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If You Give the Court a Commerce Clause: An Environmental Justice Critique of Supreme Court Interstate Waste Jurisprudence

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IF YOU GIVE THE COURT A COMMERCE CLAUSE[1]: AN ENVIRONMENTAL JUSTICE CRITIQUE OF SUPREME COURT INTERSTATE WASTE JURISPRUDENCE

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PRELUDE

I have only visited landfills a handful of times in my life, but my first trip left an indelible impression. When I was eight, my family spent the good portion of a late-March Saturday performing spring cleaning, activities that had become the ritual since moving into the maroon two-story house left somewhat dirty and unkempt

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1. There is no telling what might happen if you give the Court a Commerce Clause. By analogy, for instance, "If you give a moose a muffin, he'll want some jam to go with it." Once you apply the jam, the moose will want a number of muffins. When the muffins are gone, the moose will want more. This will require a trip to the store, a need for a sweater, and repairs to the sweater, including buttons. The buttons will remind the moose of his grandmother's puppets. This will necessitate old socks, a subsequent puppet show with accompanying stage and set— which requires paint for scenery— and then sheets to hide the moose's antlers. The sheets will remind the moose of Halloween. He will become scared, fall, and knock over the paints. After using the sheet to clean up the spilled paint, the moose will want to wash the sheet and then hang it out to dry. While hanging the sheet outside, the moose will see a blackberry bush. This will remind him of blackberry jam. "He'll probably ask you for some. And chances are . . . if you give him the jam, he'll want a muffin to go with it." LAURA JOFFE NUMEROFF & FELICIA BOND, IF YOU GIVE A MOOSE A MUFFIN (1991); *see generally* LAURA JOFFE NUMEROFF & FELICIA BOND, IF YOU GIVE A MOUSE A COOKIE (1985); LAURA JOFFE NUMEROFF & FELICIA BOND, IF YOU GIVE A PIG A PANCAKE (1998).

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for our arrival. The air was thin that spring morning as it often is in the Intermountain West, and I watched eagerly as my father, grandfather, and uncle all worked to pull a dead tree stump from the flowerbed in the front yard.

Once the day's activities were complete, my father and I climbed into the rusting-out dark red 1965 Chevrolet pickup on loan from my grandfather, a truck affectionately referred to by all of our family as Leap 'n' Lena. We headed west across the Salt Lake Valley, rubbish, refuse, and dead tree stump in tow. Turning down a dusty road, we eventually pulled up to a dull gray gate. My father got out of the truck, handed a man in grungy overalls some crumpled bills, and reentered the growling red monster. When we drove on, I could not believe what I saw: all these marvelous things — shoes, branches, combs, broken mirrors, bottles, and all other manner of things wondrous to a child already possessing too active an imagination — were heaped in mound upon mound, circle of swarming seagulls after circle of swarming seagulls. I headed straight for the nearest discarded shampoo bottle, but my father quickly restrained me. This, he reminded, was a garbage dump . . . for garbage. "How?" I wondered. "This stuff is so *cool*."

I knew not then what I know now.

INTRODUCTION

Americans are greedy. We constitute only four-and-a-half percent of the world's population,[2] but, along with

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Gerald Gunther; Katherine Ludwig, Solomon Noh, et al.; Daryl Nelson; Janet Scott and the Virginia Office of the Attorney General; Professors Doreton Taylor and Paul Mohai; and, most importantly, my wife, Kathleen, for assisting in gathering and analyzing census data, and for her continual support.

2. *See* United States Census Bureau, *U.S. Census Bureau* (last modified July 23, 1999) <http://www.census.gov/> (estimating 273,062,201 Americans and 6,000,973,731 people in the world as of 11:39 a.m. Eastern Daylight Time, July 23, 1999).

the other industrialized countries containing an additional fifteen percent of the world's population, we consume eighty-six percent of the world's gross domestic product each year.[3] In contrast, the fifth of the world's population living in the poorest countries consume only one percent of the world's resources on a yearly basis.[4]

While much might be said about the implications of a world so polarized by its resource distribution,[5] this Note focuses instead on another aspect correlated with American consumption of vast amounts of resources. For attendant with our consumer-heavy habits is our propensity to waste. Indeed, every American produces approximately 4.4 pounds of garbage a day, which equals over 180 million tons a year, and is collected by municipalities to the tune of $23 billion.[6] Indeed, somewhere between eighty to ninety percent of municipal waste eventually finds its way into landfills.[7]

These landfills often take up very valuable land, and a lot of it. For instance, the Fresh Kills landfill on New

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3. *See* United Nations Development Programme, *Human Development Report 1999: Press Kit* (visited July 26, 1999) <http://www.undp.org/hrdo/E1.htm>. For a commentary on the emptiness of America's culture of consumerism, see MITCH ALBOM, TUESDAYS WITH MORRIE 108–14, 135-42 (1997).

4. *See* United Nations Development Programme, *supra* note 3.

5. *See generally* UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1999 (1999); *cf., e.g.*, Xavier Carlos Vasquez, *The North American Free Trade Agreement and Environmental Racism*, 34 HARV. INT'L L.J. 357, 364-74 (1993) (describing NAFTA's disproportionately negative environmental effects on the U.S.-Mexico border and within Mexico because of Mexico's lower environmental standards); Hugh J. Marbury, Note, *Hazardous Waste Exportation: The Global Manifestation of Environmental Racism*, 28 VAND. J. TRANSNAT'L L. 251, 293 (1995) (advocating disposal of hazardous waste proximate to its place of generation rather than in countries where it was not employed).

6. *See Information Please, Encyclopedia Entry: Solid Waste* (visited July 26, 1999) <http://cbs.infoplease.com/ce5/CE048556.html>.

7. *See id.*

York's Staten Island, which is slated for closure on December 31, 2001,[8] has a total of approximately 2,200 acres.[9] Moreover, landfills do not typically brighten the neighborhoods into which they move, bringing with them rank smells, increased traffic, rats, flies, toxic waste, potential groundwater contamination, and, of course, tons of garbage.[10] Americans are not naïve about the effects of our actions on the environment,[11] and we attempt to regulate those effects fairly exhaustively.[12]

One judicial doctrine, however, limits the ways in which Americans can regulate the amount of waste we dump into our landfills. The Dormant Commerce Clause disallows states from economically discriminating against other states in their management of garbage, if that management affects interstate commerce. While this doctrine has suffered extensive criticism,[13] the Supreme Court continues to invariably employ it, using it to strike down state laws that regulate waste disposal but fetter the flow of that waste from one state to the next.

This Note criticizes the Court's doctrine and its restraints on state environmental laws from one more angle — the environmental justice theory — and concludes that at every turn, the Dormant Commerce Clause miserably fails the environmental justice critique. Part I of this Note provides a background for environmental justice, explaining its history and context, and fully outlining the movement's theoretical under-

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8. *See infra* Part V.A.

9. *See The Fresh Kills Landfill Map* (visited Jan. 9, 2000) <http://www.ci.ny.us>.

10. *See infra* Part IV.A.

11. *But see generally* PAUL R. EHRLICH & ANNE H. EHRLICH, THE BETRAYAL OF SCIENCE AND REASON: HOW ANTI-ENVIRONMENTAL RHETORIC THREATENS OUR FUTURE (1997) (warning of the danger of buying into "brownlash" literature).

12. *See infra* note 257.

13. *See infra* Part III.

pinnings. Part II summarizes the Supreme Court's Dormant Commerce Clause cases involving interstate movement of waste, and Part III extracts the traditional criticisms of the Clause. Part IV applies the environmental justice theory developed in Part I to the Supreme Court's doctrine. Finally, Part V applies the environmental justice critique of the Dormant Commerce Clause to Virginia's recent attempt to curb garbage imports, and finds that the district court judge's opinion to enjoin enforcement of Virginia's new disposal laws violates the principles of environmental justice, but perhaps predictably, follows the path the Supreme Court has laid: a Commerce Clause less and less tolerant of state attempts to protect their environment, and likely more and more blind to minorities and people of lower income.

I. BACKGROUND: ENVIRONMENTAL JUSTICE

Most accounts of the history of American environmentalism begin with nineteenth century Transcendentalism and Henry David Thoreau, Ralph Waldo Emerson, and Winslow Homer. These accounts elaborate on the debates between John Muir's preservationist camp and Gifford Pinchot's conservationist/utilitarian retinue, debates that were galvanized by the Hetch Hetchy dam controversy, and conclude by discussing Rachel Carson's *Silent Spring* and its lingering effects, including the proliferation of both environmental groups and modern environmental law.[14] This "classic" history is neat, clean, and easy to weave, but it is not complete. To be sure, most environmental historians have either blatantly ignored or simply overlooked the fuller, more complex history of American environmentalism. The

14. *See, e.g.*, LESTER W. MILBRATH, ENVIRONMENTALISTS: VANGUARD FOR A NEW SOCIETY (1984); RODERICK. NASH, WILDERNESS AND THE AMERICAN MIND (3d ed., 1982); R.E. Dunlap & K.D. Van Liere, *The "New Environmental Paradigm,"* 9 J. ENVTL. EDUC. 4 (1978).

American environmentalist movement has been painted white, and left two-dimensional. In reality, however, the movement is not monochrome, and it contains many wrinkles, folds, and intertwined developments.

Although the preservationist/conservationist dichotomy is what seems to have defined American environmentalism, other important influences and ideals helped to drive the movement forward. When the movement began in the nineteenth-century, for instance, the urban working class used arguments about the environmental inequalities they faced — such as poor sanitation, overcrowding, rampant disease, and lack of clean water — to fight for access to greenspace by developing neighborhood parks.[15] Similarly, nineteenth-century urban, middle-class women campaigned for better sanitation, campaigns that by the early twentieth century evolved into concerns for quality of life issues in general, and eventually also became part of the rural and suburban agenda.[16] While the mainstream American environmental movement — especially as traditionally portrayed — has been dominated by Caucasians, this too leaves important figures out of the environmentalist picture. During the nineteenth century, Native Americans were betrayed and abused by the U.S. government,[17] Latinos and Asians were relegated to the most difficult jobs and paid the lowest of wages, and African-Americans did not obtain Constitutional rights until after the Civil War.[18] These deplorable and unjust conditions left American minorities little room to play a

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15. *See* Dorceta E. Taylor, *American Environmentalism: The Role of Race, Class and Gender in Shaping Activism 1820-1995*, 5 RACE, GENDER & CLASS 16, 21 (1997). "These parks provided free or cheap leisure for the working class and soon became the focal point of environmental and political rallies." *Id.*

16. *See id.* at 21-24, 32.

17. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 50-143 (1982) (tracing the legal treatment of American Indians from 1532 to 1928).

18. *See* Taylor, *supra* note 15, at 24-29.

part in the environmental movement, but by the twentieth century their influence began to be felt. For example, in the early 1900s, unionized people of color fought for better working conditions.[19] In 1951, husbands and wives joined to picket silver and zinc mine employers for not only better wages, but also for improved sanitation and drinking water.[20] And in 1969, the Quinault tribe in the Pacific Northwest closed twenty-nine miles of beach to the public to prevent littering and other environmental degradation.[21]

Despite the richness minorities, women, and people of lower income have added to the mainstream environmental movement, their contributions have continually been overlooked. Indeed, by the 1980s and 1990s the mainstream environmental movement had marginalized minorities, the poor, and their interests. The movement had become a "white, middle-class [movement focused on] . . . conservation, pollution control, species and habitat preservation, . . . and consumer protection."[22] A movement purporting to protect the environment for the sake of humanity while at the same time ignoring an entire segment of society could not stand without criticism for long, and environmentalism did not.

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19. *See id.* at 33-34. American racial minorities often did not participate in other environmental activism in the early part of the nineteenth century because they were forced to place their primary concern with the daily racial discrimination they faced in the workplace. They understood that eradicating racism was a condition precedent to relieving occupational discrimination. *See generally, e.g.*, ANDREW HURLEY, ENVIRONMENTAL INEQUALITIES: CLASS, RACE, AND INDUSTRIAL POLLUTION IN GARY, INDIANA, 1945-1980 (1995).

20. *See* TERESA AMOTT & JULIE MATTHAEI, RACE, GENDER, AND WORK: A MULTICULTURAL HISTORY OF WOMEN IN THE UNITED STATES 78 (1991).

21. *See* VINE DELORIA, JR., GOD IS RED 14-15 (1973).

22. Richard Hofrichter, *Introduction* to TOXIC STRUGGLES: THE THEORY AND PRACTICE OF ENVIRONMENTAL JUSTICE 1, 1 (Richard Hofrichter ed., 1993) [hereinafter TOXIC STRUGGLES].

A. *History of the Environmental Justice Movement*

Written out of the plot by environmental historians, and left to fend for their own, often non-wilderness-centered interests by the mainstream environmental movement,[23] poor and minority communities became dumping grounds for the byproducts of industrial society. Residents of these communities certainly understood that they were bearing the brunt of the nation's pollution,[24] but the mainstream environmental movement — much as it had with the contributions given to it by women, minorities, and the working class — overlooked the dilemma. In 1987, however, environmentalism changed forever,[25] and the environmental justice movement was born. The United Church of Christ's (UCC) Commission for Racial Justice released a study that statistically proved minority and low-income communities were, in fact, disproportionately burdened by our country's pollution.[26] Other studies further sub-

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23. *See* Taylor, *supra* note 15, at 47-49 (characterizing the mainstream environmental movement as a "reformist" one, and noting that its organizations had grown "increasingly big, bureaucratized, hierarchical, and distant from local concerns and politics").

24. For an example of a local battle against environmental injustice, see generally COLIN CRAWFORD, UPROAR AT DANCING RABBIT CREEK: BATTLING OVER RACE, CLASS, AND THE ENVIRONMENT (1996) (chronicling environmental justice activities in Noxubee County, Mississippi).

25. At least one commentator argues that environmentalism has now been subsumed by the broader movement of sustainable development— in large part due to the environmental justice movement's influence on mainstream environmentalism. *See* J. B. Ruhl, *The Co-Evolution of Sustainable Development and Environmental Justice: Cooperation, then Competition, then Conflict*, 9 DUKE ENVTL. L. & POL'Y F. 161, 177-78 (1999).

26. COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE CITES (1987). The United States General Accounting Office had published a study four years earlier, but it had gone largely unnoticed until the UCC study was released. *See* U.S. GEN. ACCOUNTING OFFICE, SITING OF HAZARDOUS

stantiating the UCC's conclusions followed,[27] and although based in the grassroots, the environmental justice movement became a national phenomenon.

The extent to which the environmental justice movement had become a national phenomenon was apparent in 1991 at the People of Color Environmental Leadership Summit. There, the movement for the first time adopted a formal statement of its ideology and goals, a document entitled the *Principles of Environmental Justice*.[28] In 1994, President Clinton added to the reach of the movement by mandating that all federal agencies must consider and address their impact on minority and low-income communities.[29] An explosion of environmental justice literature also occurred in academe, further amplifying both the definition and application of environmental justice.[30] Perhaps most importantly, environmental justice advocates began to forge solutions to the disproportionate problems they faced. Some communities forced polluters and waste sites away from their neighborhoods or were able to ensure compliance with environmental laws;[31] where brownfields redevel-

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WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983).

27. *See generally, e.g.*, PAT COSTNER & JOE THORNTON, PLAYING WITH FIRE, HAZARDOUS WASTE INCINERATION: A GREENPEACE REPORT (1990); BENJAMIN A. GOLDMAN & LAURA FITTON, TOXIC WASTES AND RACE REVISITED (1994); U.S. ENVTL. PROTECTION AGENCY, 1 ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES (1992); Marianne Lavelle & Marica Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S1.

28. *See infra* Appendix A. For an analysis of how these principles influence environmental justice theory, see *infra* Part I.C; *see also* Taylor, *supra* note 15, at 53 (arguing that the *Principles* created an "environmental justice paradigm").

29. *See* Exec. Order No. 12,898, 59 Fed. Reg. 2629 (1994).

30. *See infra* Part I.C.

31. *See, e.g.*, Robert W. Collin & William Harris, Sr., *Race and Waste in Two Virginia Communities*, *in* CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 93, 98-100 (Robert D. Bullard ed., 1993) (discussing how one group of citizens defeated having a nuclear waste site located in their community)

opment took place within environmental justice areas, it improved those communities both ecologically and financially;[32] and a number of advocates began to outline other possible policy and also more pragmatic, ground-level solutions.[33]

The fight is not over, however, and there is still much work to be done. For a few success stories do not a make an ultimate victory, and protecting the environment has never been a simple thing, especially when attempting to do so in a just and equitable manner. [34]

[hereinafter CONFRONTING ENVIRONMENTAL RACISM]; Winona LaDuke, *A Society Based on Conquest Cannot Be Sustained: Native Peoples and the Environmental Crisis*, *in* TOXIC STRUGGLES, *supra* note 22, at 105-06 (summarizing four instances where Native Americans "successfully resisted the destruction of their land and lives"); Cynthia Hamilton, *Women, Home and Community: The Struggle in an Urban Environment*, RACE, POVERTY & THE ENV'T, Apr. 1990, at 3, 10-13 (examining a women-led grassroots organization in South Central Los Angeles).

32. *See* Lincoln L. Davies, Note, *Working Toward a Common Goal? Three Case Studies of Brownfields Redevelopment in Environmental Justice Communities*, 18 STAN. ENVTL. L.J. 285, 317-23 (1999).

33. *See, e.g.*, Richard Hofrichter, *Cultural Activism and Environmental Justice*, *in* TOXIC STRUGGLES 85, 93-96 (noting that the "creation and reaffirmation of community culture can advance grass-roots organizing for environmental justice"); Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN ENVTL. L.J. 33, 70 (1998) (arguing that additional public participation in the policy and land use decision-making processes can only improve environmental justice); Alice Kaswan, *Environmental Laws: Grist for the Equal Protection Mill*, 70 U. COLO. L. REV. 387, 427-56 (1999) (outlining hurdles environmental justice advocates must meet when using the Constitution's equal protection clause to bring claims).

34. Environmental problems are complex and multi-faceted, combining aspects of biophysical and social science, policy goals and value judgments, and economic and other interests of current and future generations. *See generally, e.g.*, STUART L. PIMM, THE BALANCE OF NATURE? (1991); Kenneth Arrow et al., *Economic Growth, Carrying Capacity, and the Environment*, 268 SCIENCE 520 (1995); Gretchen Daily & Paul Ehrlich, *Population, Sustainability, and Earth's Carrying Capacity*, 42 BIOSCIENCE 761, 770 (1992); Norman Myers, *Consumption in Relation to Population, Environment*

Though certainly not as crucial to eliminating environmental injustice as, say, removing lead from poor and minority communities might be,[35] one of the things that still requires attention on the environmental justice front is providing a complete definition to and a cohesive theory of environmental justice. The *Principles of Environmental Justice*[36] took the first and perhaps furthest step forward in that effort, but most scholarship until now has largely focused on either demonstrating the existence of environmental inequities,[37] or discussing individual applications within the movement and specific instances where communities have faced disproportionate ecological hardship.[38] A handful of recent

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and Development, 17 ENVIRONMENTALIST 33 (1997); Terry L. Root & Stephen H. Schneider, *Ecology and Climate: Research Strategies and Implications*, 269 SCIENCE 334 (1995). Adding justice and equity to the equation only further complicates it. *See, e.g.*, J. B. Ruhl, *Sustainable Development: A Five-Dimensional Algorithm for Environmental Law*, 18 STAN. ENVTL. L.J. 31, 63-64 (1999) (summarizing how environment, equity, and economic growth must be maximized over time and space).

35. For a discussion of lead poisoning in environmental justice communities, see Janet Phoenix, *Getting the Lead out of Communities*, *in* CONFRONTING ENVIRONMENTAL RACISM 77, 77-92.

36. *See infra* Appendix A.

37. *See supra* notes 26-27.

38. *See generally, e.g.*, ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY (1990); CONFRONTING ENVIRONMENTAL RACISM, *supra* note 31 (addressing lead poisoning and pesticide exposure, and examining specific studies in Alabama, Colorado, New Mexico, and Virginia); RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE (Bunyan Bryant & Paul Mohai eds., 1992) (considering the need for minority involvement in environmental groups, consumption of toxic fish in Detroit and Michigan generally, and occupational hazard for minorities) [hereinafter RACE AND ENVIRONMENTAL HAZARDS]; TOXIC STRUGGLES, *supra* note 22 (addressing gender-based critiques of mainstream environmentalism, occupational hazard disparities, and the global connection in environmental inequity); UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR (Robert D. Bullard ed., 1994) (examining instances of environmental injustice in specific communities, including Indian Creek, Warren County, and Texarkana) [hereinafter UNEQUAL PROTECTION]; WHO PAYS THE PRICE?

works examine environmental justice from other social paradigms,[39] but they still largely leave explicitly coalescing the theoretical underpinnings of the movement in the creases. The next two sub-Parts of this Note briefly define environmental justice, and then attempt to provide a complete examination of environmental justice theory. The latter of these attempts will provide the framework on which this Note later critiques the Dormant Commerce Clause.[40]

THE SOCIOCULTURAL CONTEXT OF ENVIRONMENTAL CRISIS (Barbara Rose Johnston ed., 1994) (discussing, among other things, the Yanonami and China) [hereinafter WHO PAYS THE PRICE?].

39. *See* Sheila Foster, *Race(ial) Matters: The Quest for Environmental Justice*, 20 ECOLOGY L.Q. 721, 730-52 (1993) (examining environmental justice from a critical race perspective); Gloria E. Helfand & L. James Peyton, *A Conceptual Model of Environmental Justice*, 80 SOC. SCIENCE Q. 68, 74-77 (1999) (arguing that hazardous waste siting decisions can often be explained by analyzing the cost-benefit curves of affected residents, communities decisionmakers, and industries); Ralph M. Perhac, Jr., *Environmental Justice: The Issue of Disproportionality*, 21 ENVTL. ETHICS 81, 85-91 (analyzing environmental justice from utilitarianism, natural rights theory, and Rawlsian contractarianism); Taylor, *supra* note 15, at 19-30, 32-39, 43-47, 49-56 (tracing the involvement of women, minorities, and the working class in the environmental movement from a historical perspective); Dorceta A. Taylor, *The Urban Environment: The Intersection of White Middle-Class and White Working-Class Environmentalism (1820-1950s)*, 7 HUMAN ECOLOGY 202, 207-24 (1998) (using social movement theory); Robert R.M. Verchick, *In a Greener Voice: Feminist Theory and Environmental Justice*, 19 HARV. WOMEN'S L.J. 23, 30-54 (1996) (applying feminist method, contextual reasoning, and consciousness-raising); Rozelia S. Park, Note, *An Examination of International Environmental Racism through the Lens of Transboundary Movements of Hazardous Wastes*, 5 IND. J. GLOBAL LEGAL STUD. 659, 703-09 (1998) (using sovereignty as a model); *see also* Kaswan, *supra* note 33, at 396-407 (condensing environmental justice into two primary tenets); Ruhl, *supra* note 25, at 177-84 (explaining the "co-evolutionary" relationship of environmental justice and sustainable development).

40. *See infra* Part IV.

B. *Defining Environmental Justice*

Because environmental justice grew along with — and in many ways, out of— mainstream environmentalism,[41] it is easiest to define the movement by discussing how it is similar to and different from its historical companion. Indeed, such analysis shows that environmental justice and mainstream environmentalism are at once deeply intertwined and forcefully divergent. Their relationship is a schizophrenic one: sometimes that of a loving mother and her adoring daughter, sometimes feuding siblings interned in a never-ending dispute.

1. Similarities

Mainstream environmentalism and environmental justice share a common core: on a general level, both movements are concerned with attaining ecological protection.[42] In this respect, the two movements are at times interlocking. Although not always the case, removing environmental injustices usually advances goals that fall within the mainstream environmental movement. When the mainstream movement obtains ecological protection that benefits society as a whole, the goals of environmental justice are advanced.[43] Moreover, both movements use some of the same techniques to advance their goals, including environmental education and personal behavior change. Both movements also often focus on critiquing negative effects of technology, especially pollution and toxic waste.[44]

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41. *See* Ruhl, *supra* note 25, at 178-80; Taylor, *supra* note 15, at 19-30, 32-39, 43-47, 49-56.

42. However, at more specific levels— each movement's emphases of environmental protection— they differ. *See infra* Part I.B.2.

43. Of course, when environmental goods are not distributed evenly, or when ecological harms are disproportionate, primary examples of environmental injustice abound.

44. However, mainstream environmentalism has only included this critique since the 1960s and 1970s. Taylor, *supra* note

2. Differences

While environmental justice and mainstream environmentalism are in part housed within the same structure — they share portions of the same foundation, and from time to time use the same walls and doorways — they also distinctly differ. Such differences are perhaps most pronounced when the two movements are employed in the real world. Mainstream environmentalism is broad, overarching, and continually encompassing more and more issues within its grasp, while environmental justice activism typically arises over narrower, more discrete disputes such as waste disposal siting decisions.[45] Likewise, environmentalism has evolved to incorporate environmental justice, while the latter movement continues by attempting to distinguish itself from the mainstream. As Professor Ruhl notes, "In the sustainable development framework, equity is co-equal with environment and economy. In the environmental justice framework, equity is placed above all else. Sustainable development is a multi-trait, long-term policy optimizer, whereas environmental justice is a single-trait, short-term policy maximizer."[46] The two movements also differ in a number of other respects.

Emphases of environmental protection. Although mainstream environmentalism and environmental justice share a common general goal of protecting our ecosystems, each movement often targets dissimilar specific areas of protection. For the mainstream, Pinchot's

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15, at 41. Environmental justice, on the other hand, has used it since the movement's inception. *See id.* at 52-53.

45. *See* Ruhl, *supra* note 25, at 180-82. *But see, e.g.*, Hofrichter, *supra* note 22, at 4-6 ("Environmental justice is about social transformation directed toward meeting human need and enhancing the quality of life— economic quality, health care, shelter, human rights, species preservation, and democracy— using resources sustainably."); Taylor, *supra* note 15, at 52-53 (contending that, at least from a theoretical vantage, environmental justice broadened the mainstream movement).

46. Ruhl, *supra* note 25, at 180.

conservationism and Muir's preservationism are still very much alive; the movement centers on wilderness, wildlife, and recreation.[47] In contrast, environmental justice focuses on disproportionate impacts of ecological deterioration, especially in the context of contaminants, human rights, working-class concerns, and access to natural resources and greenspace.[48] Indeed, environmental justice tries to link "occupational, community, economic, environmental, and social justice issues . . . ."[49]

Membership. Another difference in the two movements is in their memberships. There are two primary differences here. First and perhaps predictably so, environmental justice groups enjoy more diverse memberships than do mainstream groups. In fact, approximately fifty-eight percent of environmental justice groups serve either Native Americans[50] or African American constituents.[51] Another twenty-four percent serve a mixture of minority constituents, while fifteen percent serve Latinos or Asians, and three percent serve a mixture of minority and white constituents.[52] Mainstream groups, on the other hand, are overwhelmingly Caucasian.[53]

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47. *See* BULLARD, *supra* note 38, at 10-11; Taylor, *supra* note 39, at 208.

48. *See* Taylor, *supra* note 15, Minorities and people of lower income have been denied equal access to environmental resources throughout time, but one specific context in which environmental goods have been offered disproportionately is the urban park. *See* Dorceta E. Taylor, *Central Park as a Model for Social Control: Urban Parks, Social Class and Leisure Behavior in Nineteenth-Century America*, 31 J. LEISURE RESEARCH 1, 32-33 (forthcoming 1999).

49. Taylor, *supra* note 15, at 54; *see* Deeohn Ferris, *A Call for Justice and Equal Environmental Protection*, *in* UNEQUAL PROTECTION, *supra* note 38, at 298.

50. I define Native Americans as including Alaska Natives, American Indians, and Native Hawaiians.

51. *See* Taylor, *supra* note 15, at 54.

52. *See id.*

53. *See* Dorceta Taylor, *Can the Environmental Movement Attract and Maintain the Support of Minorities?*, *in* RACE AND

Moreover, environmental justice groups share in leadership diversity, often with women taking the helm.[54] But nearly eighty percent of mainstream groups have male leaders.[55]

Second, environmental justice groups are almost always grassroots; local citizens work to solve local problems. Yet mainstream environmental groups have become large hierarchical bureaucracies, often working in cooperation with industries and divorced from local issues.[56] These structural differences in the two movements' memberships also influence the methods the two movements employ to institute change.

Methods and posture. Mainstream groups generally use incremental or reformist measures such as lobbying and direct mail campaigns to further their goals,[57] while environmental justice groups often take more radical or refractory actions to implement the changes they seek. Indeed, one of the touchstones of environmental justice groups is that they are "action-oriented."[58] Although their varied methods distinguish the two groups, an analysis of their heritages shows that this difference is rather predictable. Over two-thirds of environmental justice organizations formed in 1980 or later, but nearly three-quarters of mainstream environmental organizations formed prior to 1980.[59] This implies that predominantly Caucasian groups have a greater likelihood of having been formed in conjunction with the well-evolved and polished mainstream environmentalism and

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ENVIRONMENTAL HAZARDS 28, 28; John H. Adams, *The Mainstream Environmental Movement: Predominately White Memberships Are Not Defensible*, EPA J., at 25, 26 (Mar./Apr. 1992).

54. *See* Barbara Epstein, *Ecofeminism and Grass-roots Environmentalism in the United States*, *in* TOXIC STRUGGLES, *supra* note 22, at 149.

55. *See* DONALD SNOW, INSIDE THE ENVIRONMENTAL MOVEMENT: MEETING THE LEADERSHIP CHALLENGE 48-49 (1992).

56. *See* Hofrichter, *supra* note 22, at 7.

57. *See id.*

58. Ferris, *supra* note 49, at 298-99.

59. *See* Taylor, *supra* note 15, at 54-55.

the already-developed procedures, methods of operation, and agendas carried with it. However, predominantly minority groups are more likely to have deliberately splintered from the mainstream because their interests were not being looked after. In fact, sixty-one percent of environmental justice groups did not begin as environmental groups at all;[60] their heritage often lies in the Civil Rights Movement or other more militant causes such as the Chicano Movement[61] and the American Indian Movement.[62]

Worldview: environmental protection as a good versus as a right. Finally, environmental justice and mainstream environmentalism differ in what might be called their "worldviews." The mainstream movement advances its goal of protecting the environment under the assumption that ecological protection is a good to humans that must be balanced with the negative byproducts of our modern industrialized society.[63] Indeed, environmental economists devote their careers to analyzing the tradeoffs between environmental protection and environmental harm.[64] There is, they argue, an "optimal" level of pollution, and equity is only a matter of distribution.[65]

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60. *See id.*

61. For a discussion of the Chicano Movement, see RODOLFO ACUNA, OCCUPIED AMERICA: A HISTORY OF CHICANOS 307-58 (3rd ed., 1988).

62. An example of the tactics used by the American Indian Movement includes their occupation of Alcatraz Island in San Francisco Bay during 1969. For a history of American Indian activism, including the occupation of Alcatraz, see PAUL CHAAT SMITH & ROBERT ALLEN WARRIOR, LIKE A HURRICANE: THE INDIAN MOVEMENT FROM ALCATRAZ TO WOUNDED KNEE (1996).

63. This is perhaps largely an outcome of the incremental, reformist tactics the movement employs; compromise is at the heart of lobbying for and legislating change. *See supra* notes 57-62 and accompanying text.

64. *See generally* DAVID W. PEARCE & R. KERRY TURNER, ECONOMICS OF NATURAL RESOURCES AND THE ENVIRONMENT (1990); TOM TIETENBERG, ENVIRONMENTAL ECONOMICS AND POLICY (1994).

65. *See id.*

Conversely, environmental justice advocates contend that access to natural resources and environmental protection are fundamental human rights.[66] Distribution of ecological harms is certainly an important concern, but an environmental justice analysis cannot end there. Instead, the right to live in an uncontaminated environment is inextricably tied to the rights to pursue life and happiness; a sustainable environment is the foundation on which life and happiness must grow.[67] As a right, environmental protection, at least according to environmental justice advocates, must receive an uncompromising stature rather than one in which it is balanced against other concerns.[68] For environments in which people live, the only acceptable level of pollution is one at which they are not harmed, and when people are being harmed, "pollution optimality" is only an insult.

C. *Environmental Justice Theory*

While defining the environmental justice movement, especially in juxtaposition with mainstream environ-

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66. *See infra* Appendix A, at Principles 1, 3-5, 7-8, 10. *See generally* Barbara Rose Johnston, *The Abuse of Human Environmental Rights: Experience and Response*, *in* WHO PAYS THE PRICE? 219 (discussing how environmental injustice violates human rights); *but see* South East Lake View Neighbors v. Department of Hous. and Urban Dev., 685 F.2d 1027 (7th Cir. 1982) (holding that recovery for environmental damages is not a right). *Compare* 42 U.S.C. § 4331(c) (1994) (recognizing that "each person *should* enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment") (emphasis added).

67. *See infra* Appendix A at Principle 1.

68. *Cf.* Mark Ritchie, *Trading Away the Environment: Free-Trade Agreements and Environmental Degradation*, *in* TOXIC STRUGGLES, *supra* note 22, at 209, 212-18 (describing how using "free-market" economics as opposed to "sustainable" development has harmed environmental justice communities in the developing world).

mentalism, is not a very perplexing matter, describing the theoretical underpinnings of environmental justice is apparently a more difficult task. The *Principles of Environmental Justice*[69] began setting forth a cohesive paradigm of the movement. But these *Principles* are rather limited in scope,[70] and nothing else has presented a truly comprehensive analysis of environmental justice theory. Using the *Principles* — and gleaning from other environmental justice literature — this sub-Part attempts to outline four tenets that comprise the environmental justice paradigm.

1. Distributional Justice

What forms the core of environmental justice is what the movement was born out of: an aspiration for distributional justice. Indeed, if one tenet alone were to define environmental justice, it would be the movement's striving for equity — fair distribution of environmental goods and harms. This is where the movement's discovery of disproportionate environmental burdens for minorities, the poor, and history of the civil rights movement merge, and where the rivers of activism and environmental rights run together. While other types of distributional environmental injustices might exist, at minimum the environmental justice movement seeks three types of distributional justice.

Pollution and environmental harms. The movement first seeks to correct the problems that brought environmental injustice to the forefront of the environmental community's attention: unequal and unfair distribution of pollution, toxic waste, and other environmental harms.[71] In a perfect world, the movement would eliminate all human exposure to such toxics,[72] but in the im-

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69. *See infra* Appendix A.
70. *See id.* at Principles 4, 6, 8-9, 11-15.
71. *See supra* notes 26-27.
72. *See infra* Appendix A, at Principles 4, 6, 8.

perfect world where we live, the movement would reduce exposure as much as possible, and make exposure equal across all races, classes, and nations.[73]

Natural resources and environmental goods. Interconnected with the skewed distribution of pollution is an inequitable distribution of access to natural resources and other environmental goods.[74] By default, people who have polluted air and polluted water do not have the same access to clean air and clean water as do other citizens. Moreover, minorities and the poor historically have been denied equal access to resources such as parks and other greenspace,[75] and this problem continues today.[76] Environmental justice seeks to eliminate it.

Environmental laws. In 1992, the *National Law Journal* published a groundbreaking study that revealed discrimination in environmental law enforcement. Not only were minorities and the poor bearing the brunt of society's pollution, but they also were not receiving equal protection from such harms.[77] A third aspect of the movement's distributional justice tenet seeks equal protection of environmentally disadvantaged communities under our nation's laws.[78] Without this, distributional justice is unlikely. And even if somehow distributional justice were obtained without equal application and prosecution of environmental laws, it would be unstable and in many ways incomplete.

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73. *See id.* at Principles 9, 12; *see also* BULLARD, *supra* note 38, at 11 (discussing "environmental elitism"); Robert D. Bullard, *Conclusion: Environmentalism with Justice*, *in* CONFRONTING ENVIRONMENTAL RACISM, *supra* note 31, at 195, 204-06 (outlining a solution-oriented "environmental justice framework").

74. *See infra* Appendix A, at Principle 3.

75. *See* Taylor, *supra* note 48, at 32-33.

76. *See* Martin Khor Kok Peng, *Economics and Environmental Justice: Rethinking North-South Relations*, *in* TOXIC STRUGGLES, *supra* note 22, at 219, 221-25 (examining unequal access to resources from an international perspective).

77. *See generally* Lavelle & Coyle, *supra* note 27.

78. *See* Foster, *supra* note 39, at 729-30; *see also infra* Appendix A, at Principle 2.

2. Political Justice

In addition to the three levels of distributional justice sought by the environmental justice movement, advocates of environmental justice also hope to obtain a greater measure of political justice than minorities and the poor received in the past.[79] One of the corollaries of political justice is largely in the vein of the civil rights movement and reflects the environmental justice movement's historical roots in civil rights advocacy: political justice must include greater representation of minorities and people of lower income.[80]

Moreover, true political justice for the environmental justice movement means that not only would disadvantaged communities receive equal access to environmental goods — and equal protection from environmental harms — but they would also have a voice in how those harms and goods are distributed.[81] Importantly, however, this voice must not be cast upon closed ears. Indeed, environmental justice advocates often face a number of barriers to representing their cause, including the nascent dilemma of living in communities that enjoy less political pull,[82] as well as often being categorized as selfish "not in my backyard" activists, or as "hysterical and irrational . . . greedy publicity-seekers."[83] However, studies indicate that environmental justice is advanced furthest when community residents not only enjoy a greater level of participation,

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79. *See* Stella M. Capek, *The "Environmental Justice" Frame: A Conceptual Discussion and an Application*, 40 SOC. PROBLEMS 5, 8 (1993) ("The dimensions of environmental justice are unified by a strong emphasis on citizenship rights, democratic process, and respect for 'grass-roots' knowledge . . . .").

80. *See* Kaswan, *supra* note 33, at 404.

81. *See infra* Appendix A, at Principle 7.

82. *See, e.g.*, Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, *in* CONFRONTING ENVIRONMENTAL RACISM, *supra* note 31, at 15, 21-22.

83. Capek, *supra* note 79, at 7.

but when that participation is legitimized and actually influences the outcome.[84]

In the end, greater political justice for environmental justice communities means that the residents of those communities become more influential players in the environmental decision-making process — the process becomes more democratic.[85] As Professor Kaswan writes, "The touchstone for political justice is that decision makers treat all citizens with 'equal concern and respect.' Understood in its political sense, this form of justice looks at the fairness of the decision-making process rather than the fairness of its outcome."[86]

3. Self-Determination and Sovereignty

Closely linked to environmental justice's need for participation — and legitimization of that participation — is the movement's advocacy of self-determination. To be sure, legitimate participation and fair representation in the political system are the precursors to self-determination, but true self-determination moves be-

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84. *See* Davies, *supra* note 32, at 322; Gauna, *supra* note 33, at 72 (contending that public participation is a key element of environmental justice, but that the movement's goals are defeated when the participation is ignored); Edward Walsh et al., *Backyards, NIMBYs, and Incinerator Sitings: Implications for Social Movement Theory*, 40 SOC. PROBLEMS 23, 33 (1993). Increased public participation may also increase the quality of the decision-making process, and subsequently, the project about which the decision was made. *See* Ortwin Renn et al., *Public Participation in Decision Making: A Three-Step Procedure*, 26 POL'Y SCI. 189, 205-08 (1993) (providing a theoretical framework for improved public participation); Robert A. Rubin & Bettina Carbajal-Quintas, *Environmental Regulation and Public Participation in Project Planning*, 121 J. PROF. ISSUES ENG'G EDUC. & PRAC. 183, 184 (1995) ("[T]ime, money, and effort can be saved if an open and participatory atmosphere is established.").

85. *See* Robert D. Bullard, *Environmental Justice for All*, *in* UNEQUAL PROTECTION, supra note 38, at 3, 11; *see* John O'Connor, *The Promise of Environmental Democracy*, *in* TOXIC STRUGGLES, *supra* note 22, at 47, 47-57.

86. Kaswan, *supra* note 33, at 402 (citations omitted).

yond participation and representation alone. As the *Principles of Environmental Justice* state, "Environmental justice affirms the fundamental right to political, economic, cultural and environmental self-determination of all peoples."[87] In other words, the movement strives to give all citizens means by which to determine and influence the environment where they live. Without such means, community residents are left to rely on others for environmental protection; with such means, however, residents are empowered to help achieve true environmental justice, and they become accountable for any injustice they allow. In this sense, self-determination is akin to the sovereignty sought after by American Indian tribes[88] — self-governance within each community's own cultural and historical interface.[89]

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87. *See infra* Appendix A, at Principle 5.

88. *See id.* at Principle 11.

89. Of course, Indian nations on the North American continent enjoyed sovereignty prior to Columbus' landing in 1492 and the subsequent European colonization of America. Many tribes still enjoy some extent of sovereignty due to treaties with the United States. *See* COHEN, *supra* note 17, at 232-57. However, these treaties have been construed by the Supreme Court to be waivable by Congress, *see, e.g.*, Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823), although today such an occurrence is essentially a political impossibility. On the other hand, some environmental statutes now seek to further tribal sovereignty. The Clean Water Act, for instance, allows tribes to be "treated as states," which in turn means that tribes may enact National Pollution Discharge Elimination System Programs, Water Quality Standards, and Wetlands Protection Programs. 33 U.S.C. § 1377(e) (1998). This is important because state water quality standards can be more stringent than federal standards, and they are enforceable upstream. 33 U.S.C. § 1370 (1998); *see* City of Albuquerque v. Browner, 97 F.3d 415, 421-23 (10th Cir. 1996). But regardless of the extent to which tribes still possess sovereignty, at least one commentator has argued that tribes would be better off environmentally if they had a fuller measure of self-governance. *See* LaDuke, *supra* note 31, at 98-106.

4. Home as the Environment: Local Control and Sense of Place

Self-governance for communities ties intimately into a final theoretical facet of environmental justice. Perhaps the greatest contribution from women to the environmental justice movement was the expansion of the notion of "environment" to include home.[90] This expansion helped to de-pigeonhole many environmental problems from other disciplines,[91] and furthered the idea that communities, humans, other species, industry, and ecosystems are interconnected and influence each other.[92] As Professors Collin and Harris point out, environmental justice recognizes that "[n]o part of a community is an island unto itself; all residents benefit or suffer when any of them do."[93] Moreover, including home and the workplace among the definition of environment means that the scope of the movement is broader and includes the interests of more citizens, namely the working class and minority stay-at-home parents. Perhaps most importantly, considering home as part of the environment ties together all aspects of the environmental justice movement: home is the place most central to people's lives, and the place where participation, self-governance, and environmental protection matter the most.

II. THE SUPREME COURT, THE DORMANT COMMERCE CLAUSE, AND INTERSTATE WASTE

The Commerce Clause grants Congress "the Power . . . [t]o regulate Commerce . . . among the several states."[94]

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90. *See* Verchick, *supra* note 39, at 30, 47.

91. An example of this is the environmental justice movement's considering lead poisoning as an environmental, rather than public health, problem. *See id.* at 47.

92. *See infra* Appendix A, at Principle 1.

93. Collin & Harris, *supra* note 31, at 100.

94. U.S. CONST. art. I, § 8, cl. 3.

This power is clear and without qualification, but in between the words written by the Framers, the Supreme Court has long seen a corollary doctrine deemed the "negative" or "dormant" aspect of the Commerce Clause. This Dormant Commerce Clause restricts states from economically discriminating against other states — unless Congress empowers them to do so. As the Court wrote in *H.P. Hood & Sons, Inc. v. DuMond*:

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control the economy, including the vital power of erecting customs barriers against foreign competition, has 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.[95]

In exercising this Dormant Commerce Clause, the Court typically cites two justifications for the doctrine, both of which are intimated in the *H.P. Hood & Sons* quotation. First, the Dormant Commerce Clause ensures an efficient and free interstate trade market. Second, the doctrine protects residents from burdensome laws about which they have no vote.[96]

Although these justifications may very well be the stuff out of which good policy is made, and although there may be some historical reasons for inferring the

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95. 336 U.S. 525, 537-38 (1949) (internal quotation marks and citations omitted).

96. *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 270-71 (13th ed. 1997); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 408-13, 436-38 (2d ed. 1988); Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1406-07 (1994); Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3. CONST. COMMENTARY 395, 396 (1986). In interstate waste Dormant Commerce Clause cases, however, the Court typically focuses on economic protectionism concerns. *See infra* Parts II.A-II.C.

doctrine,[97] even the Supreme Court itself recognizes the Dormant Commerce Clause as a theoretical shroud the Justices sewed from whole cloth. As Justice O'Connor recently wrote, "The scope of the Dormant Commerce Clause is a judicial creation."[98] Regardless, the Court seems unlikely to overrule the doctrine, and Justice Scalia has gone so far as to say that the Dormant Commerce Clause has "adversely possessed" the judicial landscape.[99]

The seminal Dormant Commerce Clause case involving interstate waste, *Philadelphia v. New Jersey*,[100] typifies the Supreme Court's stance on such cases in both result and analysis. The Court repeatedly strikes down the laws, and in doing so, applies a two part test to determine the law's validity. If the law affecting interstate waste bears economic protectionism justifications, then the legislation "is virtually per se invalid."[101] On the other hand, if the legislation is not discriminatory and affects interstate commerce only incidentally, the law falls under the so-called *Pike* test and is valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[102]

What follows is a discussion of the Court's five Dormant Commerce Clause cases that have restricted states from controlling the flow of interstate waste into their jurisdictions. Collectively, these cases deny states three legislative measures by which they could have

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97. *See* THE FEDERALIST NO. 22 (Alexander Hamilton), NO. 42 (James Madison); James Madison, *Vices of the Political System of the United States*, *in* WRITINGS 362-63 (G. Hunt ed. 1901).

98. C & A Carbone, Inc. v. Town of Clarkstown, New York, 511 U.S. 383, 401 (1994) (O'Connor, J., concurring).

99. Tyler Pipe Indus. v. Washington State Dep't of Revenue, 438 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part).

100. 437 U.S. 617 (1978).

101. Oregon Waste Systems, Inc. v. Dep't of Environmental Quality of the State of Oregon, 511 U.S. 93, 99 (1994); *see Philadelphia*, 437 U.S. at 624.

102. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

more stringently controlled disposal of imported waste within their states: import bans, discriminatory surcharges, and flow control laws.[103] While these cases differ in the types of laws they invalidate, they are unified by the Court's underlying reasoning, an inquiry forever focused on economic protectionism, free markets, and political representation — an examination that long ago accepted the analogies from which the Dormant Commerce Clause was drawn, and never looks back to again decide whether the doctrine exists at all except in the minds of the Justices.

A. *Import Bans*

Import bans provide the most direct means to avoid disposal of interstate waste within a jurisdiction. These limitations allow states to preserve landfill space by preventing waste from other states to enter their borders. Moreover, import bans facilitate local planning of needs for disposal, and may reduce community resistance to siting of new disposal facilities.[104] However, the directness of import bans also most clearly raises the specter of discrimination against other states, and as such, most easily invokes the Supreme Court's strict scrutiny test.

1. *Philadelphia v. New Jersey*

In *Philadelphia v. New Jersey*, the Supreme Court struck down a New Jersey law prohibiting importation of "any solid or liquid waste [that] originated or was collected outside [New Jersey] . . . ."[105] The Court began its analysis by summarily concluding that waste is an

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103. *See* Kirsten Engel, *Reconsidering the National Market in Solid Waste: Trade-offs in Equity, Efficiency, Environmental Protection, and State Autonomy*, 73 N.C. L. REV. 1481, 1496-1500 (1995).

104. *See id.* at 1498.

105. 437 U.S. at 618-19 (quoting N.J. Stat. Ann. § 13:1I- (West Supp. 1978)).

object of commerce,[106] and then continued by examining the intent of the law. Acknowledging that the New Jersey legislature enacted the law to cope with rapidly increasing solid waste within the state and its accompanying attributes such as environmental harm, landfill scarcity, and public health threats, the Court nevertheless concluded that "the evil of protectionism can reside in legislative means as well as legislative ends."[107] The Court distinguished the New Jersey law from other "quarantine" cases where the Court had found exceptions to the Dormant Commerce Clause. New Jersey's law did not qualify here, because trash must not be disposed as soon as possible, while the objects in the other quarantine cases "by their very movement risked contagion and other evils."[108] Having found the New Jersey law outside the quarantine exception — and having acknowledged the discriminatory effects of the law — the Court concluded that "on its face and in its plain effect" the law was invalid.[109]

Dissenting vigorously, Justice Rehnquist, who was joined by Chief Justice Burger, explained the importance of the New Jersey statute. Pointing to the negative environmental effects of solid waste, Justice Rehnquist contended that states must be empowered to protect against these effects.[110] He argued that the majority's interpretation of the quarantine exception cases was ill-founded, noting that transporting— not just landfilling — solid waste creates potential health hazards.[111] Justice Rehnquist concluded:

> The fact that New Jersey has left its landfill sites open for domestic waste does not, of course, mean that solid waste is not innately harmful. Nor does it

106. *See id.* at 621-23.
107. *Id.* at 626.
108. *Id.* at 628-29.
109. *Id.* at 626-27.
110. *See id.* at 630.
111. *See id.* at 632.

> mean that New Jersey prohibits importation of solid waste for reasons other than the health and safety of its population. New Jersey must out of sheer necessity treat and dispose of its solid waste in some fashion, just as it must treat New Jersey cattle suffering from hoof-and-mouth disease. It does not follow that New Jersey must, under the Commerce Clause, accept solid waste or diseased cattle from outside its borders and thereby exacerbate its problems.[112]

2. *Fort Gratiot Sanitary Landfill, Inc.*

Despite Chief Justice Burger's and Justice Rehnquist's objections, the Supreme Court extended its *Philadelphia v. New Jersey* reasoning fourteen years later in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources.*[113] At issue in *Fort Gratiot* was a Michigan law that disallowed counties from landfilling waste generated outside their borders unless they received approval from their county Solid Waste Planning Committee to do so. St. Clair County petitioned to receive permission to dispose of non-St. Clair waste, but the county committee denied their application. Unable to process out-of-county waste, a local disposal company challenged the law.[114]

In a 7-2 decision, the Court invalidated the Michigan statute, finding that as did the law at issue in *Philadelphia*, the statute discriminated against out-of-state waste producers. Pointing out that the county disposal restrictions were added to the Michigan statute subsequent to enactment of the main body of the law, which the Court found to advance its goals for public health and safety concerns, the Court based its analysis on an extension of the economic protectionism reasoning in *Philadelphia*. Despite the fact that the law here focused

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112. *Id.* at 633.
113. 504 U.S. 353 (1992).
114. *See id.* at 355-57.

on counties rather than states, the statute's effects not only discriminated against other states but also fettered the national market. The Michigan statute:

> authorize[d] each of the [s]tate's 83 counties to isolate itself from the national economy. Indeed, unless a county acts affirmatively to permit other waste to enter its jurisdiction, the statute affords local waste producers complete protection from competition from out-of-state waste producers who seek to use local waste disposal areas.[115]

The Court left open an alternative measure for controlling problems associated with solid waste disposal, such as statutory limits on how much waste can be disposed yearly by landfill operators, but that measure was not at issue in the Michigan law.[116]

Again dissenting, Chief Justice Rehnquist, joined this time by Justice Blackmun, argued that the Michigan statute advanced local environmental concerns, not economic protectionism. Highlighting the intricate and comprehensive nature of the statutory scheme, Chief Justice Rehnquist elaborated:

> If anything, the challenged regulation seems likely to work to Michigan's economic disadvantage. This is because, by limiting potential disposal volumes for any particular site, various fixed costs will have to be recovered across smaller volumes, increasing disposal costs per unit for Michigan consumers. The regulation also will require some Michigan counties . . . to confront environmental and other risks they have previously avoided. Commerce Clause concerns are at their nadir when a state Act works in this fashion — raising prices for all the [s]tate's consumers, and working to the substantial disadvantage of other segments of the [s]tate's population.[117]

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115. *Id.* at 361.
116. *See id.* at 367.
117. *Id.* at 370.

Therefore, Chief Justice Rehnquist contended that the statute should be remanded for consideration under the *Pike* test, rather than being subjected to strict scrutiny as it had originally been.

B. *Discriminatory Surcharges*

Discriminatory surcharges on waste imported to states generally serve two purposes: if set high enough, they may act as a substitute for an import ban; and when set according to the impacts created by the waste, they may compensate a state for the costs of importing the waste.[118] Regardless of their purpose, however, the Supreme Court has struck down both types of these statutes.

1. *Chemical Waste Management, Inc. v. Hunt*

In *Chemical Waste Management, Inc. v. Hunt*,[119] the Court applied the Dormant Commerce Clause to invalidate an Alabama law that imposed a $72 per ton disposal fee on hazardous waste generated outside Alabama, but not on hazardous waste generated inside the state. Despite the fact that nearly ninety percent of hazardous waste disposed within Alabama was from other states, the Court found that the law did not serve to compensate the state for the additional costs of disposing out-of-state toxic material within Alabama. Instead, the Court held that the law's "additional fee facially discriminates against hazardous waste generated in [s]tates other than Alabama, and the Act overall has plainly discouraged the full operation of petitioner's . . . facility."[120]

The Court rejected the argument that the disposal fee served any legitimate local interest, because it saw no

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118. *See* Engel, *supra* note 103, at 1498.
119. 504 U.S. 334 (1992).
120. *Id.* at 342.

evidence that hazardous waste generated outside Alabama was any more dangerous than such waste originating within the state.[121] The majority dismissed the claim that the Alabama law fell under the quarantine exception to the Dormant Commerce Clause,[122] and rebutted Alabama's contention that a disposal fee for both in-state and out-of-state hazardous waste would provide a disincentive to Alabama for dealing with its own problems, because the fee would encourage Alabama to export its own hazardous waste to other states.[123] Noting that Alabama had valid, less discriminatory options available for regulating hazardous waste — such as a generally applicable per-ton disposal fee, a per-mile tax on all vehicles transporting hazardous waste within the state, and caps on total tonnage allowances at disposal sites[124] — the Court concluded that Alabama's law was unconstitutional: "Such burdensome taxes imposed on interstate commerce alone are generally forbidden . . . . Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry."[125]

Dissenting alone, Chief Justice Rehnquist contended that the commodity at stake was not hazardous waste, but a clean and safe environment. From this perspective, the Chief Justice argued that it was not Alabama isolating itself from the national economy. Rather, the thirty-four states "that have no hazardous waste facility whatsoever, not to mention the remaining [fifteen s]tates

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121. *See id.* at 343-44.

122. *See id.* at 346-47.

123. *See id.* at 346 n.8.

124. *See id.* at 344-45.

125. *Id.* at 342. This language may indicate that the Court has shifted from a true strict scrutiny analysis, which establishes a presumption that may be overcome, to a "per se invalid" standard— one that is lethal upon application. *See supra* note 101 and accompanying text; GUNTHER & SULLIVAN, *supra* note 96, at 276-81. Because the Court refers to the *Philadelphia* test as one of strict scrutiny, however, I do also throughout this Note, even though "lethal scrutiny" seems more accurate in its description.

with facilities all smaller" than Alabama's, were the economic isolationists.[126] As such, Chief Justice Rehnquist explained that a tax discouraging the consumption of a scarce resource such as a state's clean environment would be constitutional.[127]

2. *Oregon Waste Systems, Inc.*

In a second case overturning a discriminatory surcharge statute, the Supreme Court extended its analysis from *Chemical Waste Management* and held that states may not charge different disposal rates for in-state and out-of-state waste, even if the rate differences are based on cost calculations demonstrating taxes and administrative fees paid by in-state but not by out-of-state corporations. In *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon*,[128] the Court invalidated an Oregon law that charged $0.85 per ton for in-state waste, but $2.25 per ton for out-of-state waste. The Oregon legislature had based the additional portion of the out-of-state waste on an amalgamation of factors, including statewide activities for reducing environmental risks of and improving solid waste management, reimbursing the state for tax credits and other public subsidies, costs for waste reduction and recycling plans, increased environmental liability, lost disposal capacity, infrastructure costs, and nuisance costs from transportation.[129] Regardless, the Court found "Oregon's compensatory aim to be foreclosed by our precedents."[130] Citing the *Chemical Waste Management* holding that intent of a law carries no weight when the law bears economic protectionist motivations or effects, the Court held that "[i]n making [a] geographic distinc-

126. 504 U.S. at 350.
127. *See id.* at 349.
128. 511 U.S. 93 (1994).
129. *Id.* at 109 n.1 (Rehnquist, C.J., dissenting).
130. *Id.* at 100.

tion, the surcharge patently discriminates against interstate commerce."[131] Accordingly, the Court found it "obvious" that the Oregon statute was "discriminatory on its face."[132]

Chief Justice Rehnquist dissented, and Justice Blackmun again joined him. The dissent criticized the majority's "myopic focus on 'differential fees,'" pointing out that without the additional fees, state income taxes and landfill operation tolls subsidized disposal of out-of-state waste.[133] Rather than presenting economic protectionist interests, the dissent argued that the additional surcharge was, as Oregon contended, a fair compensation for the subsidies out-of-state waste producers received. Chief Justice Rehnquist wrote:

> Oregon solid waste producers do not compete with out-of-state businesses in the sale of solid waste . . . . If anything, striking down the fees works to the disadvantage of Oregon businesses. They alone will have to pay the 'nondisposal' fees associated with solid waste: landfill siting, landfill cleanup, insurance to cover environmental accidents, and transportation improvement costs associated with out-of-state waste being shipped into the [s]tate.[134]

C. *Flow Control Laws*

In its most recent Dormant Commerce Clause case, the Supreme Court struck down a final type of waste import restriction utilized by states.[135] Flow control laws act effectively in the opposite way import bans do. Rather than blocking all waste from entering the state,

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131. *Id.*
132. *Id.* at 99.
133. *Id.* at 110.
134. *Id.* at 112.
135. *But see* Gardner v. Michigan, 199 U.S. 325, 334-35 (1905) (upholding what was essentially a flow control ordinance); California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 325 (1905) (same).

flow control laws require all waste generated within a locality to be processed, transferred, treated, or disposed at a designated facility.[136] This requirement gives towns the ability to raise money according to the amount of trash processed at their facility. Localities can then use this cash for purposes such as building a recycling or disposal facility, or for advancing waste reduction or education initiatives.

In *C & A Carbone, Inc. v. Clarkstown*,[137] the Court struck down a New York locality's flow control ordinance that required all trash to be separated into recyclable and non-recyclable waste at a transfer station for an $81 per ton tipping fee before leaving the municipality. A local recycling company that received waste from other areas — and separated the waste at its own facility — challenged the law, contending that the tipping fee was discriminatory. Writing for the majority, Justice Kennedy held that:

> [w]hile the immediate effect of the ordinance is to direct local transport of solid waste to a designated site within the local jurisdiction, its economic effects are interstate in reach . . . . By requiring Carbone to send the nonrecyclable portion of [its] waste to the . . . transfer station at an additional cost, the flow control ordinance drives up the cost for out-of-state interests . . . .[138]

Justice Kennedy then analogized to a long list of Supreme Court cases that had invalidated ordinances favoring local businesses.[139] Finding one distinction in

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136. *See* Engel, *supra* note 103, at 1499-1500.

137. 511 U.S. 383 (1994).

138. *Id.* at 389.

139. *See* South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984) (Alaska timber); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (Arizona cantaloupe); Dean Milk Co. v. Madison, 340 U.S. 349 (1951) (Madison, Wisconsin milk); Toomer v. Witsell, 334 U.S. 385 (1948) (South Carolina shrimp); Johnson v. Haydel, 278 U.S. 16 (1928) (Louisiana oysters); Foster-Fountain Packing

the ordinance at hand from the Court's previous precedent — that the ordinance favored a single company rather than an entire town's businesses — Justice Kennedy concluded that "this difference just makes the protectionist effect of the ordinance more acute."[140]

Writing in concurrence, Justice O'Connor disagreed that the flow control law was discriminatory; she instead felt it placed an excessive burden on interstate commerce.[141] Arguing that because all waste generated within the town's borders had to pass through the transport station, Justice O'Connor pointed out that the ordinance "'discriminates' evenhandedly against all potential participants in the waste processing business."[142] Under this analysis, Clarkstown had advanced a legitimate interest in ensuring the financial viability of its transfer station, but this interest was simply outweighed by its effect on interstate commerce: it "squelche[d] competition," and could have been accomplished by narrower means.[143]

In dissent, Justice Souter, joined by Chief Justice Rehnquist and Justice Blackmun, objected to the majority's "greatly extending the [Commerce] Clause's dormant reach."[144] The dissent highlighted the notion that the flow control ordinance was not discriminatory because it affected in-town and out-of-town waste disposal companies in the same way, and then distinguished the ordinance from the cases to which Justice Kennedy had analogized. First, the Clarkstown ordinance favored a single business, not an entire town. Second, this business was acting essentially as a government agent, ensuring waste removal according to local policy goals.[145]

Co. v. Haydel, 278 U.S. 1 (1928) (Louisiana shrimp); Minnesota v. Barber, 136 U.S. 313 (1890) (Minnesota meat).

140. 511 U.S. at 392.

141. *See id.* at 401.

142. *Id.* at 404.

143. *Id.* at 405-06.

144. *Id.* at 411.

145. *See id.* at 416.

From these differences, the dissent drew its conclusion: "while these differences may underscore the ordinance's anticompetitive effect, they substantially mitigate any protectionist effect, for subjecting out-of-town investors and facilities to the same constraints as local ones is not economic protectionism."[146]

III. TRADITIONAL CRITIQUES OF THE DORMANT COMMERCE CLAUSE

From Chief Justice Rehnquist's collection of dissents alone, one might gather that the Dormant Commerce Clause has not gone without criticism. Indeed it has not. From its very inception, the Dormant Commerce Clause has suffered — yet survived (at least in the Supreme Court's eyes) — an onslaught of disapproval and discontent from scholars, practitioners, and the judiciary alike.[147] In fact, some of the Clause's most stinging criticism has come from the pens of the Justices. For instance, in a partial concurrence and partial dissent, Justice Scalia wrote:

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146. *Id.* at 418.

147. *See, e.g.*, Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part, dissenting in part) ("[T]o the extent that [the Court has] gone beyond guarding against rank discrimination against citizens of other [s]tates . . . the Court for over a century has engaged in an enterprise that it has been unable to justify by textual support or even coherent nontextual theory, that it was almost certainly not intended to undertake, and that it has not undertaken very well."); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 427-28, 484-85 (1982); Henry P. Monaghan, *The Supreme Court 1974 Term, Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 10-17 (1975); Robert A. Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885, 998-1000 (1985); *see generally* Earl M. Maltz, *How Much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47 (1981); James M. O'Fallon, *The Commerce Clause: A Theoretical Comment*, 61 OR. L. REV. 395 (1982); Mark V. Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125.

> The fact is that in the 114 years since the doctrine of the negative Commerce Clause was formally adopted as 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.[148]

Even a majority decision employing the doctrine has called it a "quagmire."[149]

From these piercing words the Dormant Commerce Clause has gained a tainted reputation at best, and the shine of New Jersey's imported waste at worst, among the legal rank and file. Yet with steadfastness and an apparently tightening grip,[150] the Court continues to apply the Clause. Interestingly, critics of the doctrine do not object to the political goal of economic union behind the Dormant Commerce Clause, but they do object — vehemently — on other grounds. The remainder of this Part lays out the traditional critiques of the Dormant Commerce Clause in general, and specifically, its application to interstate waste.[151] The following Part presents a new critique of the doctrine from the perspective of environmental justice.[152]

A. *Constitutional Critiques*

Many commentators criticize the Dormant Commerce Clause for its lack of foundation in, and effects on, the

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148. Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 259-60 (1987) (citations omitted).

149. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959).

150. The extension of the *Philadelphia* "lethal scrutiny" test to statutes not facially discriminatory is perhaps the best example of the Dormant Commerce Clause's tightening grip.

151. Notice that many of these critiques ring familiar with Chief Justice Rehnquist's dissents. This Part of the Note, however, serves not to supercede or ignore the Chief Justice's arguments, but rather to lay out a comprehensive framework of the shortcomings of the Dormant Commerce Clause.

152. *See infra* Part IV.

Constitution. For their relevance and acuteness, these critiques are perhaps the most forceful of any; they cut to the core of where the Court claims the Dormant Commerce Clause has its roots, and they demonstrate just how extra-constitutional the doctrine really is. While other critiques must emphasize the shortcomings of the doctrine itself, or fight its policy with their policy, constitutional critiques assert the ghastliest claim of all: that the Dormant Commerce Clause has no basis in the Constitution, and in any event, that it harms the document from which it supposedly comes.

1. Lack of Textual Foundation

Perhaps the most obvious — yet also most glaring — criticism of the Dormant Commerce Clause is apparent in the "dormant" or "negative" aspect of the doctrine. In short, the Clause has no foundation in the text of the Constitution. Plainly, the Constitution delegates the power to regulate interstate commerce to Congress, not to the Court or the President.[153] As Justice Scalia wrote, "On its face, [the Commerce Clause] is a charter for Congress, not the courts, to ensure 'an area of trade free from interference by the [s]tates.'"[154]

Despite this clear delegation of power, the Court infers from the Constitution a duty to enforce its own brand of economic regulation when Congress is silent in the area of interstate commerce legislation. This interpretation, however, does not mesh with the framework in which the Commerce Clause sits.[155] If the Commerce Clause

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153. U.S. CONST. art. I § 8, cl. 3.

154. Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 260 (1987) (Scalia, J., concurring in part, dissenting in part).

155. *See* Michael DeBow, *Codifying the Dormant Commerce Clause*, 1995 PUB. INT. L. REV. 69, 72-75; Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 582-87; Amy M.

granted Congress exclusive and sole power to regulate interstate economic activity, then the Court would be acting in its proper role by filling Congressional silence with the Dormant Commerce Clause noise. However, the Commerce Clause merely grants Congress the power to regulate interstate commerce when — and if — it chooses.[156] Its failure to do so has no single plausible meaning. Congressional inaction may just as well represent a conscious choice not to legislate as it may a legislative oversight. When there "is no reciprocal power granted to the judiciary to invalidate burdensome state legislation in the absence of congressional action,"[157] the Court is acting through a doctrine that has no foundation in the words memorialized by the Framers.

2. Lack of Historical Foundation

While the Court has cited to *The Federalist Papers* as historical support for the Framers' intent for a Dormant Commerce Clause — and thus a solidified economic union[158] — it is not clear that this evidence is as strong as the Court might suggest. In fact, the historical support for the Dormant Commerce Clause is at best mixed, and at times, both proponents and opponents of the doctrine cite to the same evidence. For instance, both sides claim that James Madison's statement in an 1829 letter to a friend that the Commerce Clause was "intended as a negative and preventive provision against injustice among the [s]tates themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial

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Petragnani, Comment, *The Dormant Commerce Clause: On Its Last Leg*, 57 ALB. L. REV. 1215, 1237-43 (1994).

156. *See* Redish & Nugent, *supra* note 155, at 583-84; Petragnani, *supra* note 155, at 1238-39.

157. Petragnani, *supra* note 155, at 1238.

158. *See supra* note 97 and accompanying text.

power could be lodged."[159] Depending on one's interpretation of "General Government," President Madison's statement could favor either side.[160] If "General Government" means the judiciary, the Dormant Commerce Clause seems to have a historical foundation in this statement. But if "General Government" means the legislature, the statement seems to favor eradication of the Dormant Commerce Clause. Moreover, other historical statements indicate that the Dormant Commerce Clause should not exist at all: "[t]he powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and posterity of the State."[161] In the end, historical statements such as these seem to provide just as much fodder for debate as they do in shedding light on the Framers' intent.[162]

Indeed, at least one commentator has argued that due to the unclear nature of the historical evidence, the actual text of the Constitution is the only reliable source for interpreting the Commerce Clause.[163] This is even more so when the breadth of the historical evidence is considered; the Commerce Clause was mentioned only

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159. Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 55 (1988) (quoting Letter from James Madison to Joseph C. Cabell (Feb. 13, 1829), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 14, 15 (1867)).

160. *See* Christopher C. Faille, *Is the Dormant Commerce Clause Doctrine Zigging or Zagging?*, 42 FED. LAW. 34, 37-38 (1995).

161. THE FEDERALIST NO. 45, at 236 (James Madison) (Gary Willis ed., 1982).

162. Perhaps this is unsurprising when we remember that *The Federalist Papers* were written to convince both types of opponents to the Constitution— those afraid of a central government and those afraid the union would be too weak— that it framed an acceptable form of government. *See* THE FEDERALIST PAPERS vi-xii (Gary Willis ed., 1982).

163. *See* Petragnani, *supra* note 155, at 1241.

nine times during the Constitutional Convention.[164] Regardless, even assuming arguendo that there is strong historical support for the Dormant Commerce Clause because of the Framers' fear for "economic Balkanization," such a fear seems to carry little weight in today's modern, industrialized, international economy. As Professor Eule explains:

> The time-honored rationales for traditional dormant commerce clause jurisprudence have become historical vestiges. Because the Constitution does not protect free trade or a national market, the Court's current role as the trumpeter of these values can only be viewed as that of congressional spokesman. In 1789 Congress needed this crutch. Congress can now fend for itself.[165]

3. Displacing the Constitution's Balance of Power

A third constitutional critique of the Dormant Commerce Clause expands in type on the contextual critique presented by the lack of historical evidence. Rather than focusing on a lack of textual or historical evidence, these critics emphasize that the Dormant Commerce Clause upsets the balance of power created by the Constitution. Specifically, the Framers designed the Constitution with checks and balances on each branch of the government, giving Congress, the judiciary, and the President specific — and limited — powers.[166] This was done with an intent to disallow any one of the branches, especially the executive, to run headlong over the rest of the government.[167] However, the Court's creation of the

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164. *See* Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 470 (1941).

165. Eule, *supra* note 147, at 435.

166. *See* THE FEDERALIST NOS. 47-51 (James Madison).

167. *See* THE FEDERALIST NO. 45, at 233 (James Madison) (Gary Willis ed., 1982) ("Was then the American revolution effected, was the American confederacy formed, was the precious blood of

Dormant Commerce Clause upsets this balance, because it grants to the judiciary a power not given to it by the Constitution.[168] As Professor McGinley summarized, "the Court's view of congressional power under the Commerce Clause cannot easily be squared with its own exercise of judicial power [that] is said to flow from the identical textual source."[169]

Although it is insult enough that the Dormant Commerce Clause fundamentally changes the balance of governmental power created by the Constitution, the problem is exacerbated in at least two ways. First, since 1937 the Court has expanded Congress' power to regulate under the actual Commerce Clause.[170] In light of

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thousands spilt . . . [that] the impious doctrine in the old world, that the people were made for kings, not kings for the people . . . be revived in . . . a different form?").

168. *See* Redish & Nugent, *supra* note 155, at 588-90.

169. Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra*, 71 OR. L. REV. 409, 423 (1992).

170. Prior to 1937, the Commerce Clause did not give Congress the power to regulate any economic activity that occurred entirely within a state's borders. But in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court upheld a law because it regulated an article that had an effect on interstate commerce. This reasoning was extended five years later in *Wickard v. Filburn*, 317 U.S. 111 (1942), a case that upheld one of President Roosevelt's New Deal statutes, the Agricultural Adjustment Act of 1938.

Recently, however, the Supreme Court overturned an interstate commerce law for the first time since the late 1930s. In *United States v. Lopez*, 514 U.S. 549 (1995), the Court invalidated a federal law that criminalized possessing a firearm within 1000 feet of a school. Although some might see this as a signal that Congress' power under the Commerce Clause is about to make a swing on the pendulum, the Court unanimously upheld a RICO conviction because a drug trafficker running an Alaskan gold mine involved "interstate commerce." United States v. Robertson, 514 U.S. 669 (1995) (per curiam).

For criticisms of the Court's expansion of Congress' power under the Commerce Clause, see, e.g., ROBERT H. BORK, THE TEMPTING OF AMERICA 158 (1989); Richard A. Epstein, *The Mistakes of 1937*, GEO. MASON U. L. REV. 5, 7-12 (1988); Richard A. Epstein, *The Proper Scope of Commerce Power*, 73 VA. L. REV. 1387 (1987); *see*

this expansion in Congressional authority, it seems strange that the judiciary would try to counter-balance that expansion by vesting in itself a newfound power, rather than simply limiting Congress' abilities to those expressly bestowed by the Constitution. In other words, "[t]here is something fundamentally wrong with a judicial framework that prompts judicial intervention by the same trigger that induces political response."[171]

A second exacerbating factor is that the doctrine's shift in balance of power toward the judiciary is subsequently skewed by the high hurdles one must overcome to spur on Congressional action. While it is difficult enough for Congress to pass laws on its own volition,[172] the legislature seems even less likely to act on issues the Supreme Court specifically draws to its attention.[173] This reluctance on Congress' part to overrule the Supreme Court only adds to the already-skewed power the Court has given itself under the Dormant Commerce Clause.

4. Upsetting the Constitution's Balance of Federalism

The final constitutional critique traditionally waged against the Dormant Commerce Clause is that the doctrine upsets the Constitution's balance of power vested in the states and the federal government. A central debate over the ratification of the Constitution was how governmental power would be divided between the federal government and the state governments.[174] The resolution to this controversy was achieved by giving the

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generally Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

171. Eule, *supra* note 147, at 436.

172. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971).

173. *See* Redish & Nugent, *supra* note 155, at 593; Petragnani, *supra* note 155, at 1247-48.

174. *See* THE FEDERALIST NO. 9 (Alexander Hamilton), NOS. 39, 44, 45, 46 (James Madison).

federal government limited and specifically defined powers, while leaving for the states only residual power to govern through the universe of powers not granted to Congress and the President.[175] As James Madison wrote, "the States will retain, under the proposed Constitution, a very extensive portion of active sovereignty . . . ."[176]

Yet the Dormant Commerce Clause acts to fastidiously erode the residual governance of the states. By giving the federal government a power not explicitly granted to it by the Constitution, the doctrine fundamentally betrays the compromise of federalism reached by the Framers.[177] Indeed, the Framers' balance of federalism in the area of commerce seems quite clear, for the Constitution not only grants Congress the power to regulate interstate commerce but also limits the states' power to do so: the states may not coin money, "emit Bills of Credit," pass laws impairing contractual obligations, and, without the consent of Congress, excise duties on imports or exports.[178]

But even under an assumption that the Constitution grants an exclusive authority of commerce regulation to the legislature, the Dormant Commerce Clause still violates the constitutional balance of federalism. Under this assumption, which has been termed "dual federal-

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175. *See* THE FEDERALIST NO. 45, at 236 (James Madison) (Gary Willis ed., 1982) ("The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.").

176. *Id.* at 233; *see also* THE FEDERALIST NO. 9, at 41 (Alexander Hamilton) (Gary Willis ed., 1982) ("The proposed Constitution . . . leaves in [the states'] possession certain exclusive and very important portions of sovereign power.").

177. *See* Redish & Nugent, *supra* note 155, at 584-85; Petragnani, *supra* note 155, at 1246-47; *see also* McGinley, *supra* note 169, at 419-23 (noting the mysteriously concurrent rise of the Dormant Commerce Clause and federal common law).

178. U.S. CONST. arts. I, § 10, cls. 1-3; IV, § 2.

ism,"[179] states could not exercise at all a power given to the central government, and vice versa. However, current Dormant Commerce Clause jurisprudence is contrary to this theory of "dual federalism," for it allows states to regulate interstate commerce so long as such regulation does not violate federal law nor evoke discrimination against other states.[180] In addition, Congress could not delegate power to regulate interstate commerce to the states,[181] even though the text of the Commerce Clause would seem to allow it.[182] Regardless, "dual federalism" is not the accepted theory of our Constitution.[183]

B. *Critiques of the Dormant Commerce Clause's Application*

While the traditional constitutional critiques may seem ruinous enough for the Dormant Commerce Clause — at least theoretically — another set of critiques attack the doctrine from an entirely different perspective. Rather than pointing out the doctrine's lack of constitutional heritage, these critiques fault the Court for employing a confusing and unpredictable doctrine.

1. A Doctrine Confused and Unpredictable: Havoc for Lower Courts

The first critique of the Dormant Commerce Clause's application is that it is impossible to draw from it any coherent and consistent theoretical framework. Indeed,

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179. Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950).

180. *See* Redish & Nugent, *supra* note 155, at 584.

181. *See id.*

182. *Cf.* Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946)(holding that Congress may constitutionally consent to state legislation that impinges on interstate commerce).

183. *See* Martin H. Redish, *Supreme Court Review of State Court 'Federal' Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861, 882-88 (1985).

modern constitutional law texts all seem to have their own take on the issue, analyzing the doctrine in their own, rather different ways.[184] The doctrine is also unpredictable. Take for instance the interstate waste cases.[185] The Court for the first time announced that strict scrutiny would apply to laws that have discriminatory ends rather than means in *Philadelphia v. New Jersey*,[186] and then applied that strict scrutiny to invalidate a statute that regulated Michigan's counties in *Fort Gratiot Sanitary Landfill*.[187] Likewise, in *Oregon Waste Systems*, the Court overturned a type of statute it had previously intimated might be constitutional in *Chemical Waste Management, Inc. v. Hunt*.[188] Indeed, the only clear trend in the Court's Dormant Commerce Clause jurisprudence seems to be that despite the many reasons to abandon the doctrine, the Justices are on a mission to relentlessly expand its reach.

Besides being theoretically faulty for its unwieldy application, the doctrine's confused and unpredictable operation also creates the unfortunate consequence of confusing the lower courts.[189] This confusion in the lower ranks only compounds the matter. Courts that cannot make sense out of the Supreme Court's Dormant Commerce Clause opinions end up issuing incoherent

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184. *See e.g.* WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW 251-338 (10th ed. 1997); GUNTHER & SULLIVAN, *supra* note 96, at 270-328; *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 284-302 (5th ed. 1995); TRIBE, *supra* note 96, at 413-36.

185. *See supra* Part II.

186. *See supra* Part II.A.1.

187. *See supra* Part II.A.2.

188. *See supra* Part II.B.

189. For an article devoted solely to explaining the doctrine's lamentable effect on the lower courts, see Stanley E. Cox, *Garbage In, Garbage Out: Court Confusion about the Dormant Commerce Clause*, 50 OKLA. L. REV. 155 (1997).

and inconsistent decisions of their own.[190] Such confusion on the trial and appellate, state and federal, levels gives attorneys little surety in any counsel they might provide their clients, and leaves states and localities wondering what interstate commerce lawsuit lurks in waiting. As Professor Lawrence stated:

> The nub of the matter is that the Court's current approach to dormant-commerce-clause cases is so scattered that nobody — not state legislators, not law students, not the academic authorities, not the lower courts, nor, indeed, the Court itself — knows clearly what the Court's rules are concerning the Dormant Commerce Clause.[191]

2. Swallowing the Dormant Commerce Clause Whole: Exceptions to the Doctrine

A second criticism of the Dormant Commerce Clause's application builds on the first. These commentators point out that not only is the doctrine confusing, but it also might not even exist. Specifically, exceptions the Court has chiseled out of the doctrine, such as the "market participant" exception, carve so much of the doctrine away that the Court might as well not even employ it. Under the so-called "market participant" exception, localities that participate in a specified economic sector may *explicitly* discriminate against other states in favor of their own citizens.[192] In the context of waste disposal, localities acting under the "market participant" exception could construct landfills and affect

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190. *See* Lisa J. Petricone, Comment, *The Dormant Commerce Clause: A Sensible Standard of Review*, 27 SANTA CLARA L. REV. 443, 450-51 (1987).

191. Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL'Y 395, 415 (1998).

192. *See, e.g.*, Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) (Maryland state-owned abandoned car reprocessing); *see also* Reeves, Inc. v. Stake, 447 U.S. 429 (1980) (South Dakota state-owned cement manufacturer).

blatant import bans — constitutionally. One commentator has noted a rise in use of the "market participant" loophole by localities eliciting exactly such import bans, arguing that the exception has been so abused that the Dormant Commerce Clause is meaningless.[193] Indeed, it follows that states might use other exceptions to the Dormant Commerce Clause to specifically invoke economic effects that the Court's decisions otherwise bar.[194]

3. Judges Not Economists: The Court's Faulty Economics

A final critique of how the Dormant Commerce Clause has been applied attacks the Court's economic analysis.[195] The Court since *Philadelphia*, however, has

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193. *See* Edward W. Greason, *Garbage and the Constitution: Solid Waste Disposal, the Dormant Commerce Clause and the Market Participant Exception*, 3 FORDHAM ENVTL. L. REP. 1 (1991); *see generally* Dan T. Coenen, *State User Fees and the Dormant Commerce Clause*, 50 VAND. L. REV. 795 (1997) (pointing out the tension and potential contradiction between the market participant exception and state user-fee cases).

194. Although unlikely to apply to interstate waste cases, an example of another exception to the Dormant Commerce Clause is a state's police power. *See, e.g.*, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) (upholding a city smoke ordinance that affected interstate ships on the grounds that cities are entitled to protect their citizens' health).

195. Actually, scholars have criticized the Dormant Commerce Clause's application in one other respect. Some commentators argue that the Resource Conservation and Recovery Act allows flow-control ordinances. *See* Michael D. Diederich, Jr., *Does Garbage Have Standing?: Democracy, Flow Control and a Principled Constitutional Approach to Municipal Solid Waste Management*, 11 PACE ENVTL. L. REV. 157, 187-97 (1993); Brian M. Brown & Amy P. Lund, Comment, *Flow Control Ordinances Under the Dormant Commerce Clause: Unconstitutional Restraint on Commerce?*, 5 U. BALT. J. ENVTL. L. 92, 101-02 (1995); Ann R. Mesnikoff, Note, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home*, 76 MINN. L. REV. 1219, 1246 (1992). However, at least one Justice frowned on this argument in *C & A Carbone, Inc.*, and the majority

rejected these arguments. Some commentators continue to insist, in the same vein as Chief Justice Rehnquist, that garbage simply is not commerce.[196] Under this analysis, trash does not fall under the reach of the Dormant Commerce Clause for two reasons. First, by its very definition, waste is not bought and sold; rather, communities must pay companies to take it away. Second, waste is not interstate commerce until it actually reaches other states; communities that locally dispose the waste they locally create have not entered that waste into the stream of commerce, so statutes such as flow-control laws should be constitutional.[197]

A second argument against the Supreme Court's economic theory under the Dormant Commerce Clause contends that the Court's assumptions underlying its free-market approach are not always correct. Instead, under a game theory analysis,[198] actually allowing dis-

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decision seemed to ignore it. *See* 511 U.S. 383, 407-10 (1994) (O'Connor, J., concurring).

196. *See* Diederich, *supra* note 195, at 208-10; *see generally* Stanley E. Cox, *Burying Misconceptions About Trash and Commerce: Why It Is Time to Dump Philadelphia v. New Jersey*, 20 CAP. U. L. REV. 813 (1991).

197. *See* Diederich, *supra* note 195, at 209-10 (analogizing to *Parker v. Brown*, 317 U.S. 341 (1943), a case where the Supreme Court allowed local control over raisins, 95% of which eventually entered interstate markets, based on the distinction that the raisins had not yet entered interstate commerce).

198. Game theory analyzes problems by placing the decision-makers in a framework where they seek to maximize their own net benefits, but do so by guessing what the other decision-maker will decide.

In the classic example, a "prisoner's dilemma," two co-conspirators are interrogated separately. If they both remain silent as to guilt, the joint net gain is greatest. Both receive minimal sentences. If one decision-maker pins the blame on the other, and the other remains silent, their net benefits are mixed. One prisoner is released and the other is sentenced. And if both pin the blame on the other, their net benefits are lowest. Both serve time in jail. Clearly, the mutually silent option is the best from an aggregate perspective. But the greatest individual rewards lie in pinning the blame on the other decisionmaker. This inevitably leads to a result

crimination between states may be what maximizes the nation's economic good. For instance, *Philadelphia v. New Jersey* places states in a prisoner's dilemma game. In this dilemma, "both states will refuse to site a landfill, even though that strategy yield[s] a worse joint outcome. Solid waste will be either undisposed or unsafely disposed."[199] If both states site landfills, then each state accounts for a portion of the waste, driving the aggregate costs of disposal, which includes transportation and potential environmental harms, down.[200] As Professor McGreal explains, "[T]he Court's prevailing dormant Commerce Clause antidiscrimination test takes the neoclassical economic view, assuming states do not act strategically. [A game theory analysis], however, show[s] that states will act strategically in some cases, undermining the Court's neoclassical economic assumption."[201] This means that not only might the Court's economics be faulty, but also they might even be faulty in trying to achieve the goal for which the Court claims it aims.

Finally, the Court's economic principles have been criticized for being too narrow in their analysis. Specifically, a number of commentators point out that the

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where both pin the blame on the other, individually they both receive punishment, and in the aggregate, the net benefits are the lowest.

The type of analysis used in the "prisoner's dilemma" game is currently employed in numerous academic disciplines, including economics, biology, and law. *See generally* DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW (1994); JOHN R. KREBS & NICHOLAS B. DAVIES, BEHAVIOURAL ECOLOGY: AN EVOLUTIONARY APPROACH (4th ed. 1997); DAVID M. KREPS, GAME THEORY AND ECONOMIC MODELING (1990); RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW (5th ed. 1998); MARK SEIDENFELD, MICROECONOMIC PREDICATES TO LAW AND ECONOMICS (1996); Bobbi S. Low, *Men, Women, and Sustainability*, 18 POPULATION & ENV'T 111 (1996).

199. Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191, 1278 (1998).

200. *See id.* at 1245-79.

201. *Id.* at 1279.

Court's analysis under the Dormant Commerce Clause focuses only on the easily-seen, actual monetary benefits and costs for interstate waste garbage corporations.[202] Although useful as a starting point, a true economic analysis cannot end there. Instead, a full economic accounting cannot be complete until it includes benefits and costs external to garbage companies: health and environmental risks; safety and traffic costs; risk of future potential financial responsibility for cleanup; and depreciated housing prices or community reputation. If the Court were to include these factors in its economic analysis, what laws might pass under the Dormant Commerce Clause could very well change from the list of acceptable laws today.[203]

C. *Policy-Based Critiques*

The final set of traditional critiques of the Dormant Commerce Clause is often the most contemporarily compelling, but at the same time lacks the level of logical force evinced by many of the constitutional critiques. Indeed, these policy-based critiques offer convincing reasons why the Dormant Commerce Clause must fail, but do so by combating the Court's politics with their own. On one level this may seem to undercut the effectiveness of these critiques, for they lack the historical and textual support the other critiques enjoy. But from another perspective, there seems no reason why the Court's political preferences should not be overcome by other policies, or why the economic flames of a judicial construction cannot be drowned by the waters of economic tenets conflicting with the Court's, or the need for

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202. *See* James E. Breitenbucher, *Yakety Yak, Take Your Garbage Back: Do States Have Any Protection from Becoming the Dumping Grounds for Out-of-State Municipal Solid Waste?*, 52 WASH. U. J. URB. & CONTEMP. L. 225, 251-53 (1997); *see also* Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2395-96 (1996).

203. *See* Breitenbucher, *supra* note 202, at 252.

environmental, health, and safety measures. Moreover, these policy-based critiques seem particularly poignant in light of the foregoing constitutional and application-based criticisms, which place the Dormant Commerce Clause's moorings in an extremely tentative position.

1. Environmental, Health, and Safety Policy

Throughout his dissents, Chief Justice Rehnquist reminds us of the importance of advancing environmental and health protection, and how the Dormant Commerce Clause robs states of some methods by which they may provide that same protection. A corollary to the Chief Justice's argument is that the Dormant Commerce Clause also produces potential environmental and health harms of its own. Indeed, the doctrine does not necessarily increase the amount of waste disposed in the United States, but it does increase the distance the waste travels.[204] With this increase in distance travel comes increased risks of spills, contamination, and other environmental concerns.[205] Moreover, moving waste greater distances also means elevated safety risks, as the chance for automobile accidents is greater the farther the waste must travel, and increased movement of heavy waste trucks will slowly but inevitably degrade interstate highways.

Additional environmental criticisms of the Dormant Commerce Clause include the doctrine's ignorance of the idea of risk multiplication. For instance, in *Chemical Waste Management, Inc. v. Hunt*, the Court failed to

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204. Currently, some American waste travels as far as from Nevada to Pennsylvania, from New Jersey to Texas, and from Connecticut to Illinois. *See, e.g.*, Edward W. Repa, *Interstate Movement 1995 Update*, WASTE AGE, June 1997, at 42, 46. The state of Washington also imports waste from Alaska, Hawaii, and Antarctica. *See id.*

205. *See* Bruce H. Aber, Note, *State Regulation of Out-of-State Garbage Subject to Dormant Commerce Clause Review and the Market Participant Exception*, 1 FORDHAM ENVTL. L. REP. 99, 115 (1989).

recognize that Alabama residents near the facility at issue now face approximately nine times greater chance of being harmed as they did prior to the Court's decision, because only ten percent of the waste disposed at the plant was produced in-state.[206] Moreover, the actual risk Alabama residents may now face — the extent of the harm as opposed to the chance of the harm — is also greater, because more waste is processed at that facility.

Finally, the Dormant Commerce Clause fails on environmental tenets, because it nullifies many state efforts to affirmatively address the municipal waste problem. Indeed, laws such as the flow-control measure at issue in *Carbone* facilitate local waste reduction and recycling programs by ensuring that a set percentage of all waste produced in that area will end up in more beneficial places than a landfill. By invalidating such laws, the Court not only ignores environmental problems associated with waste transport, but also curtly turns its head away from the problems associated with the waste itself.[207]

2. Alternate Economic Policy: A "Freer" Market than the Court's

Although the argument could be made, it seems unlikely that a country working for so long under a generally free-market system would be convinced that the Dormant Commerce Clause should die at the hand of other economic philosophies such as socialism.[208] There

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206. *See* Janet Cornwall Panacoast & Leonidas W. Payne, Comment, *Hazardous Waste in Interstate Commerce: The Triumph of Law over Logic*, 20 ECOLOGY L.Q. 817, 846-47 (1993).

207. *See* C.M.A. McCaulliff, *The Environment Held in Trust for Future Generations or the Dormant Commerce Clause Held Hostage to the Invisible Hand of the Market?*, 40 VILL. L. REV. 645, 682-84 (1995).

208. This seems especially unlikely in light of the domino-like demise of the Soviet bloc, along with an increasingly free-market Communist China.

is, however, an argument why the Dormant Commerce Clause might be overturned for the brand of free-market economics it promulgates. While the Court contends that the Dormant Commerce Clause only advances an open market for all Americans, at the same time it ignores the fact that the United States government directly and indirectly regulates multiple facets of the economy. Consequently, it seems odd that the Court would strive to minimize additional regulation by the states, especially when it allows them to regulate the economy in many other ways. Moreover, the Dormant Commerce Clause does not effect the same principles of fair play it proclaims. Instead, "the Supreme Court's application of strict scrutiny [under the doctrine] benefit[s] states that have shirked their disposal responsibility, while punishing those states that have taken responsibility for disposal."[209] In light of the enormous body of federal law and regulation in the environmental area, which in turn influences the national economy, such a result created by the judicial pen seems insincere at best, if not fundamentally flawed.

IV. ANOTHER BULLET HOLE IN THE SUPREME COURT'S DOCTRINE: AN ENVIRONMENTAL JUSTICE CRITIQUE OF THE DORMANT COMMERCE CLAUSE

The Dormant Commerce Clause has been criticized by many commentators and shot at from almost every angle. From a constitutional vantage, the doctrine seems to have little foundation; an analysis of its application reveals its convoluted and apparently contradictory nature, along with its potentially incorrect economic analysis; and there are strong policy currents that run against the Clause. This Part proposes, however, that

209. Panacoast & Payne, *supra* note 206, at 847; *see* Stanley E. Cox, *What May States Do about Out-of-State Waste in Light of Recent Supreme Court Decisions Applying the Dormant Commerce Clause? Kentucky as Case Study in the Waste Wars*, 83 KY. L.J. 551, 559-62 (1995).

there is at least one more bullet hole to be shot in the Supreme Court's doctrine. Following the theoretical foundation laid in Part I.C, this environmental justice critique reveals that the Court's interstate waste jurisprudence violates almost every tenet the movement advances, and at times dumps interstate waste disproportionately on people of color and lower income. While a law enacted by Congress delivering such results would at minimum present a reason to question facets of our policymaking processes, the same effect delivered at the hand of nine life-tenured, non-elected judges seems undemocratic, if not unjust.

A. *Distributional Justice*

By its mere presence, a landfill presents numerous environmental and health risks to the communities to which it is closest. Perhaps most palatably, landfills are associated with increases in everyday annoyances such as noise, smells, traffic, and rat populations.[210] Unfortunately, the impacts of landfills do not end there. Many landfills receive toxic and hazardous wastes as a part of their municipal waste stream.[211] Households that put common materials such as batteries, cleaning materials, fluorescent light bulbs, thermometers, paint thinners, or pesticides out on the curb every Tuesday night for pickup the next morning are sending hazardous waste to landfills.[212] These toxics often leak from the landfills, subsequently migrating into aquifers and drinking water supplies.[213] Indeed, nearly twenty percent of the nation's most toxic Superfund sites are for-

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210. *See* Robert R.M. Verchick, *The Commerce Clause, Environmental Justice, and the Interstate Garbage Wars*, 70 S. CAL. L. REV. 1239, 1247 (1997).

211. *See* WILLIAM RATHJE & CULLEN MURPHY, RUBBISH! THE ARCHEOLOGY OF GARBAGE 76 (1992).

212. *See* Engel, *supra* note 103, at 1488.

213. At least two-thirds of operating landfills are currently unlined. *See* RATHJE & MURPHY, *supra* note 211, at 88.

mer landfills.[214] Moreover, some landfills generate methane gas, which can also migrate offsite and create health or fire hazards.[215]

Communities near landfills are at greater risk of these environmental and health dangers than are communities farther away from the sites.[216] Likewise, communities that export their waste do so at their environmental advantage, and at another community's environmental disadvantage. While in some areas the data is mixed, there is a clear overall indication that from a distributional justice viewpoint, the Dormant Commerce Clause, by allowing states to export their waste to other states, disproportionately burdens the poor, and perhaps minorities as well.

1. Pollution and Environmental Harms

One study previously examined the distributional effects of interstate waste movement. In *Reconsidering the National Market in Solid Waste*,[217] Professor Engel analyzed the data presented in *Interstate Movement of Municipal Solid Waste — 1992 UPDATE*.[218] From her state-based analysis, Professor Engel concluded that the Dormant Commerce Clause's allowance of essentially unfettered interstate waste markets runs counter to the environmental justice movement's goals in three ways. First, waste moves from more densely populated states to more rural states. This may be a fairly predictable outcome given that landfills require land, but the differ-

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214. *See* Engel, *supra* note 103, at 1489.

215. *See* Verchick, *supra* note 210, at 1247 (citing an example of a five-foot pillar of fire touched off by a cigarette smoker at a Steve Winwood concert at Shoreline Amphitheater in Mountain View, California, a concert venue built on top of an old landfill).

216. *See* Cox, *supra* note 209, at 556-58.

217. Engel, *supra* note 103.

218. Edward Repa, *Interstate Movement of Municipal Solid Waste— 1992 UPDATE*, WASTE AGE, Jan. 1994, at 37.

ence is pronounced: net-importing states have approximately 173 people per square mile less than net-exporting states.[219] In addition, interstate waste also moves from cleaner states to states that are already more polluted before they receive the waste. Indeed, net-importing states suffer both greater air pollution (13 million pounds per year more) and greater water pollution (2.65 million pounds per year more) than net-exporting states.[220] This is especially significant given the fact that net-importing states have lower population densities. Finally, interstate waste moves from richer to poorer states. In fact, net-importing states maintain a per capita income that is $1,170 less than that of net-exporting states.[221] Professor Engel also reported that net-importing states suffer a higher poverty rate than net-exporting states, but that difference was not statistically significant.[222]

However, Professor Engel's analysis also revealed one way interstate waste does not comport with what environmental justice advocates would normally expect. On a state level, interstate waste moves to states with significantly lower percentage of minorities than the states exporting the waste. Specifically, net-importing states had three percentage points less minorities than net-exporting states.[223] This finding indicates, at least on a state level, that the Dormant Commerce Clause does not disproportionately burden minorities. Rather, the Clause's distributionally unjust effects are correlated only with population density, already-existing environmental degradation, and income levels.

Professor Engel's article was the first to study interstate waste from an environmental justice perspective, and its insights are extremely useful. Indeed, her

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219. *See* Engel, *supra* note 103, at 1493-94.
220. *See id.* at 1494, 1562.
221. *See id.* at 1562.
222. *See id.* at 1494.
223. *See id.* at 1494-95.

analysis reveals that on a state level the Dormant Commerce Clause bears all the distributionally unjust effects the environmental justice movement would expect it to, excluding a correlation with minority populations. However, Professor Engel's analysis does not address the other tenets of the environmental justice movement, nor does it consider the interstate movement of waste on a narrower basis than the state level. While an analysis tracking interstate waste shipments from neighborhood-to-neighborhood or census-tract-to-census-tract would be ideal,[224] such a study is not currently possible.[225] There are, however, some states that track their waste imported from other states on a county level. The remainder of this sub-Part analyzes this data for the four highest net-importing states[226] for which the county-specific data is available: Pennsylvania, Virginia, Michigan, and Ohio. While varying by state, this analysis reveals that at least for some states, the waste imported from other states is disproportionately dumped on counties with statistically significant higher levels of minority residents and poverty rates.

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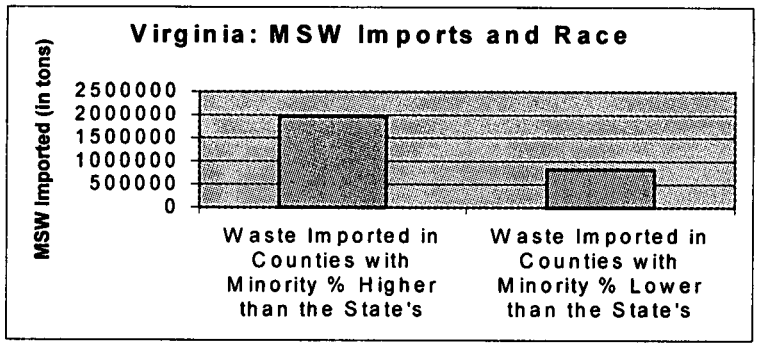
224. A more narrow analysis is superior to a geographically-broader one, because a state with a low minority population, for instance, may import all of its waste into an area occupied by predominantly poor and minority residents.

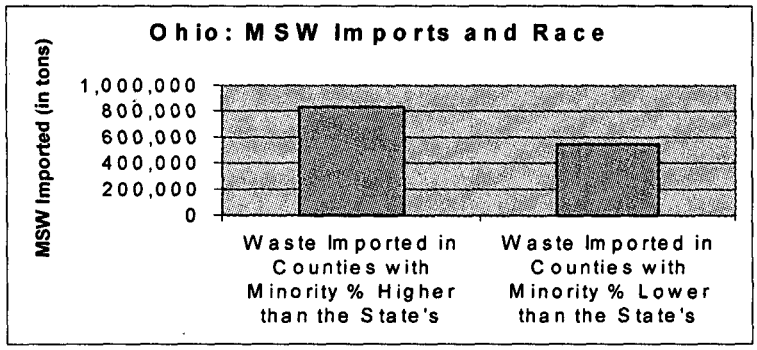
225. The movement of interstate waste is geographically far-reaching, often inter-company, and sometimes difficult to track. Edward Repa's publications in the magazine *Waste Age* are the most reliable and comprehensive source of the data. *See* Repa, *supra* notes 204, 218. However, when I recently spoke with Mr. Repa, he informed me that the more specific data underlying his publications is largely confidential and thus unavailable to the public. Telephone Interview with Edward W. Repa, Director, Environmental Industries Association (Feb. 17, 1999).

226. In 1995, the ten highest net-importing states were, in order, Pennsylvania, Virginia, Michigan, Kansas, Indiana, Oregon, Ohio, Texas, New Hampshire, and South Carolina. *See* Repa, *supra* note 204, at 52. I was able to obtain county-specific data for Pennsylvania, Virginia, Michigan, Ohio, and Illinois. Illinois is the eleventh biggest net-importing state. *See id.*

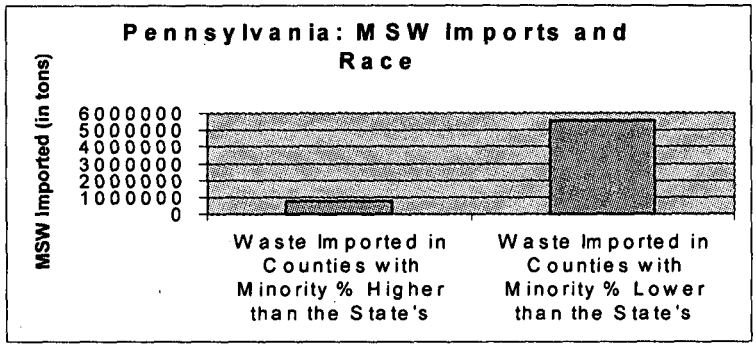
Out-of-state waste and county racial makeup. While interstate waste may travel to states that generally have lower minority populations than the states exporting the waste, what happens to the waste once it enters a state is not as clear. In two of the four states analyzed, the majority of the imported waste is eventually landfilled in counties with significantly higher minority populations than the rest of the state. In Virginia, this means that 1,966,714 tons of waste were deposited in counties with minority populations higher than the state's, and only 833,287 tons of imported waste were deposited in counties with minority populations equal to or less than the state's.[227] Likewise, in Ohio, 835,279 tons of imported waste were landfilled in counties with more minorities than the state in general, while just 546,224 tons were disposed in counties with minority levels less than or equal to the state's.[228]



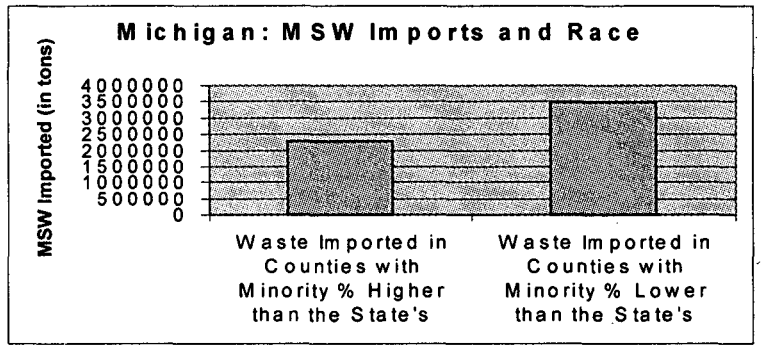
227. *See infra* Appendix E.
228. *See infra* Appendix C.



In contrast to Virginia and Ohio, waste imported to Pennsylvania and Michigan went primarily to counties with minority levels equal to or less than their respective state levels. This trend was most pronounced in Pennsylvania, where 5,606,288 tons of waste were disposed in counties with average or lower than normal minority populations for the State, and only 767,279 tons were disposed in counties with significantly higher minority populations.[229] Michigan followed a trend similar to Pennsylvania, although not as strikingly; 3,459,333 tons of imported waste were disposed in counties with minority populations typical of or lower than average for the State, and 2,276,054 tons were disposed in significantly high minority counties.[230]



229. *See infra* Appendix D.
230. *See infra* Appendix B.



Although the trends in Virginia/Ohio and Pennsylvania/Michigan diverge, they are nevertheless important under an environmental justice analysis. Indeed, the Virginia and Ohio data indicate that there are at least some states where interstate waste disproportionately harms racial minorities. While this might not be the case in every state, this finding at least partially contradicts the notion that interstate waste is free of racially correlated harm. In this light, the Dormant Commerce Clause takes on an increasingly dim hue for states such as Virginia and Ohio. Not only does the doctrine prevent the states from protecting their citizens from imported waste, but it also prevents them from doing so for a portion of their residents who already bear the brunt of our society's environmental harms. Moreover, it is possible that if all the net-importing states had county-specific data available, then what happens to interstate waste once it enters a state may become the more important Dormant Commerce Clause analysis. And importantly, an analysis based on waste volume alone is forever skewed toward Pennsylvania's demography,[231] because that state imports nearly four times more waste a year than the next largest net-importer,

231. At least this is the case as long as Pennsylvania imports so much more waste than the other states.

Virginia.[232] But if a majority of net-importing states' waste imports follow the same disposal pattern as Virginia's and Ohio's, then the Dormant Commerce Clause would begin to fade from the dim to the dismal, a doctrine robbing citizens of protections and working against even many federal initiatives.[233]

Out-of-state waste and county poverty levels. Professor Engel's analysis revealed that waste moves from states with higher per capita incomes to states with lower per capita incomes, and possibly from states with lower poverty levels to states with higher poverty levels. A county-specific analysis, however, exposes trends similar to the county-specific racial trends.

In Virginia and Ohio, the majority of imported waste is disposed in counties with statistically significant higher levels of poverty than the state. For Virginia this means that 1,969,945 tons of waste were disposed in high poverty counties, while 830,056 tons were disposed in counties with average or lower than average poverty rates.[234] Likewise, 917,078 tons of imported waste were landfilled in Ohio counties with significantly high poverty rates, and only 464,425 tons were deposited in counties with poverty levels equal to or lower than the state level.[235]

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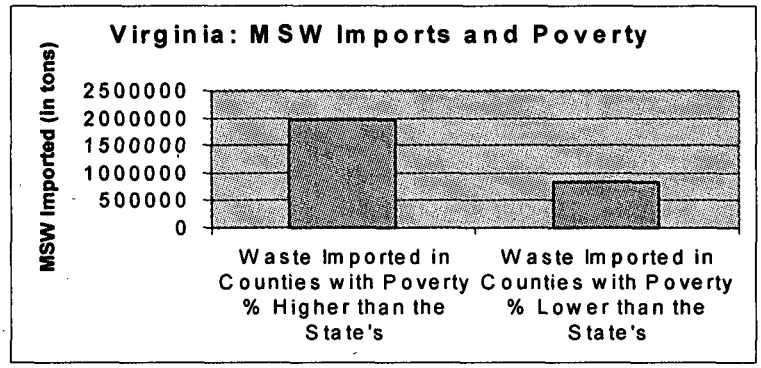
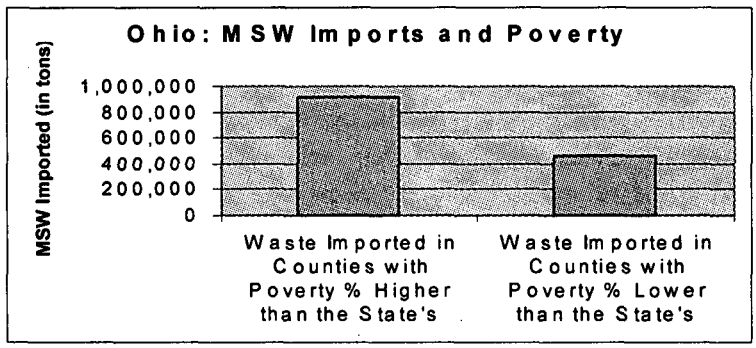
232. *See* Repa, *supra* note 204, at 52. Importantly, however, Virginia's *ratio* of waste imported to exported (17:1) is much higher than Pennsylvania's (8.4:1). *See id.*

233. This would certainly be the case for initiatives such as President Clinton's Environmental Justice Executive Order, *see supra* note 29 and accompanying text, the Clean Water Act's treatment of tribes as states provision, *see supra* note 89, and possibly for certain civil rights statutes.

234. *See infra* Appendix E.

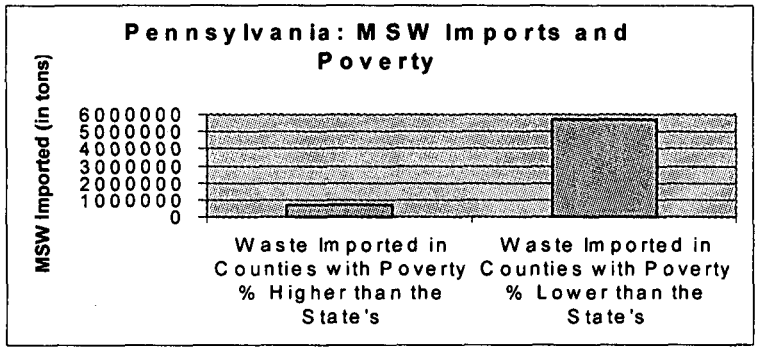
235. *See infra* Appendix C.

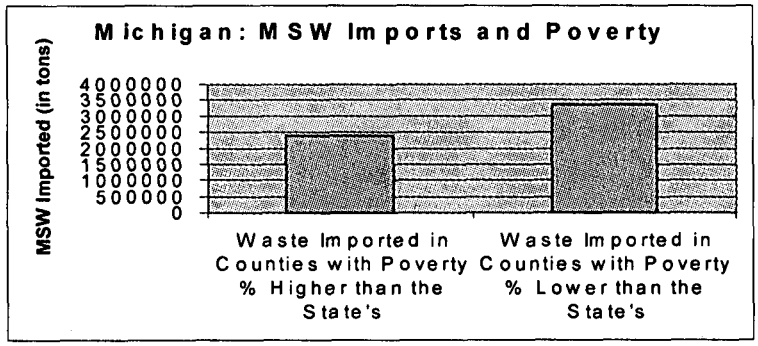




Likewise, waste imported into Pennsylvania and Michigan follow remarkably similar trends in correlation with poverty as with race. The majority of waste imported into these states go to counties with poverty levels equal to or lower than the state rates. In Pennsylvania, the trend is again the most pronounced, and 5,692,188 tons of waste were disposed in counties with poverty levels typical of or better than the state.[236] Only 681,379 tons went to especially poverty-stricken counties.[237] Furthermore, in Michigan, 3,358,440 tons of imported waste went to typical or wealthier counties, while 2,376,947 tons were landfilled in significantly impoverished counties.

236. *See infra* Appendix D.
237. *See id.*





As they did with interstate waste and county racial makeup, the conflicting trends in the county-specific data for Virginia/Ohio and Pennsylvania/Michigan indicate meaningful things about the Dormant Commerce Clause as viewed under environmental justice theory. We know from Professor Engel's analysis that interstate waste moves from richer to poorer states, and we now also know that waste sometimes additionally disproportionately impacts impoverished communities. While this brief glance at county-specific data cannot provide a complete picture of what happens to interstate waste once it enters state boundaries, it indicates that in some states imported waste presents additional environmental justice concerns. Indeed, at least to some extent this further taints the Dormant Commerce Clause, a judicially imposed judicial construction that for some states disproportionately harms minorities and the poor.

2. Natural Resources and Environmental Goods

The primary way landfills limit access to natural resources is through opportunity costs. Siting of a landfill in an area deprives that community of a chance to use the land for greenspace or other similar purposes. This deprivation is especially problematic when acreage could have been used in a way that would provide the poor or minorities actual access to natural resources, such as parks or wilderness preserves.[238] Regardless, greenspace often benefits an area by providing ecosystem services, including air pollution reduction, water purification, and in some circumstances, pest control.[239] Moreover, problems associated with loss of greenspace are only exacerbated by landfills' attendant environmental degradation, particularly when landfills leak, polluting the environment and thus diminishing that community of other environmental goods such as clean water or absence of hazardous waste sites. Finally, landfills may deprive communities of environmental goods in one other tangential way. By driving down real estate prices, a landfill taints a community's environmental reputation, thus minimizing the little potential for mobility that lower income minority residents may have initially possessed to move to a different area with greater access to natural resources.[240]

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238. *See* Taylor, *supra* note 48, at 32-33 (explaining the historical pattern in which minorities and the poor have not had access to greenspace such as parks, especially in the urban context).

239. *See generally* NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS (Gretchen Daily ed., 1997). For discussions on valuing ecosystem services, see Janet N. Abramovitz, *Putting a Value on Nature's "Free" Services*, WORLD WATCH, January/February 1998, at 10; Graciela Chichlinsky & Geoffrey Heal, *Economic Returns from the Biosphere*, 39 NATURE 629 (1998).

240. *See* A. Dan Tarlock, *City Versus Countryside: Environmental Equity in Context*, 21 FORDHAM URB. L.J. 461, 468, 477-91 (1994) (describing environmental inequities associated with America's car culture and the failure of urban redevelopment in relation to increased immobility of minorities and the poor).

Clearly, interstate waste does not deny actual access to natural resources as, say, a toxic waste spill that decimates a community's only wilderness area might. Yet interstate waste movement does not help the matter either. At its very best, the Dormant Commerce Clause's unfettered market in interstate waste only adds to the problem. States that are net-exporters of waste enjoy the option to preserve their land for parks, nature trails, or other refuges. States that import that waste, on the other hand, concomitantly lose that option, ton of garbage by ton of garbage. Additionally, states that are forced by the Court's decisions to import waste also reduce their capacity to dispose of their own waste. This denial was advanced furthest by *Carbone*, as that decision also negatively influenced municipalities' ability to reduce and recycle their waste, environmental goods in and of themselves.

Furthermore, because the Dormant Commerce Clause's interstate waste travels from richer to poorer states — and from less polluted states to more polluted states — this reduction in access to natural resources and other environmental goods also collides with environmental justice's goal of distributional equity. Further, in states such as Virginia and Ohio, where imported waste moves primarily to minority and lower income counties, the Dormant Commerce Clause seems to completely fail under the eye of environmental justice.

3. Environmental Laws

Inasmuch as environmental laws are enforced less vigorously for environmental dilemmas proximate to poor and minority communities,[241] it seems to follow that this problem would also be a concern for interstate waste moved into poorer states, or poor and minority counties. Indeed, approximately fifty percent of landfills

241. *See supra* Part I.C.1.

operate without valid permits.[242] However, it seems unlikely that the Dormant Commerce Clause's allowance of waste movement does not present any environmental justice concerns unique to interstate waste. Instead, any potential distributional justice problems with environmental law enforcement are only heightened in the interstate waste arena to the extent that waste moves into poorer or more minority-populated areas where the enforcement is already lax.[243] Because that waste does move to poorer states — and in some instances, to the poorest and most minority-populated counties within those states — environmental law enforcement surrounding interstate waste is, in fact, an environmental justice concern, but just not one that presents evidence unique to the interstate waste arena.

B. *Political Justice*

The Dormant Commerce Clause also works against the environmental justice movement's goal of greater political justice. The Court's decision in *Philadelphia* to apply strict scrutiny to all interstate waste cases means that democratically enacted laws serving important local or regional interests such as environmental protection will be struck down "with almost no regard for the local

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242. *See* RATHJE & MURPHY, *supra* note 211, at 85.

243. The problem of states relaxing their environmental laws in order to attract industry is typically referred to as the "race to the bottom." *See generally* Richard Revesz, *Rethinking the "Race to the Bottom,"* 67 N.Y.U. L. Rev. 1210 (1993); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977). It is not clear, however, that such a race is an issue here, as the Dormant Commerce Clause, not the states, guides the regulations, and because racial makeup does not neatly correlate with waste disposal. Indeed, races to the bottom are not always the case. *See generally* Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It to the "Bottom"?*, 48 HASTINGS L.J. 271 (1997).

needs or motivation behind them."[244] Moreover, while not all local or state laws always reflect the will of the populace, restrictions on waste importing seem to carry a greater chance that they were enacted to environmentally protect localities rather than to harm them.[245] Indeed, states that would ban importing waste would do so to their own immediate economic disadvantage, a fact that in itself seems to be enough of a check on economic "balkanization." Similarly, even the statute at issue in *Oregon Waste Systems*, a law that generated tax revenues for the state, very well could have economically disadvantaged the state by scaring away would-be waste importers by imposing higher fees on their imports.

But perhaps the Court's grandest assault on environmental justice's advancement of public participation came in *Fort Gratiot*.[246] In striking down a state law that allowed counties to decide whether to import waste, the Justices moved the decision-making process from the immediate jurisdiction in which citizens live, vote, and often work, to the chambers of the Supreme Court.

Indeed, an average citizen has much greater access to a city council or county board of governors meeting than to her senator on Capitol Hill, or a Justice on the Supreme Court for that matter.[247] A citizen's voice is also louder in a town-hall-like meeting than in a letter sent to a Congressman; by volume and quantity alone, one person's participation in a local meeting is much less likely to be drowned out by the flood of powerful lobbyists or their eloquently written handbills constantly pre-

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244. Verchick, *supra* note 210, at 1302. Note, again, however, that even a true strict scrutiny analysis would take such factors into accounts— so long as the interests were "compelling." But under what appears to be the Court's "lethal scrutiny" test, even compelling interests do not protect state laws.

245. *See id.* at 1303 (citing SDDS, Inc. v. South Dakota, 47 F.3d 263, 271-72 (8th Cir. 1995)).

246. 504 U.S. 353 (1992).

247. *See id.*

sent on the federal level.[248] In fact, by moving the decision-making process away from localities, the Court further undercuts environmental justice's interest in public participation by giving corporations a skewed share in the participation market. Under the Dormant Commerce Clause, corporate interests can lobby at the state and local level unchecked by citizen groups now restrained by the Court's doctrine, and when suffering the unlikely loss, run to the federal judiciary for protection under the same Dormant Commerce Clause that increased their lobbying power in the first place.[249] This problem of diminished participation is only further compounded when large corporations rather than counties or municipalities also manage the landfills that are importing the waste, as may often be the case for importing landfills. In Virginia, for instance, six of the nine facilities that accept out-of-state waste are either owned or operated by private companies.[250]

C. *Self-Determination and Sovereignty*

Environmental justice's advocacy for greater public participation proceeds in lockstep with the movement's advancement of greater self-determination and sovereignty. However, if the Dormant Commerce Clause hinders public participation, it stifles self-determination. For apart from participation, citizens are left largely to turn to local or state governments for protection. This is, in fact, by design, and under a logical construction of the Constitution should not be feared. Indeed, states

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248. Indeed, lobbying is so prevalent in Washington, D.C., that Congress recently passed a law requiring lobbyists, trade associations, and other certain classes of entities wielding lobbying influence to report their lobbying expenses on a semiannual basis. *See* Lobbying Disclosure Act of 1995, 2 U.S.C. §§ 1601-1607 (Supp. 1998).

249. *See* Verchick, *supra* note 210, at 1303.

250. *See* VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY, REPORT ON THE MANAGEMENT OF MUNICIPAL SOLID WASTE IN THE COMMONWEALTH OF VIRGINIA 25-46 (1998).

were left "numerous and indefinite" powers for the purpose of protecting their citizens.[251] As James Madison wrote,

> The State Governments may be regarded as constituent and essential parts of the federal Government: whilst the latter is nowise essential to the operation or organization of the former . . . . The number of individuals employed under the Constitution of the United States will be much smaller than the number employed under the particular States. There will consequently be less of personal influence on the side of the former than of the latter.[252]

While Madison mis-aimed in his prediction of the extent to which the federal government would grow, his statement takes on even greater meaning in light of just how extensive the federal government has become.

To be sure, the Dormant Commerce Clause's limits on state sovereignty work against Madison's vision of the Constitution, and to the chagrin of the environmental justice movement. By upending complex state environmental laws such as the one at issue in *Fort Gratiot*, the Court limits states' ability to regulate environmental harms, and in so doing, to protect their citizens.[253] Similarly, the Court's decision in *Carbone* restricted state sovereignty that could be used to provide environmental services, such as recycling programs, to local citizens. Further, *Philadelphia*'s strict scrutiny test not only removes local interests from a public participation arena, but also obliterates it from consideration for

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251. *See supra* note 176 and accompanying text.

252. THE FEDERALIST NO. 45, at 234-35 (James Madison) (Gary Willis ed., 1982).

253. *See* McCaulliff, *supra* note 207, at 683-84 ("The notion of trusteeship and police powers acts as a corrective when we depart too far from the balance of competing values of individual freedom and social controls, thus potentially endangering the values and culture of the American way of life that the Constitution is designed to protect.").

states seeking on their own initiative to protect their citizens.

Finally, the Dormant Commerce Clause's hampering of state sovereignty in environmental regulation is important for two additional reasons. First, federal environmental laws typically set floors for protection, not specific standards.[254] The Dormant Commerce Clause, however, undercuts states' ability to heighten environmental protection in the waste disposal arena.[255] This effect of the Dormant Commerce Clause is particularly important to the environmental justice movement, for it denies states the ability to become laboratories for policy experiments.[256] In addition, while the federal government continues to regulate more and more aspects of the environment,[257] at the same time it relies on the

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254. *See, e.g.*, Resource Conservation and Recovery Act, 42 U.S.C. §6936 (1994) (allowing states to administer their own programs so long as the state program is equivalent to the federal program); Clean Air Act, 42 U.S.C. § 7410 (1994) (setting forth requirements for "state implementation plans" under the act).

255. *See* Engel, *supra* note 103, at 1522-23.

256. *See* Crist v. Bretz, 437 U.S. 28, 40 (1978).

257. *See, e.g.*, Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-1364 (1994); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2671 (1994); Multiple-Use Sustained-Yield Act, 16 U.S. C. §§ 528-531 (1994); Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464 (1994); Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1994); National Forest Management Act, 16 U.S.C. §§ 1600-1614 (1994); Forest and Rangeland Resources Act, 16 U.S.C. §§ 1600-1687 (1994); Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1994); Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 (1994); Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994); Ocean Dumping Ban Act, 33 U.S.C. §§ 1401-1445 (1994); Oil Pollution Act, 33 U.S.C. §§ 2701-2761 (1994); Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26 (1994); National Environmental Policy Act, 42 U.S.C. §§ 4321-4361 (1994); Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992K (1994); Clean Air Act, 42 U.S.C. §§ 7401-7462 (1994); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (1994); Pollution Prevention Act, 42 U.S.C. §§ 13101-13109 (1994); Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1784 (1994).

states to implement those laws.[258] When Congress is relying on state sovereignty to implement environmental protections, and the Supreme Court is eroding that autonomy, a double whammy for environmental justice ensues: less state autonomy, less protection for minority and lower income citizens, and less environmental protection overall.

D. *Home as the Environment: Local Control and Sense of Place*

The environmental justice movement's idea of home as the environment combines all tenets of the movement by linking environmental protection, equity, participation, self-determination, and explaining the interconnectedness of ecosystems to a sense of place. Embedded in this multi-linked interconnectedness is the notion that home is the space where your influence on the environment — and the environment's influence on you — can be felt the greatest.[259] From this vantage, the Dormant Commerce Clause immediately founders.

In *Fort Gratiot*, for instance, the Court's invalidation of the county-based statute created a fissure between waste production and waste disposal. Rather than deferring to Michigan's attempt to internalize the true costs of waste production for each county, the Court mixed the signals by allowing waste imports and the attendant ability to export waste. Similarly, in *Carbone*, the Court perpetrated another disconnection between waste production and disposal. No longer may localities force their residents to pay for the cost of separating all

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258. *See* Engel, *supra* note 103, at 1523; *see also, e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987) (allowing Congress to use its spending power to "commandeer" state governments).

259. *See* ALDO LEOPOLD, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE 6 (1968) ("There are two spiritual dangers in not owning a farm. One is the danger of supposing that breakfast comes from the grocery, and the other that heat comes from the furnace.").

their garbage for recycling purposes. Instead, citizens are free to cast their waste to the winds of the Dormant Commerce Clause, which will then take it to a poorer state, and possibly a lower-income, minority-populated county within that state.

Indeed, the Court's decision to disallow true internalization of waste production costs by county or by municipality are important, because that decision means that the incentives created by waste production are removed from localities. Rather than cope with the problem themselves, localities may export their waste to other states, creating an ignorance of the true impacts of the community's waste production.[260] Moreover, the Court's decisions ignore the fact that waste disposal has been a local issue since the first prehistoric villages.[261] To remove that control from localities in the latter part of the twentieth century is a curious decision, and one that does not seem to comport with sensible environmental regulation. In sum, having faltered under the scrutiny of the first three tenets of environmental justice, the Dormant Commerce Clause steps up one last time to the movement's critique and, again, fails.

V. THE ENVIRONMENTAL JUSTICE CRITIQUE OF THE DORMANT COMMERCE CLAUSE APPLIED: A BRIEF CASE STUDY OF VIRGINIA

In 1992, Virginia was the fifth largest net-importer of waste in the United States.[262] In 1995, the Commonwealth had "moved up" three slots in the rankings, second only to Pennsylvania in its net amount of waste imported from other states.[263] In 1992, Virginia imported

260. *See* Cox, *supra* note 209, at 559-62.
261. *See* RATHJE & MURPHY, *supra* note 211, at 9, 33-40.
262. *See* Engel, *supra* note 103, at 1563.
263. *See* Repa, *supra* note 204, at 52.

1.5 million tons of municipal waste,[264] but by the end of 1998, the Commonwealth had imported 4.6 million tons in the year, a 300% rise in just six years' time.[265]

The increasing growth of Virginia's waste imports, along with a report released in late 1998 by the Virginia Department of Environmental Quality,[266] caught the attention of Virginia Governor James S. Gilmore III. The Republican governor subsequently called for action in the Commonwealth's General Assembly, and publicity surrounding Virginia's campaign to fight waste imports began to swirl.[267] Clearly, a time of political action was approaching.

A. *A Political Volley: Gilmore versus Giuliani*

Nearly fifty-five percent of waste currently imported to Virginia comes from New York, and in December 1998, New York City Mayor Rudy Giuliani announced a new waste disposal plan for his city in response to the impending closure of the Fresh Kills landfill.[268] The plan called for a larger portion of his New York City's waste to be shipped to Virginia by barge, nearly 4000 tons per day.[269] Giuliani's proposal only heightened Governor Gilmore's interest in protecting Virginia from out-of-state waste, and in his State of the Commonwealth ad-

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264. *See* Engel, *supra* note 103, at 1564.

265. *See* Craig Timberg, *N.Y. Accused of Targeting Va. For Trash: State Fights to Save Limits on Garbage*, WASHINGTON POST, July 14, 1999, at A10.

266. VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY, *supra* note 250, at 32.

267. *See, e.g.*, David W. Chen, *Glow of New York Trash Flickers in Virginia*, N.Y. TIMES, March 11, 1999, at A1.

268. *See* Paul H.B. Shin, *Golden Trashes Plan for Fresh Kills Landfill*, N.Y. DAILY NEWS, Dec. 17, 1998, at 2.

269. *See* Eric Lipton, *Five States Challenge New York's Trash Plan: Letter Says Amount Is "Unacceptable,"* WASHINGTON POST, Feb. 7, 1999, at C1.

dress on January 13, 1999, the governor vowed to bar New York from barging its additional trash to Virginia.[270]

Angered, Giuliani responded that "People in Virginia like to utilize New York because we're a cultural center . . . . We don't have the room to handle the garbage that's produced not just by New Yorkers."[271] Giuliani continued:

> one of the helps we need from the rest of the country is to assist us with a problem that arises from that [distinction], which is that we produce a lot of garbage. We don't do it because we're profligate. We don't do it because we're wasteful. We do it because there are a lot of people in the city and that brings great benefit to the American people.[272]

Governor Gilmore responded to Mayor Giuliani's comments the next day in front of the press, chiding the New Yorker for his myopic view:

> New York City is a great city, but there's no equation [between cultural amenities and trash]. There is no relationship or obligation as a result of the excellence of New York City. Anybody else in the entire country, all the way from Maine to Florida to California, would be insulted by that type of approach.[273]

One of Virginia's lawmakers, William T. Bolling, also got in on the political volley, echoing Governor Gilmore's message on the Virginia Senate floor. "We pay our hard-earned money to buy goods at their shops, and food in their restaurants. We spend our hard-earned money to attend plays on Broadway. Yet, somehow we

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270. *See* Jeremy Redmon & Stephen Dinan, *New York's Giuliani Talks Trash to Virginia: Tells Gilmore State Can't Refuse Refuse*, WASHINGTON TIMES, Jan. 15, 1999, at A1.

271. *Id.*

272. Ledyard King, *New York Mayor's Trash Talk Angers Governor of Virginia*, NORFOLK VIRGINIAN-PILOT, Jan. 15, 1999.

273. *Id.*

have to reciprocate for those pleasures by accepting their trash."[274]

Giuliani fired back one last time, apparently dismissing the Virginian rebuff. He stated:

> There are more places that want to do business with us than you could possibly imagine. I mean, every time somebody makes these statements — some politician trying to get on television — we get five mayors and ten communities to call us and say: "Don't listen to him, we need your business."[275]

In response to this statement, Gilmore mailed the New York mayor a letter stating he was "offended,"[276] and then two weeks later signed Virginia on to a letter from Maryland, New Jersey, Pennsylvania, and West Virginia criticizing Giuliani's plan to export its waste.[277] Gilmore's comeback to Giuliani's statements, however, did not end in mere words.

B. *Political Bantering Turns to Law*

Hardly one week after the dust had settled from the Gilmore-Giuliani spat and the five-state letter had been mailed to the New York mayor, the Virginia General Assembly swiftly put their pens where their governor's mouth was. The Commonwealth's House and Senate separately passed nearly identical waste disposal packages, addressing in large measure the concerns Governor Gilmore had quarreled over with Mayor Giuliani. Together, the three bills — a cap on per day landfill disposal, a ban on transport of waste over Virginia rivers, and new monitoring and inspection programs for land-

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274. Redmon & Dinan, *supra* note 270.

275. Tom Topousis, *Rudy: Ignore Grouchy Gov— Va. Wants Our Garbage*, N.Y. POST, Jan. 19, 1999, at 21.

276. *Id.*

277. *See* Lipton, *supra* note 269; *Va. Joins Four States in Concern with N.Y. Trash: Giuliani's Plan Would Double Brooklyn's Trash Output by 2001*, CHARLESTON DAILY MAIL, Feb. 8, 1999, at 3C.

fills — sought to help limit the amount of out-of-state waste entering Virginia each year to roughly the same level of 1998.[278]

1. Dumping Caps

The new Virginia laws restrict waste landfilling in the Commonwealth in two ways. First, the law requires that new disposal facilities — and applications from existing facilities for increases in their disposal capacity — may not be granted until the Director of the Virginia Department of Environmental Quality (DEQ) determines that the new facility or facility expansion will protect:

> present and future human health and safety and the environment; [that] there is a need for the additional disposal capacity; [that] there is sufficient infrastructure . . . to handle the waste flow; [that the facility is consistent with local and state disposal limits; and that the facility is in the public interest and comports with regional and local waste plans].[279]

Further, new facilities may not be sited until the DEQ holds a public hearing within the locality where the landfill will be sited.[280]

The second way the new Virginia statute regulates the Commonwealth's waste disposal amounts is much more direct; it imposes a 2000-ton per day cap on Virginia landfills.[281] While facilities that have consistently accepted more than 2000 tons of garbage on a daily basis may receive more than 2000 tons per day under an exception in the law, they may not accept more waste than

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278. Some Virginia politicians, however, were not entirely pleased with a limit based on 1998 figures. *See* Rex Springston, *Delegate Trashes Gilmore Policy*, RICHMOND TIMES-DISPATCH, July 3, 1999, at B6 (noting that Kenneth R. Plum and A. Donald McEachin felt the governor should focus on obtaining authorization from Congress to enact more restrictive waste measures).

279. VA. CODE ANN. § 10.1-1408.1(D)(1) (Michie 1999).

280. *See id.*

281. *See id.* at § 10.1-1408.3(A).

the average daily amount they received during 1998.[282] Facilities that have not consistently operated in the last two years may also receive more than 2000 tons of waste a day, but they may not in any circumstances accept more than 2400 tons per day.[283]

2. Bans on Waste Transport by River

In addition to the new waste disposal facility requirements, the newly enacted statutes also regulate the flow of waste by barges, ships, and vessels. To ensure protection of Virginia's aquatic ecosystems, the law strengthens the permitting requirements for transport of waste by water, disallowing disposal facilities from accepting waste moved by water without first receiving a permit to do so.[284] This provision also limits the way in which garbage may be transported by barge; the containers holding the waste may not be stacked more than two high.[285]

Virginia's new laws also include a more stringent measure. Finding that the current provisions regulating transport of waste by water "will not in all circumstances provide sufficient protection of [public] health, safety and welfare or of the Commonwealth's atmosphere, lands, and waters," the new law bans movement of hazardous and nonhazardous waste, along with medical wastes, from being shipped via the Rappahannock, James, and York Rivers.[286] However, this provision creates exceptions for scrap metal, dredged material, and source-separated recyclable materials.[287] Additionally, the extent of the ban may be mitigated by a qualifying clause that imposes the restriction only to the extent allowed by the United States Constitution, and as

282. *See id.*
283. *See id.* at § 10.1-1408.3(D).
284. *See id.* at § 10.1-1454.1(B).
285. *See id.* at § 10.1-1454.1(A)(ii)(d).
286. *See id.* at § 10.1-1454.2.
287. *See id.*

"necessary to protect [public] health, safety and welfare" and Virginia's environment.[288]

3. Heightened Monitoring, Inspection, and Permit Requirements

Finally, a third aspect of Virginia's new waste disposal laws heightens regulation of landfill siting, monitoring, and inspecting. For siting, the new law requires that the disposal facility accommodate its locality. The site must comply with the local or regional waste management plan;[289] reach a host agreement with the locality, addressing at a minimum, issues of financial compensation, traffic volume, daily disposal limits, and the anticipated service area of the facility;[290] and must provide at least some room for the locality's waste.[291]

In addition to the new requirements to accommodate localities, the Director of the Department of Environmental Quality may not issue new landfill permits without first conducting a site feasibility study. These studies must address traffic and highway safety impacts of the facility, potential environmental impacts, and the geological suitability of the site.[292] And when landfills are closed down, the owners and operators of the site must conduct monitoring and maintenance on the site for at least six months to "protect human health and the environment."[293] At the end of the six months, the DEQ is authorized to extend the monitoring period if needed to protect Virginians or their ecosystem.

The final provisions of the law are more general in nature. The first provides a cleanup fund that extends grants to local governments to remediate leaking land-

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288. *Id.*
289. *See id.* at § 10.1-1408.1(B)(6).
290. *See id.* at § 10.1-1408.1(B)(7).
291. *See id.* at § 10.1-1408.1(P).
292. *See id.* at § 10.1-1408.1(D)(1).
293. *Id.* at § 10.1-1410.2(A)-(B).

fills.[294] The other provision authorizes the DEQ to promulgate regulations to ensure that trucks transporting waste within the state satisfy minimum environmental and safety controls.[295]

C. *Waste Management's Challenge*

On March 27, 1999, Governor Gilmore signed Virginia's new waste disposal legislation into law. However, before the package could take effect on its slated date of July 1, 1999, Waste Management, Inc., the largest waste disposal company in the world,[296] filed a lawsuit challenging the law in the federal trial court for the Eastern District of Virginia.[297] Eventually joined by five other plaintiffs — including three other waste disposal companies and the County of Charles City, Virginia — the action sought invalidation, and in the meantime a temporary injunction, of the laws.[298]

On June 30, 1999, district court Judge James Spencer granted Waste Management's motion for a preliminary injunction, temporarily barring enforcement of Virginia's waste disposal cap, the limit on container stacking on barges, and the ban on waste transport over the Rapahannock, James, and York Rivers.[299] In his strongly worded memorandum opinion accompanying issuance of the injunction, Judge Spencer concluded that Virginia's new statutory provisions were "precisely

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294. *See id.* at § 10.1-1413.2.

295. *See id.* at § 10.1-1454.3.

296. *See* Waste Management, Inc., *About Waste Management* (visited July 29, 1999) <http://www.wm.com/category/sub/1,1076,11,00.html>.

297. *See* Waste Management Holdings, Inc. v. Gilmore, No. 3:99CV425 (E.D. Va. trial date pending).

298. *See* Waste Management Holdings, Inc. v. Gilmore, No. 3:99CV425, mem. op. at 1-2 (E.D. Va. June 30, 1999) (accompanying order granting preliminary injunction).

299. *See* Waste Management Holdings, Inc. v. Gilmore, No. 3:99CV425 (E.D. Va. June 30, 1999) (order granting preliminary injunction).

what the [Dormant] Commerce Clause forbids."[300] Focusing on the political landscape surrounding passage of the legislation, Judge Spencer noted that "numerous Virginia lawmakers and other state officials . . . frequently couch[ed] their [support for the legislation] in anti-out-of-state waste terms."[301] The judge also noted that the landfill cap and the river ban primarily influenced out-of-state waste interests and not those of Virginia, because no Virginia landfill receiving only local waste even neared the 2000-ton cap, and because only minimal amounts of intra-state waste are transported over Virginia's rivers.[302] The judge concluded that these facts indicated clear discrimination in the laws' purpose and effects, regardless of whether the "restrictions . . . appear, on their face, to be neutral . . . ."[303]

Having found Virginia's laws protectionist in nature, Judge Spencer held that strict scrutiny applied, and as such, the plaintiffs would "almost certainly . . . succeed on the merits."[304] The judge rejected Virginia's argument that the laws were required for environmental protection and as health and safety measures. In discussing this claim in relation to the barging bans, for instance, he wrote, "Virginia clearly could address its health, safety, and environmental concerns without totally prohibiting the use of container barges for transporting solid waste. Indeed, the General Assembly approved such legislation in 1998 . . . ."[305] Having rejected Virginia's contended reason for the laws' validity, the Judge also dismissed a more general claim that the laws

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300. *See* Waste Management Holdings, Inc. v. Gilmore, No. 3:99CV425, mem. op. at 23 (E.D. Va. June 30, 1999).

301. *Id.* at 8, 18-20.

302. *See id.* at 4-6.

303. *Id.* at 14; *see id.* at 16, 17 ("[I]t is impossible to review this record without concluding that the challenged provisions were motivated by an undisguised animus against the importation of out-of-state municipal solid waste.").

304. *Id.* at 23; *see id.* at 18-20.

305. *Id.* at 22.

functioned in the public interest: "Such interstate commercial warfare is clearly in no one's interest."[306] With Virginia's justifications rejected — and the laws subject to strict scrutiny — the judge's determination that plaintiffs' eventual success was likely meant that an injunction was in order.

D. *Critique of the Preliminary Injunction: Offending Environmental Justice and More*

Although Judge Spencer's memorandum opinion accompanying the preliminary injunction is clearly not a final determination based on the merits, let alone a decision that will necessarily be granted certiorari when appealed to the Supreme Court,[307] the vigor with which he issued the injunction — along with his verbal comments in doing so — indicates that Virginia's laws will in fact be struck down when the full trial commences.[308] Indeed, at the hearing in which Judge Spencer granted Waste Management's motion, he stated that "[t]he cases are crystal clear . . . in terms of what can be done and can't be done in terms of inhibiting the free flow of commerce."[309] The judge further stated of the Virginia laws, "[t]his is a classic example of what the [Dormant]

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306. *Id.* at 23.

307. Governor Gilmore has vowed to fight to have Virginia's laws implemented, even if that means taking it to the Supreme Court. *See* Craig Timberg, *War on Trash Isn't Over, Gilmore Declares*, WASHINGTON POST, July 1, 1999, at B1.

308. The trial date is currently set for December 14, 1999. Telephone Interview with Stewart Leeth, Attorney, Virginia Office of the Attorney General (July 28, 1999).

309. Craig Timberg, *Va. Laws on Imports of Trash Blocked: Judge Calls Limits Unconstitutional*, WASHINGTON POST, June 30, 1999, at A1.

Commerce Clause is designed to prevent — fifty bickering commercial islands unto themselves."[310]

The injunction is not entirely surprising in light of the path the Supreme Court has been trodding with its interstate waste decisions. In fact, by definition, once strict scrutiny applies, laws are "virtually per se invalid." Judge Spencer's detection of discriminatory effects in the Virginia statutes is also reminiscent of the Court's determinations in prior Dormant Commerce Clause cases, particularly *Fort Gratiot* and *Carbone*. From the political record surrounding the laws' enactment, it is fairly clear that at least some of the Virginian lawmakers somewhat despised New York's waste. But despise for an imported evil does not make discriminatory design for an entire General Assembly, and determining legislative intent is a rather slippery endeavor in any event.[311] Judge Spencer's injunction order also highlights just how lost the Supreme Court has left trial courts in the quagmire of sleeping constitutional text:[312] uncertain what constitutes important local government interests, ignorant of the crucial nature of state environmental protections, and able only to stare into the flames, searching desperately for some hint of "discrimination" and its escape hatch out of the much harder-to-apply *Pike* balancing test. Moreover, the injunction is also subject to the traditional constitutional, application-based, and policy critiques of the Dormant

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310. Larry O'Dell, *Judge Issues Injunction Blocking Trash Import Laws*, ASSOCIATED PRESS NEWSWIRES, June 30, 1999, at 00:01:00 *available in* Westlaw, ALLLNEWS library.

311. *See generally* Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1 (1998) (analyzing the Supreme Court's 1996 term statutory interpretation cases).

312. For an analysis of courts' recent attempts to navigate the quagmire, see Jennifer M. Anglim, Note, *The Need for a Rational State and Local Response to Carbone: Alternate Means to Responsible, Affordable Municipal Solid Waste Management*, 18 VA. ENVTL. L.J. 129, 136-55 (1999).

Commerce Clause. Indeed, the case underscores just how powerful the judiciary has become under a judicially-constructed doctrine, with federal trial judges invalidating state environmental laws neutral in their application — and written apparently precisely in the vein of Dormant Commerce Clause exceptions that the Court had previously carved out.[313]

The injunction also clearly offends in the eyes of the environmental justice movement. Under this analysis, it is to Judge Spencer's credit for leaving intact the public hearing, local waste management plan, and increased monitoring provisions of the laws. But even under a most basic environmental justice critique, the injunction falls short in its failure to allow Virginia to protect its own environment. The judge found that Virginia's interests in protecting the environment were important, but by dismissing that contention at the instant he thought he smelled discrimination emanating from the law,[314] he belied the point entirely. In fact, it is uncertain that New York's garbage is identical to Virginia's, especially in light of the fact that medical waste was recently discovered in a Waste Management shipment from New York.[315] Further, the injunction order ignores the argument that by capping the amount of waste landfilled each day, Virginia may better monitor whether that waste complies with its specified environmental standards for landfill disposal. And by holding

313. The Court has at least twice noted that flat dumping restrictions would be valid under the doctrine. *See supra* Parts II.A.2, II.B.1.

314. *See* Waste Management Holdings, Inc. v. Gilmore, No. 3:99CV425, mem. op. at 21 (E.D. Va. June 30, 1999). Again, it is one thing to find discrimination in the actual law, and another thing entirely to see it somewhere near the law.

315. *See* Bob Brown, *WMI Fined for Dumping in Va.*, WASTE NEWS, May 10, 1999, at 3. *But see* Dominic Perella, *Medical Waste Discovered in a Second Virginia Landfill*, ASSOCIATED PRESS NEWSWIRE, Feb. 13, 1999, at 00:04:00, *available* on Westlaw, ALLNEWS library (reporting medical waste from a Richmond hospital that was landfilled in Charles City County).

that the barging ban is not needed to protect the environment, Judge Spencer surreptitiously transported himself from the bench to the Virginia Senate floor: the General Assembly clearly found that their previous barging requirements were not adequate to protect the environment,[316] and in any event, such a finding is for the legislature not the judiciary.[317]

Besides falling short by foregoing important environmental protections, the injunction also fails under environmental justice's principle of distributional justice. Because waste imported to Virginia disproportionately lands in minority and impoverished counties,[318] restrictions on the Commonwealth's effort to ameliorate this dilemma is contrary to the movement's goals. In fact, there may also be an additional distributional concern for Virginia: waste imported to the state also disproportionately impacts counties with significantly higher percentages of adults who do not have high school diplomas.[319] Further, the injunction at once assaults the environmental justice movement's advancement of political justice, self-determination, sovereignty, and home-as-the-environment.

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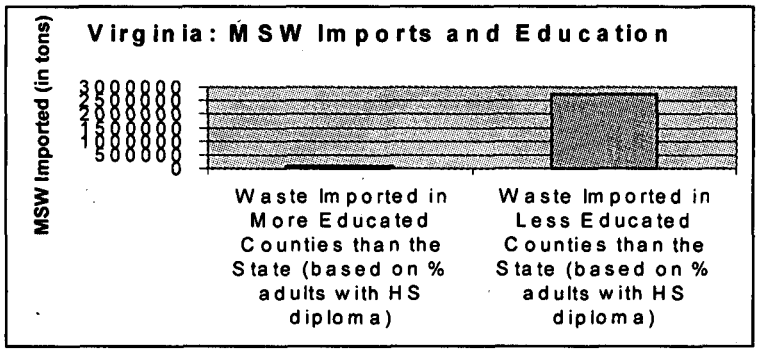
316. *See* VA. CODE ANN. § 10.1-1454.2 (Michie 1999).

317. It is unclear whether waste transport by barge is more environmentally friendly than by truck or rail, although the U.S. Coast Guard believes it is. Apparently the Virginia General Assembly disagreed, however. *See id.*; Bob Brown, *Waste Imports: A Tale of Two States: Va. Legislature Constructs Roadblock*, WASTE NEWS, Feb. 15, 1999, at 1 (quoting Virginia State Senator Bolling as saying "If a barge sinks, then we've created an environmental catastrophe that could take a generation to correct.").

318. *See supra* Part IV.A.

319. *See infra* Appendix E.



For the injunction bars enforcement of laws that enjoyed wide political support,[320] and also received much approval in public polls.[321] In addition, it removes the decision-making process about the environment and natural resources not only away from counties or smaller jurisdictions, but also from the state level where those counties are more accurately represented.[322] Such a result is not democratic, and it is not environmentally just.

CONCLUSION

In the collective mind of our nation's highest Court, the Dormant Commerce Clause is alive and well, striding along in perfect unison with the wakeful text of the actual Commerce Clause. Despite this belief, the Dormant Commerce Clause remains subject to copious and cutting criticisms. This Note presents one more critique of the doctrine — that of environmental justice — and

320. The landfill cap bill passed 97-0-1 in the Virginia House, 40-0 in the Virginia Senate. The barge transport ban passed 78-19-1 in the House, and 33-6-1 in the Senate. The additional monitoring provisions bill passed 97-0-1 in the House, 38-0-1 in the Senate.

321. *See* Timberg, *supra* note 309.

322. Indeed, the landfill cap, for instance, would allow facilities to apply for increased tonnage allowances. *See* VA. CODE ANN. § 10.1-1408.1 (Michie 1999). Presumably, localities would have some input into such decisions.

finds that there, too, the Dormant Commerce Clause severely offends. Indeed, the Court's fairly recent extension of the doctrine into interstate waste hinders environmental justice's advancement of distributional and political justice, self-rule, and home-as-the-environment. Environmental justice gives yet one more reason to overturn the doctrine.

While the Court seems unlikely to overrule itself — despite the Chief Justice's continuing dissents — Congress has the explicit power to do so. But legislative action on the federal level, although it would be well advised,[323] seems tenuous, with our nation's Senators and Congressmen ever debating but still not deciding.[324] This leaves states to craft environmental and legal innovations of their own. Unfortunately, the waters of the Dormant Commerce Clause are increasingly perilous, with a recent preliminary injunction issued by a federal trial court restraining Virginia from enforcing its new environmentally-friendly, neutral-on-their face laws. This injunction, too, besieges the goals of environmental justice, and leaves states to fend for themselves. The success of their fending, however, remains to be seen. For now, only one thing is certain: more trash is on the way.

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323. For a proposal articulating how such legislation might be crafted, see Lawrence, *supra* note 191, at 415-63.

324. At least six bills were introduced in 1999 that would address the problems created by the Dormant Commerce Clause for interstate waste. *See* S. 533, 106th Cong. (1999); S. 663, 106th Cong. (1999); S. 872, 106th Cong. (1999); H.R. 1190, 106th Cong. (1999); H.R. 378, 106th Cong. (1999); H.R. 891, 106th Cong. (1999). None of these bills, however, had made it past referral to a subcommittee or hearings as of July 29, 1999.

APPENDIX A: PRINCIPLES OF ENVIRONMENTAL JUSTICE FROM THE PEOPLE OF COLOR LEADERSHIP SUMMIT

WE THE PEOPLE OF COLOR, gathered together at this multinational People of Color Environmental Leadership Summit, to begin to build a national and international movement of all peoples of color to fight the destruction and taking of our lands and communities, do hereby re-establish our spiritual interdependence to the sacredness of our Mother Earth; to respect and celebrate each of our cultures, languages and beliefs about the natural world and our roles in healing ourselves; to insure environmental justice; to promote economic alternatives which would contribute to the development of environmentally safe livelihoods; and, to secure our political, economic and cultural liberation that has been denied for over 500 years of colonization and oppression, resulting in the poisoning of our communities and land and the genocide of our peoples, do affirm and adopt these Principles of Environmental Justice:

1. Environmental justice affirms the sacredness of Mother Earth, ecological unity and the interdependence of all species, and the right to be free from ecological destruction.

2. Environmental justice demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias.

3. Environmental justice mandates the right to ethical, balanced and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things.

4. Environmental justice calls for universal protection from nuclear testing, extraction, production and disposal of toxic/hazardous wastes and poisons and nuclear testing that threaten the fundamental right to clean air, land, water, and food.

5. Environmental justice affirms the fundamental right to political, economic, cultural and environmental self-determination of all peoples.

6. Environmental justice demands the cessation of the production of all toxins, hazardous wastes, and radioactive materials, and that all past and current producers be held strictly accountable to the people for detoxification and the containment at the point of production.

7. Environmental justice demands the right to participate as equal partners at every level of decision-making including needs assessment, planning, implementation, enforcement and evaluation.

8. Environmental justice affirms the right of all workers to a safe and healthy work environment, without being forced to choose between an unsafe livelihood and unemployment. It also affirms the right of those who work at home to be free from environmental hazards.

9. Environmental justice protects the right of victims of environmental injustice to receive full compensation and reparations for damages as well as quality health care.

10. Environmental justice considers governmental acts of environmental injustice a violation of international law, the Universal Declaration On Human Rights, and the United Nations Convention on Genocide.

11. Environmental justice must recognize a special legal and natural relationship of Native Peoples to the U.S. government through treaties, agreements, compacts, and covenants affirming sovereignty and self-determination.

12. Environmental justice affirms the need for urban and rural ecological policies to clean up and rebuild our cities and rural areas in balance with nature, honoring the cultural integrity of all our communities, and providing fair access for all to the full range of resources.

13. Environmental justice calls for the strict enforcement of principles of informed consent, and a halt to the testing of experimental reproductive and medical procedures and vaccinations on people of color.

14. Environmental justice opposes the destructive operations of multi-national corporations.

15. Environmental justice opposes military occupation, repression and exploitation of lands, peoples and cultures, and other life forms.

16. Environmental justice calls for the education of present and future generations which emphasizes social and environmental issues, based on our experience and an appreciation of our diverse cultural perspectives.

17. Environmental justice requires that we, as individuals, make personal and consumer choices to consume as little of Mother Earth's resources and to produce as little waste as possible; and make the conscious decision to challenge and reprioritize our lifestyles to insure the health of the natural world for present and future generations. [325]

325. PROCEEDINGS OF THE FIRST NATIONAL PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUMMIT xiii (1991).

APPENDIX B: MICHIGAN WASTE IMPORT AND DEMOGRAPHIC DATA SUMMARY

County	MSW Imported[326]	%Minority[327]	% Poverty
Washtenaw	1,492,829	16.2	12.2
Berrien	1,384,366	17.3	14.7
Monroe	987,189	3	8.8
Menominee	531,342	1.9	12.8
Genesee	477,072	21.8	16.5
Wayne	414,616	42.6	20.1
Shiawassee	181,980	1.6	10.6
Lenawee	69,413	5.6	10.4
Ontonagon	54,121	1.7	13.2
Alger	46,311	6.2	14.5
Saint Joseph	41,550	41	11.5
Dickinson	31,300	1.2	10.8
Macomb	22,384	3.2	5.2

326. WASTE MANAGEMENT DIVISION, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, REPORT OF SOLID WASTE LANDFILLED IN MICHIGAN 10 (1999).

327. All demographic data— minority, poverty, and education data— in Appendices B-E comes from the 1990 U.S. Census, available on the internet. *See* United States Census Bureau, *1990 Census Lookup (1.4a)* (visited July 26, 1999) <http://www.census.gov>.

Sanilac	461	1.8	14.3
Oakland	420	10.4	6
Midland	33	2.7	11.1
MICHIGAN	5,735,387	16.5	13.1

APPENDIX C: OHIO WASTE IMPORT AND DEMOGRAPHIC DATA SUMMARY

County	MSW Imported[328]	% Minority	%Poverty
Mahoning	708,271	16.5	15.9
Stark	339,047	7.5	11.1
Hamilton	113,723	22.3	13.3
Williams	54,107	1.3	7.6
Wood	30,690	3.3	10.6
Perry	24,993	0.5	19.1
Wyandot	21,533	0.8	8.5
Athens	18,505	5.6	28.7
Gallia	15,280	3.8	22.5
Ashtabula	12,502	4.2	16.1
Ottawa	9318	2.7	7.2
Cuyahoga	6857	27.4	13.8
Lucas	6428	17.7	15.3
Brown	5258	1.3	14.2

328. DIVISION OF SOLID AND INFECTIOUS WASTE MANAGEMENT, OHIO ENVIRONMENTAL PROTECTION AGENCY, 1998 OHIO SOLID WASTE FACILITY DATA REPORT 36-46

Jackson	5255	1.1	24.2
Mercer	4706	0.9	6.7
Warren	3216	3.1	6.8
Logan	1409	2.8	10.5
Defiance	210	6	8.8
Seneca	186	4.1	10.9
Columbiana	6	1.7	15.9
Fairfield	3	1.9	8.8
OHIO	1,381,503	12.2	12.5

APPENDIX D: PENNSYLVANIA WASTE IMPORT AND DEMOGRAPHIC DATA SUMMARY

County	MSW Imported[329]	% Minority	% Poverty
Bucks	2,146,662	4.9	4
Lacakawanna	1,562,583	1.5	10.7
York	542,800	4.8	6.3
Delaware	459,263	13.5	7
Dauphin	224,675	17.5	10.1
Somerset	213,837	0.5	14.3
Northampton	190,635	5.7	7.3
Erie	180,523	6.4	12.9
Franklin	156,080	3.3	8.3
Berks	150,496	6.3	8
Clarion	114,452	1.2	23.2
Elk	95,513	0.7	9.5
Allegheny	83,341	12.4	11.5
Butler	79,479	1.2	9.7

329. BUREAU OF LAND RECYCLING AND WASTE MANAGEMENT, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, LANDFILL WASTE RECEIPTS 1-40 (1997).

Washington	55,591	3.8	12.8
Westmoreland	39,758	2.5	10.7
Schuylkill	27,167	1.1	10.7
Fayette	19,448	3.9	20.9
Cumberland	11,935	3.1	5.3
McKean	9698	2.3	14.9
Montgomery	5142	8.5	3.6
Indiana	4489	2.1	18.7
PENNSYLVANIA	6,373,567	11.4	11.1

APPENDIX E: VIRGINIA WASTE IMPORT AND DEMOGRAPHIC DATA SUMMARY

County	MSW Imported in the 4th Quarter[330]	MSW Year Imports Est.[331]	% Minority	% Poverty	% No HS Diploma
Sussex	209,847	864,790	58.6	20.1	42.9
Charles City	105,666	435,455	71.3	15.8	42.3
Amelia	99,345	409,406	32.3	10.9	42.9
King-George	98,472	405,808	21.7	6	27.6
Glouces-ter	85,632	352,894	12	8.4	26.3
King& Queen	49,943	205,818	43.2	10.8	41.8
Prince William	17,315	71,356	16.5	3.2	13.4

330. VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY, *supra* note 250, at 32.

331. I calculated the yearly estimate for each county by using each county's ratio of waste and applying it to the known yearly total of 2.8 million tons imported. *See* VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY, SOLID WASTE MANAGED IN VIRGINIA: FOURTH QUARTER 1997 at 5 (1998).

Brunswick	12,435	51,245	58.7	24.7	46
Bristol	784	3231	6.7	20.6	37.5
VIRGINIA	679,439	2,800,000	22.5	10.3	24.2