal law. Such a conflict arises when compliance with both state and federal law is impossible, or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[104]

As discussed above, hazardous waste transportation, treatment, and disposal are governed by RCRA. In *City of Philadelphia v. New Jersey*[105] the Court commented in dicta that there is no congressional intention in RCRA to pre-empt state regulation of interstate waste management:

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[103] U.S. CONST. art. VI, cl. 2.

[104] Michigan Canners & Freezers, Inc. v. Agricultural Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984)(quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (citations omitted).

[105] 437 U.S. 617 (1978).

> From our review of [RCRA], we find no "clear and manifest purpose of Congress" to pre-empt the entire field of interstate waste management or transportation, either by express statutory command, or by implicit legislative design. To the contrary, Congress expressly has provided that "the collection and disposal of solid wastes should continue to be primarily the function of state, regional, and local agencies."[106]

The Court then concluded that a Supremacy Clause challenge to the state laws in that case was not appropriate.[107]

The Court's statement in *City of Philadelphia* is not the end of the inquiry. In that case the Court spoke of pre-empting the entire field of interstate waste management and did not preclude Supremacy Clause challenges to state regulations which conflict with particular areas within the RCRA scheme. As one commenter noted, "at some point, . . . overly restrictive local legislation does conflict with the fundamental national goals expressed in RCRA."[108] In this regard, state restrictions on hazardous waste imports may violate the Supremacy Clause in two ways.

First, state hazardous waste import laws enacted in bad faith may violate the Supremacy Clause. When state or local laws are promulgated with the intent of undermining the concept of a national RCRA hazardous waste program, courts have refused to uphold them. The Eighth Circuit Court of Appeals took this position in *ENSCO, Inc. v. Dumas*.[109] The plaintiff ENSCO, Inc. sought a RCRA permit to incinerate acutely hazardous waste in its Union County, Arkansas facility. To stop the project the county adopted an ordinance prohibiting the treatment, storage, or disposal of that type of hazardous waste within county lines. The county relied on RCRA section 3009, which permits states to adopt hazardous waste regulations that are more stringent than federal standards, to support the ordinance.[110] The ordinance was challenged on Supremacy Clause grounds, and the court determined that overly restrictive hazardous waste laws are limited by a rule of good faith:

> A county cannot, by attaching the label "more stringent requirements" or "site selection" to an ordinance that in language and history defies such description,

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[106] *Id.* at 621 n.4 (citations omitted).

[107] *Id.* at 621.

[108] Earp Quattlebaum, *Keeping Out Hazardous Waste: Limitations on the Authority of Local Governments*, 1989 A.B.A. SEC. NAT. RESOURCES L. 15.

[109] 807 F.2d 743 (8th Cir. 1986).

[110] *Id.* at 744 (citing 42 U.S.C. § 6929 (West Supp. 1985)). Federal regulations do not prohibit the incineration of acutely hazardous waste. Rather, they heavily regulate the incineration process. *See*, 40 C.F.R. § 265.352 (acutely hazardous waste may be burned in incinerators if the owner or operator receives certification that the incinerator will meet applicable performance standards).

> **arrogate to itself the power to enact a measure that as a practical matter cannot function other than to subvert federal policies concerning the safe handling of hazardous waste.**[111]

Therefore, the first limitation on the *City of Philadelphia* dicta is that a state may not use its authority to intentionally subvert the goals of a national hazardous waste system.

The second way state hazardous waste prohibitions may be pre-empted under the Supremacy Clause is if they conflict with an area of RCRA regulation expressly reserved for the federal government.[112] With respect to the interstate movement of hazardous waste, Congress stated that the hazardous waste problem is a national one[113] and that state laws should be "consistent" for that reason.[114] To prevent inconsistent state programs, EPA regulations were drafted that preclude state programs from unreasonably interfering with the interstate movement of hazardous waste.[115] Consequently, state hazardous waste regulations which absolutely prohibit interstate hazardous waste transportation, treatment, storage, or disposal are in direct conflict with EPA's RCRA scheme.

1. Application to the South Carolina Laws

The South Carolina laws may not be capable of surviving a challenge under the Supremacy Clause. First, South Carolina arguably acted with bad faith when it sought to preclude hazardous waste imports. The State's objectives were to stop the influx of hazardous waste, not to serve legitimate public health concerns. Through the blacklisting laws, needs requirement, and discriminatory orders, it is obvious South Carolina sought to undermine any hazardous waste trade in South Carolina regardless of RCRA provisions for the safe management of those wastes.

Second, the South Carolina laws block the free movement of hazardous waste across the nation. This prevents the congressional policy of a national hazardous waste program from being accomplished and intrudes on an area of RCRA authority reserved to EPA.

The United States District Court for South Carolina recognized the merits of a Supremacy Clause challenge to the South Carolina laws in the *Hazardous Waste Treatment Council* decision. In granting an injunction against the enforcement of the

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[111] 807 F.2d at 745 (emphasis added).

[112] *See National Solid Wastes Management Ass'n*, 910 F.2d at 724 (striking down a state land disposal regulation as violating the Supremacy Clause because the state was attempting to reserve powers to itself that RCRA specifically designated for EPA).

[113] RCRA § 1002(a)(4), 42 U.S.C. § 6901(a)(4) (1988).

[114] RCRA § 3006(b)(2), 42 U.S.C. § 6926(b)(2) (1988).

[115] 40 C.F.R. § 271.4(a) (1990).

South Carolina laws, the court commented, "it is apparent that Plaintiff will prevail on the merits in its challenges under the Supremacy Clause . . . ."[116]

C. The Due Process Clause

The Fourteenth Amendment Due Process Clause is the third provision of the United States Constitution that may apply to state restrictions on out-of-state hazardous waste.[117] The Due Process Clause prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law."[118] Accordingly, if the South Carolina laws arbitrarily deprive businesses of a property interest in hazardous waste transportation, treatment, and disposal without due process, the laws are unconstitutional.

Over time, this clause has developed into a two-way shield against state action. On one hand the Due Process Clause protects against loss of life, liberty, or property by requiring adequate constitutional procedures; this is called procedural due process.[119] On the other is substantive due process, which precludes government action that deprives a person of life, liberty, or property through laws that are fundamentally unfair or arbitrary, regardless of the procedures used.[120] State regulations like the South Carolina laws may pose some procedural concerns; however, the real problems arise under substantive due process. Substantive due process analysis is not exact, but it does incorporate a two-part test.

First, it must be shown that a protected "property interest" or "liberty" is at risk.[121] The Supreme Court has suggested property interests include entitlements secured by statutes or regulations.[122] Furthermore, property interests have been found in contractual rights[123] and the right to operate landfills.[124] Loss of business opportunity is arguably a loss of liberty under the Due Process Clause as well.

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[116] 766 F. Supp. at 441 n.15.

[117] U.S. CONST. amend. XIV, § 1.

[118] *Id.*

[119] *See* Cleveland Bd. of Educ. v. Loudermilk, 470 U.S. 532, 542 (1985).

[120] *See* Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986).

[121] *See* Littlefield v. Afton, 785 F.2d 596 (8th Cir. 1986) (commenting that the first requirement in a due process analysis is that a constitutionally protected property interest be at stake).

[122] Perry v. Snidermann, 408 U.S. 593, 603 (1972); *accord*, Parks v. Watson, 716 F.2d 646, 656 (9th Cir. 1983) ("[S]tate statutes providing for particular procedures amount to 'entitlements' protected by due process.").

[123] 408 U.S. at 601 ("mutually explicit understandings" may create property rights subject to the Due Process Clause).

[124] Glenwillow Landfill, Inc. v. City of Akron, 485 F. Supp. 671, 683 (N.D. Ohio 1979) (a landfill's ability to dispose of waste is part of the "concept of ownership"); *see also* Northside Sanitary Landfill, Inc. v. Indianapolis, 902 F.2d 521, 523 (7th Cir. 1990).

Second, it must be demonstrated that the state law is arbitrary, fundamentally unfair, or has no relation to legitimate state objectives.[125] In effect, legitimate state interests are balanced against their impact on liberty or property interests. If the laws serve an important, legitimate state concern such as the protection of public health or safety, they will not be overturned. As the Supreme Court explained, "the due process clause is [not] to be so broadly construed that the Congress and state legislature are put in a straight jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare."[126]

Despite this broad language, courts have not been afraid to strike down certain state laws or regulations that are not legitimate. This is best illustrated by a series of Pennsylvania cases. In *General Battery v. Zoning Hearing Board*[127] a company challenged a city ordinance prohibiting the use of land within the city for industrial purposes. Similarly, in *Moyer's Landfill, Inc. v. Zoning Hearing Board*[128] a township passed an ordinance prohibiting the use of property within the township for waste disposal. In both cases the Pennsylvania Supreme Court determined that a total ban on industrial services was not rationally related to public health concerns and invalidated the ordinances.

Similarly, the Georgia Supreme Court invalidated the use of eminent domain powers by a county government to prevent construction of a hazardous waste landfill. In *Earth Management, Inc. v. Heard County*[129] the Georgia Supreme Court expressed its concerns over unbridled government restrictions writing, "the action of Heard County in exercising its right of eminent domain demonstrates the effectiveness by which a county can snuff out the very possibility of . . . a hazardous waste facility."[130] The court concluded "bad faith" motivated the county's eminent domain proceedings.[131]

1. Application to the South Carolina Laws

States are given broad latitude under the substantive due process doctrine to draft reasonable restrictions on hazardous wastes and other potentially dangerous materials. This discretion is not unlimited, however. A state must be able to show its laws and regulations are rationally related to legitimate local interests such as health concerns, and

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[125] *See* Ferguson v. Skrupa, 372 U.S. 726 (1963).

[126] New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 107 (1978) (upholding a California law that restricted new automobile dealerships in designated areas).

[127] 371 A.2d 1030 (Pa. 1977).

[128] 450 A.2d 273 (Pa. 1982).

[129] 283 S.E.2d 455 (Ga. 1981).

[130] *Id.* at 460.

[131] *Id.* at 461.

that the laws and regulations are not simply rooted in discrimination or bad faith. The South Carolina laws are not capable of sustaining a substantive due process challenge under this standard.

First, treatment and disposal of hazardous wastes within the RCRA regulatory program are protected property interests. The RCRA regulations are designed to allow for the safe transportation, treatment, and disposal of all hazardous wastes regardless of the place of origin. Arguably, a firm has a legitimate expectation to be able to operate within the regulations promulgated by RCRA. Moreover, contractual rights of commercial hazardous waste operators in South Carolina and businesses shipping hazardous wastes to the facilities are protected property interests that are nullified by the South Carolina laws.

Second, it may be argued that the South Carolina laws are not based on legitimate local concerns and, therefore, fail the rationally related test. As noted earlier, the South Carolina laws do not distinguish hazardous wastes based on the degree of threat to the public health; rather, the laws discriminate on their place of origin. Restraint on out-of-state trade alone should not be enough to pass Due Process Clause scrutiny.

Finally, the South Carolina laws evidence bad faith. They were adopted to stop hazardous waste imports, nothing more.

D. The Takings Clause

The Takings Clause is another constitutional provision that may apply to the South Carolina laws.[132] If the laws cause a taking of property interests in the interstate transportation of hazardous waste, they must be enjoined or South Carolina must compensate affected facilities for the millions of dollars in lost business.

The Fifth Amendment of the United States Constitution works with the Fourteenth Amendment to limit the powers of state governments to deprive residents of private property. In relevant part, the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation."[133] This limitation is applicable to state laws and regulations through the Fourteenth Amendment.[134]

The language of the Fifth Amendment "does not [completely] prohibit the taking of

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[132] U.S. CONST. amend. V.

[133] *Id.*

[134] The Fourteenth Amendment provides that "a State may not deprive a person of life, liberty or property without due process of law." The Supreme Court has recognized the connection between the Fifth and Fourteenth Amendments numerous times and held state statutes, regulations, and orders are subject to the Fifth Amendment guarantees. First English Evangelical Lutheran Church, v. County of Los Angeles, 482 U.S. 304, 310 n.4 (1987) ("The Fifth Amendment . . . [applies] to the States through the Fourteenth Amendment."); *see also* Chicago, B & Q R.R. v. Chicago, 166 U.S. 226 (1897).

private property, but instead places a condition on the exercise of that power."[135] The Amendment is designed not to restrict the right of states to interfere with property interests per se, but rather to secure compensation in the event an otherwise proper interference amounts to a taking. Thus, government action that completely revokes property rights requires the responsible government to pay just compensation or reinstate use of the lost property interest.[136]

A takings claim cannot occur unless a person is deprived of private property. Bans on hazardous waste imports deprive nonresident hazardous waste generators, hazardous waste transporters, and hazardous waste facilities of property rights through broken contracts and lost business opportunities. For example, hazardous waste transporters may contract with a hazardous waste facility to ship a minimum amount of hazardous waste to a facility during the contract term. Alternatively, hazardous waste facilities may agree to take a certain tonnage of hazardous waste from the transporters or out-of-state generators. All of these business opportunities are sacrificed when import bans are enforced.

First, it must be determined whether the state hazardous waste prohibitions are so overly restrictive that they effectuate a taking. The law defining what is or is not a taking is fairly complex. Two tests have emerged in the case law to help make this determination: (1) the substantial advancement test and (2) the economic viability test.[137] If either analysis shows private property has been taken, compensation must be provided to the injured parties or restrictions on the property interest removed.

The Substantial Advancement Test

The substantial advancement test consists of a two-pronged analysis. First, the state regulation is examined to determine if it advances a legitimate state interest, and then the regulation is reviewed to determine if it substantially advances that interest.[138]

A broad range of governmental purposes and regulations will satisfy the legitimate state interest part of this test. For example, in *Esposito v. South Carolina Coastal*

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[135] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 314 (1987); *see also* Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985); Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 297 n.40 (1981).

[136] *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); *accord*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); Esposito v. South Carolina Coastal Council, 939 F.2d 165 (4th Cir. 1991) (holding that the South Carolina Beachfront Management Act did not deprive certain beachfront property owners of all economic use of their property and, therefore, did not consitute a taking).

[137] For a detailed discussion of the scope of these two tests, *see* David Devault, *Regulatory Takings: Can the Government Be Liable*, 6 NAT. RESOURCES & ENV'T 10 (Summer 1991).

[138] Esposito v. South Carolina Coastal Council, 939 F.2d 165 (4th Cir. 1991).

Council[139] the Fourth Circuit found that South Carolina's regulation of beachfront property constituted a legitimate state interest when the law's "stated purpose was to protect, preserve, restore, and enhance the beach/dune system . . . of the State."[140] The second part requires the state laws to substantially advance the state's interests. The law, regulation, or executive order must be the "essential nexus" between the state's interests and the means chosen to accomplish them.[141] Once the substantial advancement test is satisfied, then the economic viability test is applied to the legislation.

The Economic Viability Test

The economic viability test is applied to determine if, in fact, the state interference with property rights constitutes a taking. There is little question that a taking occurs when the government actually occupies a parcel of land, but it is less obvious where states cause a loss through restrictive regulation. The point at which state regulation is so restrictive that it becomes a taking is not easily decided and no single formula governs.[142] Instead, cases generally make an ad hoc factual inquiry into the following factors: the economic impact of the regulation, interference with reasonable investment-backed expectations, and the character of the governmental action.[143]

Some courts have adopted the position that state action must completely destroy a property owner's primary expectations towards his or her property before a taking occurs. The Fourth Circuit adopted this position in *Esposito* and denied the plaintiff property owners compensation for the loss of use of their beachfront property because they had not lost the full economic use of their property, measurable economic loss being "purely speculative."[144] Ordinarily, total deprivation of the reasonable economic use of a property interest is a difficult case to make.

Application to the South Carolina Laws

The South Carolina laws are subject to review under the Fifth and Fourteenth Amendments. The state laws deprive hazardous waste generators and haulers of the right to honor contracts with South Carolina hazardous waste facilities, and the rights of South Carolina facilities to honor commitments with out-of-state transporters and generators to take hazardous wastes. These lost property interests should be compensated for two

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[139] 939 F.2d 165 (4th Cir. 1991).

[140] *Id.* at 169.

[141] *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

[142] *Esposito*, 939 F.2d at 169-70.

[143] *Id.*

[144] *Id.*

reasons.

First, the substantial advancement test is not met. Legitimate state interests are not promoted by the blacklisting laws, needs requirement, and discriminatory orders, because they are not linked to specific health or environmental concerns. The legislation specifically allows the generation, transportation, treatment, storage, and disposal of hazardous waste, as long as the hazardous waste comes from the proper places. Moreover, because the RCRA program is designed to allow for safe transportation, treatment, storage, and disposal of hazardous waste within all the states, South Carolina's restrictions on hazardous waste do not substantially advance state interests.

Second, the economic viability test is satisfied because hazardous waste operators are completely deprived of private property by the legislation. Hazardous waste operators outside of the state that rely on South Carolina facilities for hazardous waste treatment and disposal capacity will be forced to look elsewhere and not use South Carolina facilities. The loss of the South Carolina facilities from the list of approved commercial hazardous waste facilities will also drive costs for safe treatment and disposal of hazardous waste upward. Similarly, the South Carolina facilities and hazardous waste haulers will lose the business opportunities created by hazardous waste commitments to generators in the twenty-five blacklisted states and will be forced to cancel contracts with them. South Carolina may be required to compensate businesses for business opportunities and contractual rights lost as a result of the South Carolina laws.

The Obligation of Contracts Clause

The Obligation of Contracts Clause of the United States Constitution[145] could also invalidate the South Carolina laws. That provision states in part: "No State shall . . . pass any . . . law impairing the obligation of contracts . . . ."[146] It may come into play because the South Carolina laws force South Carolina hazardous waste treatment and disposal facilities to nullify contracts with generators or transporters from blacklisted states. Likewise, hazardous waste haulers and generators are required to cancel contracts with South Carolina hazardous waste facilities.

However, the Obligation of Contracts Clause does not completely obliterate the police powers of the states. As Justice Holmes wrote, "one whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them."[147] The Clause does impose some limits on a state's powers, and the Supreme Court has used the following approach to determine the proper

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[145] U.S. CONST. art. I, § 10, cl. 1.

[146] *Id.*

[147] Hudson Water Co. v. McCarter, 209 U.S. 349, 357 (1908) (upholding a New Jersey law that prohibited riparian owners from diverting water courses within New Jersey to other states for use therein, regardless of the contractual consequences a party may suffer).

limits to that power.[148]

First, the state action will be invalidated if it can be shown that "the state law has, in fact, operated as a substantial impairment of a contractual relationship."[149] If the contractual relationship is only minimally altered, there will be no recovery under this Clause.

Second, "severe impairment . . . will push the inquiry to a careful examination of the nature and purpose of the state legislation."[150] State laws that are enacted to "safeguard the vital interests of [the] people" are generally upheld.[151] This is a balancing test again; consequently, the state's objectives are important to the validity of a statute, regulation, and order.

Application to the South Carolina Laws

There are two reasons the South Carolina laws may not pass the Obligation of Contracts Clause balancing test. While neither is conclusive, they may work together to prohibit the South Carolina laws from taking effect.

First, the South Carolina laws are a complete ban on out-of-state hazardous waste. The Obligations of Contracts Clause balancing test is triggered since hazardous waste haulers, generators, and facilities would have treatment and disposal contracts completely nullified by the South Carolina laws.[152]

Second, there is only a weak link between the South Carolina legislation and legitimate public interests. As illustrated by the *Hazardous Waste Treatment Council* decision, banning hazardous waste solely on the basis of origin is not the kind of state regulation that is designed to protect public health and the environment or the citizens of a state.

An argument may be made that the South Carolina laws purport to deal with the broad economic and social problem of hazardous waste. This is a suspect argument at best. The South Carolina laws cannot be construed as attempting to resolve these problems because they selectively nullify the contractual obligations of a portion of the national hazardous waste industry. State laws that benefit small groups such as South Carolina hazardous waste generators instead of having broad application have greater difficulty passing constitutional muster under this provision of the United States

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[148] *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 242 (1978).

[149] *Id.* at 244.

[150] *Id.* at 245.

[151] Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434 (1934).

[152] As discussed, hazardous waste facilities, generators, and haulers generally enter a contract where parties agree that a certain amount of hazardous waste will be treated or disposed of at the facility from a given generator and that the transporter has rights to transport the waste to the facility.

Constitution.[153]

The Equal Protection Clause

Finally, the South Carolina laws may be invalidated by the Equal Protection Clause.[154] Under the Equal Protection Clause, states are prohibited from denying persons within their jurisdiction equal protection of the laws. The Supreme Court has held, however, this Clause does not prevent states from making reasonable classifications among their citizens for taxation purposes.[155]

Application of the Equal Protection Clause triggers a two-level analysis.[156] Strict scrutiny analysis is applied to those state actions which involve fundamental rights, such as freedom of speech or religion, or suspect classification of persons, such as race or sex.[157] On the other hand, state laws that involve economic matters or a state's police powers need only pass a rationally related test.[158] The latter test applies where state laws prohibit out-of-state businesses from crossing state lines.[159]

Under the rationally related test a state law or regulation will be sustained if it promotes a legitimate state purpose despite severely restricting a nonsuspect class of citizens.[160] A great deal of latitude is usually given to state laws under this test, and the state actions are generally upheld if a reasonable state interest can be found.

Application to South Carolina Laws

The South Carolina laws would be analyzed under the rationally related Equal Protection Clause analysis since they involve economic measures and state police powers. An argument may be made that the South Carolina laws should not pass the rationally related test. The hazardous waste facilities in South Carolina affected by the legislation are singled out by the laws. Although states are given broad discretion, South Carolina still must be able to demonstrate that the laws are based on some legitimate local purpose

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[153] *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 250 (1978) (invalidating a Minnesota pension plan law because it "was not even purportedly enacted to deal with a broad, generalized economic or social problem").

[154] U.S. CONST. amend. XIV.

[155] Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973).

[156] *See* Western and Southern Life Ins. Co. v. Board of Equalization, 451 U.S. 648, 656-57 (1981).

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] Exxon Corp. v. Eagerton, 462 U.S. 176, 196 (1983).

to pass the Equal Protection Clause standard.

As in the other constitutional tests, this may be difficult to do, because the South Carolina laws discriminate against businesses solely on the origin of hazardous waste. Because hazardous waste from out-of-state poses no greater hazard than hazardous waste generated in South Carolina, the three South Carolina facilities and hazardous waste transporters effected by the South Carolina laws may assert equal protection as a basis for overturning the state action. The lack of a legitimate state purpose could be fatal to any governmental regulation, especially the South Carolina laws.

III. CONCLUSION

The South Carolina laws threaten at least six substantive areas of constitutional law: the Commerce Clause, the Supremacy Clause, the Due Process Clause, the Takings Clause, the Obligation of Contracts Clause, and the Equal Protection Clause.

The Commerce Clause is the greatest hurdle for South Carolina because its laws amount to facial discrimination against interstate commerce, and legislation of that kind is generally struck down. Moreover, the remaining provisions of the Constitution may be violated simply because it is difficult for the State to demonstrate that the laws advance a legitimate local interest; the laws are predicated on the desire to lock out out-of-state commerce, not protect human health or the environment. South Carolina should consider an alternative approach to legislating the hazardous waste problem within the State.