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THE QUARANTINE EXCEPTION TO THE DORMANT COMMERCE POWER DOCTRINE REVISITED: THE IMPORTANCE OF PROOFS IN SOLID WASTE MANAGEMENT CASES

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I. INTRODUCTION

State regulation of municipal solid waste commerce is a traditional exercise of a state’s police powers. States have the inherent power to legislate for the protection of public health, safety and morals under the tenth amendment of the United States Constitution.1 Solid waste regulation has, in practical effect, largely escaped the congressional intervention so prevalent in other fields of environmental protection.2 Therefore the field has, by default, assumed center stage in the federalism theater, and a state’s power over solid waste commerce is constrained only by the United States Constitution. This constraint emanates from two sources: (1) the application of the negative implications of Congress’ plenary power over interstate commerce, known as the dormant com-

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1. The tenth amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The existence of these state powers is essentially taken for granted in the solid waste field, which is to say that the courts always analyze the issues of constitutionality from the viewpoint of limitations on these powers. See, e.g., City of Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978): "[W]e assume New Jersey has every right to protect its residents’ pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of all waste into the State’s remaining landfills, even though interstate commerce may incidentally be affected." Id. For a discussion of this case, see infra note 19.

2. The Congress has flirted with regulation of municipal solid waste, but its efforts thus far have centered principally upon the regulation of hazardous waste. In City of Philadelphia, the United States Supreme Court found "no clear and manifest purpose" to preempt the field of municipal solid waste regulation through operation of the Resource Conservation and Recovery Act [hereinafter RCRA]. City of Philadelphia, 437 U.S. at 621 n.4; see also 42 U.S.C. § 6901(4) (1976): "[C]ollection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies." Id. Amendments to RCRA have led to the United States Environmental Protection Agency’s promulgation of minimum national standards in certain municipal waste management areas, such as landfill design criteria; however, this field is still in large part the province of state regulation. See 40 C.F.R. § 241.100 (1990) (guidelines); 56 Fed. Reg. 50,978 (1991) (new minimum federal criteria).

At the time of this writing, Congress is considering measures that, if enacted, will permit state regulation of interstate commerce in solid waste. See 136 CONG. REC. S13,447, S13,450 (daily ed. Sept. 19, 1990) (The Senate passed the Coats/McConnell amendment to the Solid Waste Disposal Act, 42 U.S.C. § 6901 (1988), as an amendment to the District of Columbia Appropriations Act, Fiscal Year 1991).
merce power doctrine; and (2) the preemption of state action by specific acts of Congress. The core issue in the federalism cases involving solid waste is deceptively simple. Unless Congress has preempted a field of regulation, or has expressly authorized the state regulatory action, the question is whether the state’s regulation unconstitutionally interferes with interstate commerce. This apparent simplicity quickly evaporates, however, when one realizes that mixed questions of fact and law underpin most elements of the dormant commerce power doctrine. Hence, case outcome prediction is a rather risky proposition, notwithstanding the Supreme Court's reluctance to endorse such loose prophecy. Preemption of state laws will be recognized in three types of circumstances: (1) the federal legislation contains an explicit preemption provision (express preemption); (2) the federal legislation is sufficiently comprehensive to create the inference that Congress intended to occupy an entire field of regulation (implied preemption); and (3) although the federal law does not entirely displace state law, the particular state regulation actually conflicts with federal law. See Ogden Envtl. Servs. v. City of San Diego, 687 F. Supp. 1436, 1442 (S.D. Cal. 1988). Although the RCRA allows states to impose more stringent environmental standards affecting waste disposal practices than the federal program, the act preempted the city's effort to block siting of an experimental waste incinerator because the development of the project had been approved by the United States Environmental Protection Agency, and projects of that type were strongly encouraged in the act. Id. The often inconsistent stumbling from case to case, emphasizing the factual peculiarities of each and occasionally tendering some reconciling explanation, is typical indeed of common law methodology; see also Committee for Indus. Org. v. Hague, 25 F. Supp. 127, 142-43 (D.N.J. 1938) (“If there could be some theory of quarantine it is applicable only in the field of physical science. Ideas are not Japanese beetles.”) (citing Hannibal & St. Joseph R. Co. v. Husen, 95 U.S. 465, 472 (1887)).

3. The United States Constitution states that the Congress shall have the power “[t]o regulate Commerce with foreign nations, and among the several states, and with the Indian tribes...” U.S. Const. art. I, § 8. The commerce clause has long been interpreted as both an authorization for congressional action and a restriction on permissible state regulation, notwithstanding the possible absence of conflicting federal statutes. This is commonly referred to as the dormant commerce clause doctrine; we prefer dormant commerce power doctrine. See, e.g., Hughes v. Oklahoma, 441 U.S. 322, 326 (1979).

4. The supremacy clause of the United States Constitution establishes that the Constitution and laws enacted by the Congress “shall be the supreme law of the land” and “shall be binding on the states.” U.S. Const. art. VI. Preemption of state laws will be recognized in three types of circumstances: (1) the federal legislation contains an explicit preemption provision (express preemption); (2) the federal legislation is sufficiently comprehensive to create the inference that Congress intended to occupy an entire field of regulation (implied preemption); and (3) although the federal law does not entirely displace state law, the particular state regulation actually conflicts with federal law. See Ogden Envtl. Servs. v. City of San Diego, 687 F. Supp. 1436, 1442 (S.D. Cal. 1988). Although the RCRA allows states to impose more stringent environmental standards affecting waste disposal practices than the federal program, the act preempted the city's effort to block siting of an experimental waste incinerator because the development of the project had been approved by the United States Environmental Protection Agency, and projects of that type were strongly encouraged in the act. Id.

5. Id.

6. See, e.g., National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl Management, 910 F.2d 713, 721-22 (11th Cir. 1990), cert. denied, 111 S. Ct. 2800 (1991) (Congress must expressly authorize state actions interfering with interstate commerce). For a discussion of this case, see infra text accompanying notes 127-37.

7. See Engdahl, Constitutional Federalism § 11.11, at 293 (2d ed. 1987) (“The often inconsistent stumbling from case to case, emphasizing the factual peculiarities of each and occasionally tendering some reconciling explanation, is typical indeed of common law methodology.”); see also Committee for Indus. Org. v. Hague, 25 F. Supp. 127, 142-43 (D.N.J. 1938) (“If there could be some theory of quarantine it is applicable only in the field of physical science. Ideas are not Japanese beetles.”) (citing Hannibal & St. Joseph R. Co. v. Husen, 95 U.S. 465, 472 (1887)).

8. Justice Scalia, no fan of the current state of dormant commerce power jurisprudence, has argued on several occasions that the Court's application of the doctrine has been, in effect, inconsistent and overreaching. See, e.g., American Trucking Ass'ns, Inc., v. Smith, 110 S. Ct. 2323, 2344 (1990) (Scalia, J., concurring). Justice Scalia there states: The "negative" Commerce Clause is inherently unpredictable—unpredictable not just because we have applied its standards poorly or inconsistently, but because it requires us and the lower courts to accommodate, like a legislature, the inevitably shifting variables of a national economy. Whatever it is that we are expounding in this area, it is not a Constitution. Because our "negative" Commerce Clause jurisprudence is inherently unstable, it will repeatedly result in the upsetting of settled expectations. Justice Scalia forecast the longevity of this commerce clause liberalism prior to his joining the Court: [T]he trend toward more economic liberalism and free trade exists among precisely those people who also participate in another recent trend—a trend toward less
Court’s recent fascination with mechanical tests breaking dormant commerce power analyses into the broad categories of facial discrimination and incidental discrimination.9

Of course, where there are rules there are exceptions. Unfortunately, the exceptions in the dormant commerce power field are no clearer than the principal doctrine itself. These exceptions are sometimes classified as either quarantine cases10 or market participation cases.11 Neither operative term will necessarily appear in cases of either genre.12 This article discusses proofs under the quarantine theory. Professor Charles

judicial activism. The individual now sitting on the Court who’s most likely to favor free trade principles and to disfavor state involvement is Mr. Justice Rehnquist, who also is the justice most likely to let the states do whatever the devil they want to, even if it is stupid. . . . [N]ew members [of the Court] will often end up conserving the liberalism adopted by their predecessors.


9. The tests employed by the Court are useful approaches to weighing facts within a legal framework, yet they can be deceptive if the importance of factual presentation is underestimated. The tests break down along the lines of whether the state regulation in issue is facially discriminatory or incidentally discriminatory. Note that both are premised upon factual determinations. Facially discriminatory measures will be struck down if they fail to survive the “strictest scrutiny of any purported legitimate local purpose” and there is an “absence of non-discriminatory alternatives.” Hughes v. Oklahoma, 441 U.S. 322, 337 (1978). Economically protectionist regulations are virtually per se invalid under this formulation. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 n.15 (1981); see City of Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978).

Incidental burdens are subject to a less intrusive balancing formulation. As stated in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970):

Where the statute regulates even-handedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Mere physical classifications of goods or “bads” is not useful. It oversimplifies the inquiry. The Supreme Court itself is quick to make light of this aspect of its dormant commerce power jurisprudence. Consider the somewhat flippant statements in Maine v. Taylor, 477 U.S. 131 (1986), when Justice Blackmun, writing for the majority, noted a factual similarity with Hughes, 441 U.S. 322, a recent case that struck down a regulation comparable to the one upheld in Maine, by stating “[o]nce again, a little fish has caused a commotion.” Maine, 477 U.S. at 132. Justice Stevens in dissent countered that “[t]here is something fishy about this case.” Id. at 152.

10. Cf. Illinois v. General Elec. Co., 683 F.2d 206, 214 (7th Cir. 1982) (referring to cases that have recognized an exemption from the dormant commerce clause doctrine for state quarantines as, in essence, cases recognizing that commerce in “bads” is not commerce at all).

11. The market participant doctrine derives from Reeves, Inc. v. Stake, 447 U.S. 429 (1980) (state could favor in-state customers of its state-owned cement manufacturing plant). This doctrine has been applied numerous times to uphold discriminatory practices undertaken by government-owned solid waste landfills. See, e.g., Swin Resource Systems, Inc. v. Lycoming County, Pa., 883 F.2d 245, 250 (3d Cir. 1989), cert. denied, 110 S. Ct. 1127 (1990) (differential tipping fee structure at local government-owned landfill, which resulted in long-distance source wastes paying a higher rate, survived commerce clause challenge because the local government was a market participant in the market for landfill services).

12. See, e.g., Evergreen Waste Systems, Inc. v. Metropolitan Serv. Dist., 820 F.2d 1482 (9th Cir. 1987) (a market participant case that does not use the common terminology); see also Maine v. Taylor, 477 U.S. 131 (1986) (a quarantine case which does not emphasize the term in its analysis).
DuMars' contribution to this Symposium Issue is on the market participant doctrine.\textsuperscript{13} The law library shelves are well-stocked with the works of authors with firm enough constitution to attempt reconciliation of the multifarious dormant commerce power cases.\textsuperscript{14} The inherent difficulties attendant to these kinds of reviews are well illustrated both by the number of works and the wide variance of opinion revealed in the works.\textsuperscript{15} This contribution to the collection leans more toward pragmatism than theory. Its objective, frankly, is to cajole the litigators handling dormant commerce power cases to try the cases in a manner that produces thorough economic records. Over time, this practice should result in a clearer doctrine.\textsuperscript{16} Improvement is certainly needed. Despite the growing body of reported dormant commerce power cases (many of which are in the solid waste field),\textsuperscript{17} as well as those which are pending before the courts as of this writing,\textsuperscript{18} definition of the doctrine remains daunting.

\textsuperscript{13.} See also Coenen, Untangling the Market Participant Exemption to the Dormant Commerce Clause, 88 Mich. L. Rev. 395 (1989).

\textsuperscript{14.} In one of the more interesting pieces, Professor Eule has urged resurrection of the privileges and immunities clause as a vehicle for addressing interstate discrimination matters. See Eule, Laying the Dormant Commerce Clause to Rest, 91 Yale L.J. 425 (1982). For a possibly rare view supportive of the current doctrine, see Smith, State Discrimination Against Interstate Commerce, 74 Cal. L. Rev. 1203, 1254 (1986). Although recognizing the roots of the claims discrediting dormant commerce power theory, the author states, "the more far reaching claim that in these cases the Supreme Court has hardly any doctrine other than an amorphous balancing test is ultimately unpersuasive. Over the past fifty years, the Court has repeatedly asserted that state discriminations against interstate commerce are strongly disfavored." Id.

\textsuperscript{15.} Consider the following by C. Black:

Nearly twenty years ago, I wrote that the Commerce Clause cases do not seem to be intellectually manageable and are not likely to become so. I still believe that for two reasons. First, the concerns dealt with under this deceptively simple, rather high-level doctrine derived from the Commerce Clause are so multifarious. It is not going to be easy for us to find legal generalities that have any order of precision or that lend themselves to any reliable prediction or even advocacy. Second, drawing a negative inference from the Commerce Clause is a doctrinal problem that is evident from the cases alone.


\textsuperscript{16.} General Douglas MacArthur emblazoned the country's consciousness with his memorable farewell, "Old soldiers never die, they just fade away." The dormant commerce power doctrine may, one hopes, be destined for a similar fate. Cf. Engdahl, supra note 7, at 297 ("It is unlikely that this bad judicial habit [implied negative federal powers], of such long standing, and to which the Justices still seem so compulsively attached . . . . will be broken suddenly. One might more realistically hope that, as federal legislation and agency jurisdiction continue to expand in scope, preemption will increasingly become the significant issue, and controversies over 'negative implications' (at least as to state regulations) will just gradually fade away.'").

\textsuperscript{17.} For a discussion of the dormant commerce power, see infra note 22.

\textsuperscript{18.} Three cases pending at the time of this writing illustrate the recurring nature of these issues in the solid waste context. See, e.g., Hazardous Waste Treatment Council v. South Carolina, 21 Env't Rep. (BNA) 504 (July 20, 1990) (an industry group is urging the court to strike state standards that: (1) prohibit import of hazardous waste from states that restrict permitting of facilities within their borders; (2) give disposal facility access preference to in-state waste generators; (3) establish quotas on out-of-state waste volumes; and (4) prohibit expansion of in-state waste treatment facilities if expansion is for the purpose of handling out-of-state waste); National Solid Wastes Management Ass'n v. Casey, 20 Env't Rep. (BNA) 1659 (Jan. 26, 1990) (A trade association is challenging the Pennsylvania Governor's Executive Order No. 1989-8, which restricts landfill
In the solid waste area this is the unhappy result of the United States Supreme Court’s decision in *City of Philadelphia v. New Jersey.*19 This article explores the evidentiary backgrounds of several contemporary commerce clause cases. The article’s premise is that, just as in other complex economic theory cases, dormant commerce power cases genuinely require substantial proof efforts at trial.20 One would not expect an antitrust matter involving significant market definition issues to be resolved on the basis of mere speculation as to the relevant market;21 one should not expect questions of market discrimination in the dormant commerce power context to be treated any differently. Thorough approaches to trial court record development are indicated in this context as well.22 The plain fact is that most contemporary dormant commerce power cases, including the solid waste cases, lack construction to facilities that will accept at least 70% in-state trash and that can prove a “demonstrated need” for the new facility. This “interim moratorium” also applies to expansion of existing facilities; National Solid Wastes Management Ass’n v. Ohio, 20 Env’t Rep. (BNA) 1122 (Oct. 27, 1989) (The program under attack allows solid waste management districts to exclude out-of-state waste under their plans. It also establishes moratoria on new capacity, imposes differential fees on out-of-state waste, and sets certain qualification standards for operators importing waste to Ohio.).

19. 437 U.S. 617 (1978). The principal problem with *City of Philadelphia,* from a doctrinal perspective, is that at first blush it appears to depart from a line of cases that recognized the right of states to impose quarantines against harmful items. Anderson, Mandelker & Tarlock, *Environmental Protection: Law and Policy* 691 (1990). This article considers *City of Philadelphia* in detail and posits that, in large part, weaknesses in the trial proofs, rather than doctrinal departure, contributed to the result. From the legislative history of Ohio’s current solid waste management scheme, consider A.J. Celebrezze, Jr., Ohio Atty’ Gen., *Memorandum to Rep. Joseph Secrest, Chairman Energy and Environment Committee, Re: House Bill 592,* at 2 (Dec. 18, 1987) (available from Bremberg) (“I believe that *Philadelphia v. New Jersey* ignores the persuasive argument that other factors [than discriminatory effect], such as public health and environmental safety, should also be taken into account. Had the Court taken those factors into account, their conclusion might have been different.”).

20. The importance of proofs is readily apparent from the *Maine v. Taylor* litigation. For a discussion of this litigation, see infra notes 85-121 and accompanying text.

21. This analogy to the law of antitrust is intended only to suggest that there should be a general similarity in the nature of findings of interstate commerce discrimination in the dormant commerce power context and market power in the antitrust context. The point is not that they are identical ideas, but rather that similar economic analyses may be appropriate as part of the proofs at trial. This is largely ignored in commerce clause jurisprudence at this time. Compare the complexity of the 1984 Justice Department Merger Guidelines, § 2 (Market Definition and Measurement) with Healy v. The Beer Institute, Inc., 491 U.S. 324 (1989). In *Beer Institute,* a commerce clause case, the evidence of market impact was rather abstract. Justice Blackmun’s majority opinion states, “[Connecticut’s] discriminatory [beer pricing] treatment establishes a substantial disincentive for companies doing business in Connecticut to engage in interstate commerce, essentially penalizing Connecticut brewers if they seek border-state markets and out-of-state shippers if they choose to sell both in Connecticut and in a border State.” *Id.* at 341. In dissent, Chief Justice Rehnquist noted that “[n]either the parties nor the Court point to any concrete evidence that the Connecticut regulation will have any effect on the beer prices charged in other States, much less a constitutionally impermissible one,” and that the Court was relying upon a “personal forecast” regarding the effects of the regulation. *Id.* at 347 (Rehnquist, C.J., dissenting). Regarding application of the 1984 Merger Guidelines in the context of market definition, see C. Hills, *Antitrust Advisor §§ 3.14-.22* (3d ed. 1985 & Supp. 1989).

22. Apparently, appellate courts will review the factual records in dormant commerce power cases, at least if the records are germane to the question of the availability of reasonable alternatives to “discriminatory” regulation, under the lenient “clearly erroneous” standard of review. *See Maine v. Taylor,* 477 U.S. 131, 145 (1986); *see also Engdahl,* supra, note 7, at 284 n.8 (This review standard tempers only slightly the superlegislative role of appellate courts in determinations of the “reasonableness” of regulation.).
adequate proofs at trial.\textsuperscript{23} It is this lack of adequate proofs that has left the courts, at all levels, with a free rein to pull results out of the ether—the commonly perceived problem in the dormant commerce power field.

Consider the elements of a typical case. Following findings on possible preemption or congressional authorization, the matters shape up essentially as a market discrimination case.\textsuperscript{24} The central discrimination issue operates at several levels. In essence, characterization of the affected interstate market is key.\textsuperscript{25} The plaintiff has the burden of establishing facial discrimination against a species of interstate commerce.\textsuperscript{26} Concurrently, the plaintiff should endeavor to show that if the court defines the market broadly relative to the regulation (finds that discriminatory impacts are "incidental"), then the burden of the impacts nonetheless overrides any putative local benefits of the regulation.\textsuperscript{27}

The state defending its regulation must rebut the facial discrimination claim. If successful, the state should take the added step of proving that the benefits of the regulation outweigh the incidental impact on the interstate market defined by the court.\textsuperscript{28} On the other hand, if the state is unsuccessful at rebutting the discrimination claim, it must meet the burden of establishing that the regulations meet a legitimate purpose (usually not a difficult proof)\textsuperscript{29} and that there are no reasonable alternatives to the discriminatory regulations.\textsuperscript{30}

\textsuperscript{23} For a discussion of contemporary dormant commerce power cases, see infra note 30.

\textsuperscript{24} See, e.g., National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management, 910 F.2d 713 (11th Cir. 1990), cert. denied, 111 S. Ct. 2800 (1991) (litigation over Alabama statute affecting interstate commerce in hazardous waste raised issues of preemption, congressional consent, and dormant commerce power).

\textsuperscript{25} There are many subtleties attendant to market definition in this context. In the quarantine area, the market is usually defined as all trade in a particular good, as measured essentially at the jurisdictional boundary (e.g., at the state line). See Maine v. Taylor, 477 U.S. 131 (1989) (commerce with Arkansas fish hatcheries considered to the extent it involved Maine buyers). The solid waste market participation cases have oddly defined the relevant commerce as solid waste disposal services, a legerdemain to avoid charges that a state is hoarding its natural resources.

\textsuperscript{26} See J. Filiberto Sanitation, Inc. v. New Jersey Dep't of Envtl. Protection, 857 F.2d 913, 919 (3d Cir. 1988) ("The essential [discrimination] question is whether the challenged regulation confers an advantage upon in-state economic interests—either directly or through imposition of a burden upon out-of-state interests—vis-a-vis out-of-state competitors."); see also Browning-Ferris Indus. of Ala. v. Pegues, 710 F. Supp. 313, 317 (M.D. Ala. 1987) (a difference in waste volume supported regulatory distinctions and, thus, the regulations were not "discriminatory" within the meaning of \textit{City of Philadelphia}). Occasionally, the parties seek preliminary relief which, of course, casts the plaintiffs in the role of establishing some likelihood of success on the merits. This kind of determination also invariably requires rebuttal proofs by the state. See Government Suppliers Consol. Servs., Inc. v. Bayh, 734 F. Supp. 853, 870 (S.D. Ind. 1990) (the district court issued a preliminary injunction against a statutory requirement of waste character certification by out-of-state health officials, noting that the requirement clearly treated waste differently based solely on the state of origin and that the state failed to show a risk of injury before trial on the merits).

\textsuperscript{27} Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). For a discussion of the \textit{Pike} balancing test, see supra note 9.

\textsuperscript{28} \textit{Id.} at 142.

\textsuperscript{29} Hughes v. Oklahoma, 441 U.S. 322, 337 (1978). For a discussion of the \textit{Hughes} test, see supra note 9.

\textsuperscript{30} \textit{Engdahl}, supra note 7, at 284. Regarding the contemporary judicial inquiries into rea-
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Also implicit in the older quarantine cases are findings of immediate health threats and, possibly, a lack of market value of quarantined goods.\(^3\) Neither factor is required under contemporary quarantine jurisprudence, but either may, of course, develop in the course of proofs of regulatory purpose and presence of alternatives to regulation.\(^3\)

Characterization of the market (findings on the discrimination claim) is usually outcome determinative on the constitutional claim\(^3\) unless either the quarantine or market participant exception is recognized. Appellate courts review the factual findings under a clearly erroneous standard.\(^3\) The two exceptions are recognized only in instances of very clear proofs. In recent years, only a few regulations, none dealing with solid waste, have been upheld under a quarantine theory.\(^3\) There are many more cases recognizing an exemption under the market participant doctrine, including several in the solid waste area.\(^3\)

sonableness and adequacy of regulatory alternatives as part of commerce clause jurisprudence, Professor Engdahl states: "At the trial court level ... a challenger is not obliged to demonstrate any adequate means to the state's end; instead, 'the burden falls on the State' to show 'the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.'" Id. (quoting Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353 (1977)) (emphasis in original).

We analogize this two-tier proof setting to the case of the willful trespasser—the state is, in essence, the willful trespasser usurping the congressional power. This corresponds with Professor Engdahl's comparison of commerce power jurisprudence to the common law discussed supra note 7. Note that state regulations are ordinarily presumed to be valid, but the presumption shifts in the dormant commerce power context if discrimination is shown. See Hunt, 432 U.S. at 353. The rationale for this shift is not clearly articulated in the cases but no doubt is linked to federal supremacy.

Regarding the law of trespass as it pertains to our analogy, see, e.g., Kentucky Harlan Coal Co. v. Harlan Gas Coal Co., 53 S.W.2d 538, 542 (Ky. 1932) ("To bring himself within the rule controlling a claim against a trespasser for damage committed by him by an 'innocent mistake,' as this term is applied in such cases, the trespasser must allege and prove such facts as will show his acts were not 'willful and knowingly committed,' or not 'intentional.'"). Sometimes states do not establish proofs to meet a burden at the trial level; the results on appeal are usually unfavorable in those instances. See, e.g., the discussion of the City of Philadelphia v. New Jersey litigation, infra notes 43-50 and accompanying text.

31. See, e.g., Hannibal & St. Joseph R.R. v. Husen, 95 U.S. 465, 471 (1877) (characterizing valid quarantine regulations as defensive measures, noting that states have the right to quarantine against "convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases; [this is] a right founded ... in the sacred law of self-defence").

32. These criteria are part of the older quarantine cases. However, Maine v. Taylor, 477 U.S. 131 (1986), envelops these points within the proofs of legitimate purpose and lack of reasonable alternatives to regulation.

33. See National Solid Wastes Management Ass'n v. Alabama Dep't of Env't Management, 910 F.2d 713 (11th Cir. 1990) (finding that the lower court erroneously characterized the regulation as an incidental burden and then overruling on the merits); Harvey & Harvey, Inc. v. Delaware Solid Waste Auth., 600 F. Supp. 1369 (D. Del. 1985) (upholding a solid waste export ban under the incidental burdens analysis); see also A.J. CELEBREZZE, JR., supra note 19 (arguing for strong planning-based solid waste stream controls as a means of avoiding the virtual per se standard of City of Philadelphia).


36. The five leading market participant cases in the solid waste field are Swin Resource Systems, Inc. v. Lycoming County Pa., 883 F.2d 245 (3d Cir. 1989), cert. denied, 110 S. Ct 1127 (1990); Evergreen Waste Systems, Inc. v. Metropolitan Serv. Dist., 820 F.2d 1482 (9th Cir.
II. THE NATURE OF PROOFS IN DORMANT COMMERCE POWER LITIGATION: LESSONS FROM THE CITY OF PHILADELPHIA v. NEW JERSEY AND MAINE v. TAYLOR LITIGATIONS

Contemporary solid waste regulation cases have uniformly rejected quarantine theory as a rationale for allowing discrimination against commerce in solid waste. This has been, in large part, a function of the litigators' chosen theories of the cases. As shown in the following sections, the United States Supreme Court's decision in *City of Philadelphia v. New Jersey*,\(^{37}\) which rejected a quarantine theory as support for a ban on solid waste imports, involved a woefully inadequate record on the quarantine point. That record stands in stark contrast to the record that was before the Court in *Maine v. Taylor*,\(^{38}\) in which the Court upheld a facial quarantine on bait fish imported into the State of Maine.

A. *The City of Philadelphia v. New Jersey Litigation*

The most striking aspect of the commerce clause portion of the *City of Philadelphia* litigation\(^ {39}\) is the virtual absence of quarantine proofs. That is, although the state argued that its regulatory actions fit within the quarantine theory of dormant commerce power jurisprudence,\(^ {40}\) it offered very limited proofs on issues other than regulatory purpose. There were little or no proofs as to the character of the banned wastes, associated health and safety risks, or any technological difficulties involved in inspection or management of the wastes.\(^ {41}\) The state did, in

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20. Hackensack (Super. Ct.), 316 A.2d at 716.

21. We find ourselves highly critical of the state's effort in this litigation. Although we suppose the efforts were genuine, we doubt that many tears were shed in New Jersey after the United States Supreme Court reversed the New Jersey Supreme Court. It strikes us as disturbingly coincidental that the primary beneficiary of the state's loss in *City of Philadelphia* has been New Jersey itself, as it has become one of the principal solid waste exporting states. Consider, for example, the irony of *In re Certain Amendments to the Adopted and Approved Solid Waste Management Plan of the Camden County Solid Waste Management Dist.*, 214 N.J. Super. 247, 518 A.2d 1105 (N.J. Super. App. Div. 1986) (state agencies upheld in ordering local governments
effect, argue that limiting the imports to merchantable wastes (e.g., recyclable metals) showed a less discriminatory level of regulation than an outright ban on all solid wastes.42

The City of Philadelphia litigation began as two separate cases. In Hackensack Meadowlands Development Commission v. Municipal Sanitary Landfill Authority,43 the chancery court considered the validity of a statute and regulatory scheme44 which prohibited out-of-state wastes from being disposed of in the Hackensack Meadowlands district in northern New Jersey. The court's findings were based on affidavits and the record of testimony at an administrative proceeding. There was no hearing before the court.45 It is evident from the chancery court's opinion that the record made sparse reference to environmental risks associated with solid waste and, instead, showed a concentration of effort on the question of New Jersey's landfill capacity.46

This enforcement action pitted the state and its agency, the Hackensack Meadowlands Development Commission, against the Municipal Sanitary Landfill Authority, a local government agency. Both the state and the Commission had adopted regulations prohibiting the disposal of out-of-state origin wastes within the district.47 The state sought to enjoin the local government from accepting out-of-state solid waste shipments at its landfill.48 For the bulk of its case, the defendant local government had the burden of proof with regard to the validity of the regulation;49

to export solid waste to Philadelphia). Obviously, the growth of New Jersey waste exports that followed the City of Philadelphia litigation certainly came as no surprise to state officials. Until this litigation, New Jersey had clearly not undertaken adequate measures to ensure proper local government services in the field, further supporting, in our view, the compelling interest of the state in the result that was ultimately reached at the Supreme Court. See Note, The Commerce Clause and Interstate Waste Disposal: New Jersey's Options After the Philadelphia Decision, 11 Rut.-Cam. L.J. 31, 38 nn.66-68 (1979) (because the state had subsidized landfills to the point of creating artificially low prices, there was rapid depletion of site capacities and some incentive for imports).

42. See Hackensack (N.J. Supreme Ct.), 348 A.2d at 512.

43. The defendant, Municipal Sanitary Landfill Authority, brought a three-fold challenge to the regulatory regime being enforced by the state. This challenge included arguments that the regulations prohibiting waste imports were invalid, arbitrary and unreasonable, violated due process of law, and violated the commerce clause and privileges and immunities clause of the United States Constitution. See Hackensack (Super. Ct.), 316 A.2d at 712.

44. The Waste Control Act, N.J. STAT. ANN. §§ 13:11-1 to -8 (West Supp. 1987), empowered the state's Commissioner of Environmental Protection to promulgate regulations prohibiting the import of out-of-state wastes to in-state facilities. See Hackensack (Super. Ct.), 316 A.2d at 712. The regulation at issue in Hackensack (Super. Ct.), which was adopted pursuant to the Control Act, prohibited collectors from disposing of out-of-state solid or liquid waste at sites in the Hackensack Meadowlands District and likewise prohibited the sites in the District from accepting such waste. N.J. ADMIN. CODE tit. 7, § 26-1.5 (Supp. 1977); Hackensack (Super. Ct.), 316 A.2d at 712-13.


46. See generally id. at 713-14 (discussion of the record).

47. Id. at 712. The City of Yonkers, New York, a user of the landfill, intervened as a party defendant. Id.

48. Note that under current dormant commerce power jurisprudence, the local government ownership of the landfill site would probably qualify the regulation under the market participant exception to the dormant commerce power doctrine. See Swin Resource Systems, Inc. v. Lycoming County, Pa., 883 F.2d 245, 250 (3d Cir. 1989), cert. denied, 110 S. Ct. 1127 (1990).

49. Hackensack (Super. Ct.), 316 A.2d at 713 (addressing the defendants' charges that there
the manner of proof burdens in the constitutional challenge were less clear.\(^{50}\)

The rebuttal proofs offered by the state focused upon regulatory purpose. These consisted merely of a recitation of the legislature’s statutory findings and affidavits from state administrative officials attesting in very general terms to the problem of limited landfill capacity within the state. The legislative findings stated that out-of-state waste posed a threat to the quality of New Jersey’s environment. The affidavits, in substance, were apparently not much more developed. The Principal Environmental Engineer of the State Department of Environmental Protection stated that sanitary landfills “present a pollution danger because they do not conserve or recover resources but bury them, and because they severely limit the future use of the land on which they are located.”\(^{51}\)

The Chief of the Bureau of Solid Waste Management in the same agency stated that there was a critical shortage of landfill space.\(^{52}\) The state did not, apparently, raise quarantine arguments centered on waste character.\(^{53}\) In addition to its review of the record, the trial court referred to legal authorities which had found that solid waste posed aesthetic as well as disease and contamination risks\(^{54}\) and that waste disposal limited future land use at landfill sites.\(^{55}\)

The Hackensack chancery court struck down the statute and regulations on commerce clause grounds. The court highlighted the failure of the quarantine proofs by observing, in effect, that solid waste varied greatly in character and, accordingly, it would not presume a quarantine was justified. The court stated, “Refuse may be utilized for construction, landfill, recycling of paper, bottles and metal, and production of electricity.”\(^{56}\) The purpose of the measure, the court found, was not environmental protection but rather extension of landfill capacity for the benefit of in-state users.\(^{57}\)
In the second case, the City of Philadelphia challenged New Jersey's 1974 statute and regulations that, unlike the regulations at issue in Hackensack, established a state-wide ban on waste imports. The constitutional challenge to New Jersey's statute was the subject of cross motions for summary judgment. The court issued an oral order finding the regulations unconstitutional on commerce clause grounds; appeal was from that order. It appears that the state's proofs were again centered on legislative findings, this time as embellished in the 1974 amendments. These new findings stated:

The Legislature finds and determines that...the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited.

Neither the exact terms of the City of Philadelphia chancery court's orders nor the nature of any findings adopted are apparent from the reported court decisions. It is only indicated that this trial court found that the statute and regulations violated the commerce clause.

In reversing the two trial courts, the New Jersey Supreme Court crafted an opinion fitting of the subject area, which is to say that it makes for a rather difficult read. The essence of the court's holding is that prohibiting the import of solid waste that has no intrinsic value, i.e., putrescibles as opposed to valuable recyclable metals or fuel sources, is supportable because the waste does not qualify as a constitutionally protected article of commerce. The court relied upon the quarantine cases as authority, although it did not dwell on the proofs (or, more precisely, the lack of proofs) that were in the record before it.

The analytical approach adopted by the New Jersey Supreme Court argued, first, that declining landfill capacity was itself a health justi-

58. This inference is drawn from the New Jersey Supreme Court's decision. See Hackensack, 68 N.J. 451, 453, 348 A.2d 505, 507 (N.J. Super. Ct. 1975) (briefly discussing the proceeding brought by the City of Philadelphia against the state and footnoting to legislative findings). 59. Id. at 453, 348 A.2d at 507 n.1 (quoting N.J. STAT. ANN. § 13:1I-9 (West 1978)). 60. The lower court proceedings involving the City of Philadelphia are described succinctly by the New Jersey Supreme Court as follows: In January, 1974, in a separate plenary suit, the City of Philadelphia, together with other plaintiffs mentioned above, filed a complaint seeking a declaration that the Waste Control Act, as well as the regulations promulgated pursuant thereto, violated the Constitutions of both the United States and the State of New Jersey... On March 25, 1974 the trial judge (not the judge who had heard the Hackensack Meadowlands case), on cross-motions for summary judgment, rendered an oral opinion declaring that N.J.S.A. 13:1I-9 and 10 effected an improper discrimination against interstate commerce and were hence unconstitutional. Id. at 455, 348 A.2d at 509.
fication, in part because of the court's sense of ecological harms effected by new landfill development.\textsuperscript{61} Second, the court reasoned that regulation of the environmental protection field is a part of the state's police power.\textsuperscript{62} It should, in effect, be given greater weight than it has historically been given because of increased contemporary understanding of the problems associated with environmental degradation.\textsuperscript{63} Third, the court found that the ability to physically separate solid waste into either materials with intrinsic economic values or "throw away" materials with no value implicitly indicates that only part of the municipal solid waste stream is a constitutionally protected article of commerce.\textsuperscript{64}

The New Jersey Supreme Court's analysis of the environmental consequences of solid waste disposal, reflecting the record before it, is rather thin.\textsuperscript{65} The court's analysis acknowledges that the quarantine authorities require a two-pronged finding that the materials under regulation lack market value and pose "immediate threat to human health," but it has little to offer on the health point.\textsuperscript{66} The court did conclude, apparently from context, that the justification for the statute and regulations rested on ecological values.\textsuperscript{67}

To emphasize the declining landfill capacity problem, the court chose to supplement the meager trial record by taking judicial notice of certain state reports, as well as the current status of regulatory affairs in the field of solid waste. Generally, all of the surveys and reports considered by the court confirmed the critical shortage of landfill capacity existing in the state, especially the shortage of space in northern New Jersey.\textsuperscript{68} The court also projected that limiting landfill use "may be of crucial importance in preventing further virgin wetlands or other undeveloped lands from being devoted to landfill purposes."\textsuperscript{69} There was no reference

\textsuperscript{61} For the principal discussion of the landfill capacity problem, one issue that was developed in the record, see \textit{id.} at 456-58, 348 A.2d at 510-12.

\textsuperscript{62} \textit{id.}

\textsuperscript{63} This discussion is set out at the end of the opinion. The court relies in part on the much revered opinion of Justice Holmes in Georgia v. Tennessee, 206 U.S. 230, 237 (1907) ("This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."), quoted in Hackensack, 68 N.J. at 462, 348 A.2d at 519.

\textsuperscript{64} See Hackensack, 68 N.J. at 458, 348 A.2d at 512.

\textsuperscript{65} The court offered that many of the landfills in the state were "located within ecologically sensitive areas, such as floodplains, and wetlands, or on State-owned public trust tidelands" that posed special problems for use as landfills. Hackensack, 68 N.J. at 456, 348 A.2d at 510.

\textsuperscript{66} \textit{id.} at 459, 348 A.2d at 513.

\textsuperscript{67} The court stated that:

[T]he objectives of the statutes and regulations in question are not only to preserve the health of New Jersey residents by keeping their exposure to solid waste and landfill areas to a minimum, but also to preserve for the benefit of both present and future generations the natural habitat and ecological values which landfill usage would destroy.

\textit{id.} at 462, 348 A.2d at 516.

\textsuperscript{68} \textit{See id.} at 455-56, 348 A.2d at 509-10.

\textsuperscript{69} \textit{id.} at 457, 348 A.2d at 512.
to the record for this projection. The court’s analysis of the state of regulatory affairs examined the federal and state activity and noted a more significant level of activity at the state level. Notably, activity at the state level included the development of a New Jersey Solid Waste Management Plan. The New Jersey Supreme Court, nonetheless, chose to conclude that “very little has yet been done—in any really effective way—on either a national or an interstate level to achieve a satisfactory solution to this pressing problem.”

The court’s conclusion that solid waste could be physically separated as either articles of commerce subject to dormant commerce power doctrine protections or materials exempt under a quarantine theory apparently arose from the regulations at issue in the City of Philadelphia’s side of the case. Those regulations exempted certain categories of solid waste from the import ban, such as metals suitable for recycling. The court’s reliance on the quarantine authorities is somewhat more tenuous. Apparently unable to cite authority on the health effects of solid waste imports, the court in summary fashion listed the several cases that have applied the quarantine theory with success.

The United States Supreme Court, in City of Philadelphia v. New Jersey, reversed the New Jersey Supreme Court and held that the ban on out-of-state solid waste, even as redefined in terms of merchantable and non-merchantable categories in the 1974 regulations, violated the

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70. Id. at 457-58, 348 A.2d at 511-12.
71. The court states this point at the outset of its analysis of the picture of regulatory affairs. Id. at 457, 348 A.2d at 511.
72. See id. at 459, 348 A.2d at 513.
73. Id. at 458-59, 348 A.2d at 512-13.
75. The statute provided:
No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner [of the state Department of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State.
Id. at 618-19 (quoting N.J. STAT. ANN § 13:11-10 (West 1978)).
76. The 1974 regulations provided:
(a) No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This Section shall not apply to:
1. Garbage to be fed to swine in the State of New Jersey;
2. Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials and not mixed with other solid or liquid waste that is intended for a recycling or reclamation facility;
3. Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70 per cent of the thru-put of any such facility is to be separated or processed into usable secondary materials; and
4. Pesticides, hazardous waste, chemical waste, bulk liquid, bulk semiliquid, which is to be treated, processed or recovered in a solid waste disposal facility which is registered with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of the State.
dormant commerce power doctrine. Rejecting the New Jersey Supreme Court's quarantine theory analysis, the Court broadly interpreted the meaning of "objects of commerce":

All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset. . . . We reject the state court's suggestion that the banning of "valueless" out-of-state wastes by ch. 363 implicates no constitutional protection. Just as Congress has power to regulate the interstate movement of these wastes, States are not free from constitutional scrutiny when they restrict that movement.

The Court analyzed the statute as a facially discriminatory measure, applying the strictest scrutiny to the state's regulatory means and ends. In the absence of an exception to the dormant commerce clause doctrine, this determination led the court to a finding of virtual per se invalidity.

Those commentators in agreement with the court's broad view of "objects of commerce" distinguish the quarantine cases. These commentators agree that the quoted passage should be read as affirming the importance of proofs, not as signaling the demise of the quarantine theory in the context of solid waste or, for that matter, any other market. Clearly the idea of excluding goods by definition at the outset is not necessarily a required element of quarantine. As shown in subsequent cases, proper proofs can sustain a quarantine regulation.

In dissent, Justice Rehnquist argued that interstate commerce in solid waste should fall within the quarantine theory. Justice Rehnquist relied principally upon Bowman v. Chicago & Northwestern Railroad Co.: Under [the Bowman line of cases] New Jersey may require germ-infected rags or diseased meat to be disposed of as best as possible within the State, but at the same time prohibit the importation of such items for disposal at the facilities that are set up within New

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77. Apparently, New Jersey presented information on the environmental harm potential in its brief to the Court. Cf. Comment, Recycling Philadelphia v. New Jersey: The Dormant Commerce Clause, Postindustrial "Natural" Resources, and the Solid Waste Crisis, 137 U. Pa. L. Rev. 1309, 1332-33 n.130 (1989) (indicating that Appellee's Brief at 37-40 stated that landfills create aesthetic harms). Whether this kind of information had been developed in the record below is not clear.

78. City of Philadelphia, 437 U.S. at 622-23 (emphasis added).

79. The Court stated: Whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, ch. 363 violates this principle of nondiscrimination. Id. at 626-27.

80. Id. at 627.

81. At least one commentator views this call of the Court as correct. See Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091, 1270 (1986) (arguing that Maine v. Taylor stands for the proposition that the particular problem a quarantine is aimed at, if to be upheld, should not exist locally, or that, if it does, local controls comparable to the effect of the quarantine should be in force).

82. 125 U.S. 465, 489 (1888).
Jersey for disposal of such material generated within the State. The physical fact of life that New Jersey must somehow dispose of its own noxious items does not mean that it must serve as a depository for those of every other State. Similarly, New Jersey should be free under our past precedents to prohibit the importation of solid waste because of the health and safety problems that such waste poses to its citizens.83

Justice Rehnquist apparently was satisfied with the level of proof before the New Jersey courts (or at least was satisfied with the state courts' ability to determine the adequacy of the proofs). Justice Rehnquist was with the majority in *Maine v. Taylor,* 84 which is discussed in the following section.

B. The Maine v. Taylor Litigation

The *Maine v. Taylor* litigation began as a criminal prosecution before a federal magistrate; the magistrate's report and recommendation was accepted by the district court.85 Maine intervened at trial and later appealed to protect its statute from constitutional challenge.86 The state statute at issue provided that "[a] person is guilty of importing live bait if he imports into the State any live fish, including smelts, which are commonly used for bait fishing in inland waters."87 Federal jurisdiction was under the authority of the Lacey Act Amendments of 1981,88 which make it a federal offense "to import, export, transport, sell, receive, acquire or purchase in interstate commerce any fish or wildlife taken, possessed, transported, or sold in violation of any law... of any State."89

The government's proofs included extensive expert testimony on pathogens in parasites associated with imported fish and the impact of introducing exotic, non-indigenous fish into the state's fresh water fisheries. Both points were argued in support of the discriminatory measure. Witnesses from the state, testifying on behalf of the government, identified three particular parasites that might be found in imported bait fish, two of which had been found in the seized load of golden shiners that formed the basis of this prosecution. The other was known to occur in bait fish found in the state markets.90 Taylor produced an expert in rebuttal, whose argument-in-chief was that the particular parasites identified by the state experts were generally not a serious problem

83. *City of Philadelphia,* 437 U.S. at 632.
84. 477 U.S. 131 (1986).
86. Id.
87. ME. REV. STAT. ANN. tit. 12, § 7613 (1979).
89. Id. § 3372(a)(2); see *Taylor,* 585 F. Supp. at 394.
in the wild, but rather were a problem in the unique hatchery environment.  

The government’s experts, in testifying about the deleterious effect of exotic species on the native ecology, described Maine as having a very limited native wild fish population that was particularly vulnerable to competition from exotics. One particularly unique aspect of the fishery is the wild population of landlocked salmon, which is vulnerable to competition because of very limited natural food sources. Taylor, a fish dealer, and Taylor’s expert argued that the risk of exotic introduction was minimal because of hatchery practices.

The district court was satisfied with the magistrate’s finding that the disputed testimony was not an adequate basis for overturning the state’s ban on imports. The court stated:

[T]he constitutional principles underlying the commerce clause cannot
be read as requiring the State of Maine to sit idly by and wait until
potentially irreversible environmental damage has occurred or until
the scientific community agrees on what disease organisms are or
are not dangerous before it acts to avoid such consequences.

Having met its burden on the health aspect of quarantine, the state was charged with establishing the lack of reasonable alternatives to the outright ban. The government experts testified that, as to the bait fish, there were not any existing sampling and certification procedures. This unavailability was due primarily to scientific debate and disagreement. Although both sides agreed that certification procedures might be possible, the court found “that abstract possibility does not constitute the applicable standard.” The court also rejected Taylor’s assertion that the lack of scientific agreement precluded Maine’s discriminatory conduct: “On this record, the lack of agreement among the experts is not sufficient to justify imposing on the State of Maine the unpredictable and potentially disruptive risks which are present here.”

The district court denied Taylor’s motion to dismiss the indictment, and the defendant was thereafter convicted. A panel of the United States Court of Appeals for the First Circuit in United States v. Taylor reversed the district court on the ground that the Maine statute violated the commerce clause and that Congress had not consented to the interference with commerce. The dormant commerce power aspects of this decision are reviewed below.

91. Id.
92. Id. at 396-97.
93. Id.
94. Id. at 397.
95. Id. at 398. The court noted as an example the magnitude of the effort that was employed to develop these kinds of procedures for salmonids. Id.
96. Id. at 398.
97. 752 F.2d 757 (lst. Cir. 1985).
98. Congressional consent may be given to state actions that blatantly interfere with interstate commerce. The intent must be “unmistakably clear.” South-Central Timber Dev., Inc. v. Wun-
The government, on appeal, conceded that the Maine statute was discriminatory and was subject, therefore, to heightened scrutiny under the formulation of *Hughes v. Oklahoma*, with the state required to meet a burden of proof on the points of legitimate local purpose (in this case, demonstration of health impacts and impacts of exotics on the state ecology) and availability of alternatives per *Hunt v. Washington State Apple Advertising Commission*. The panel first found that the statute bore similarity to the New Jersey statute the United States Supreme Court invalidated in *City of Philadelphia*. The Maine statute encompassed all fish, not just diseased ones; it barred all imports, rather than imports for release to the wild only; and, it did not apply to in-state sources of the same fish.

The First Circuit, unlike the lower court, found a strong aura of economic protectionism present in Maine’s scheme and questioned the asserted environmental protection motivations of the measure. Because of its analysis of the alternative means inquiry, however, the court did not find it necessary to resolve the question of legitimacy of purpose.

The First Circuit found Maine’s rationale that the state could not depend on persons outside its control for inspections, or that inspections were impractical, unpersuasive. The court reached this conclusion because the state, at least with respect to “cold water fish” imports, clearly engaged in the very practices it argued were not feasible in this context. The court simply could not believe that Maine had met its burden of proof or that it had searched for the least discriminatory alternative.

The United States Supreme Court reversed the First Circuit in *Maine v. Taylor*, finding that the Maine statute was not violative of the commerce clause. This is a curious decision given the outward similarities (other than strength of record) to *City of Philadelphia*, and it bears close scrutiny. After clearing hurdles posed by the very odd procedural context of the litigation, the Court addressed the commerce

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99. 441 U.S. 322, 336 (1978) (“[W]e must inquire (1) whether the challenged statute regulates evenhandedly with only ‘incidental’ effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.”).


101. *Taylor*, 752 F.2d at 761.

102. *Id.* at 761-62.

103. *Id.* at 762-63.

104. 477 U.S. 131 (1986).

105. *Id.*

106. The procedural difficulties with this case were considerable. Taylor, the appellee, argued that Maine’s invocation of 28 U.S.C. section 1254(2), allowing appeals as of right to the Supreme Court “by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States,” did not confer jurisdiction in a criminal matter, or, alternatively, that Maine did not have standing to appeal the reversal of a federal criminal conviction. The Court rejected both arguments and reached the merits. *Maine*, 477 U.S. at 133-37.
clause issues. First, the Court recognized that "Maine's statute restricts interstate trade in the most direct manner possible, blocking all inward shipments of live bait fish at the State's border."\textsuperscript{107} The state conceded that the Lacey Act Amendments did not contain congressional consent to the discrimination, but argued that the amendments should be read as lowering the level of scrutiny applied to this facially discriminatory measure.\textsuperscript{108} The Court rejected this notion, refusing to distinguish between congressional consent for flat waiver of commerce clause protections or a grant of lesser scrutiny level, and found that both consents must be express.\textsuperscript{109}

The Court approached the disparate opinions of the First Circuit and the district court from the viewpoint of the appropriate handling of district court findings on appeal. The First Circuit had not expressly rejected the district court’s findings; instead, it treated the matter as a question of mixed fact and law, and interpreted the evidence as casting some doubt on the conclusions reached by the lower court.\textsuperscript{110} The Court observed that if this were a civil appeal, a review of the facts would be subject to the clearly erroneous standard established in the Federal Rules of Civil Procedure.\textsuperscript{111} The Court reasoned that, at least as to factual determinations not bearing on the guilt of the defendant, the rationales supportive of a clearly erroneous standard in civil proceedings (e.g., judicial efficiency, importance of first hand observation of witnesses) applied in the criminal context. The parties conceded application of the clearly erroneous standard and, therefore, a ruling on the use of the standard was not required. The Court was careful to not only apply the clearly erroneous standard, but also to note "that no broader review is authorized here simply because this is a constitutional case, or because the factual findings at issue may determine the outcome of the case."\textsuperscript{112} Thus, review of factual findings in the context of the state’s proofs supportive of state regulation under commerce clause scrutiny is limited to the clearly erroneous standard.\textsuperscript{113} Application of the clearly erroneous standard and the court’s treatment of the record in \textit{Maine v. Taylor} highlight the importance of a strong factual record.

The Court found that the specific alternatives question before the district court—whether scientifically accepted techniques existed for sam-

\begin{itemize}
  \item \textsuperscript{107} Id. at 137.
  \item \textsuperscript{108} Id. at 139.
  \item \textsuperscript{109} Id. at 139 (citing South-Central Timber Dev., Inc. v. Wunnicker, 467 U.S. 82, 92 (1984)) ("clear expression" of congressional intent required to waive application of the dormant commerce clause power).
  \item \textsuperscript{110} Id. at 143-44.
  \item \textsuperscript{111} Id. at 145.
  \item \textsuperscript{112} Id.
  \item \textsuperscript{113} The application of the clearly erroneous standard in \textit{Maine v. Taylor} was fairly straightforward, given the detailed record. In a subsequent case, the lack of a record on the subject of out-of-state impacts of certain liquor pricing legislation led the Court to engage in apparent speculation about market impacts. This occurrence, involving Justice Blackmun, author of the majority opinion in \textit{Maine v. Taylor}, is somewhat troublesome and may signal a fairly loose meaning of the clearly erroneous standard, or at least a willingness to go beyond the record. \textit{See supra} note 21 for a discussion of Healy v. The Beer Institute, Inc., 491 U.S. 324 (1989).
\end{itemize}
pling and inspection of the fish—was one of fact. Accordingly, the
Supreme Court reviewed the case under the clearly erroneous standard
and upheld the trial court's two-fold finding: first, that no testing
procedures existed; and, second, that development of the testing pro-
cedures could take a significant amount of time. Significantly, by agree-
ing with the district court's factual findings on both points, the Supreme
Court further concurred that:

A State must make reasonable efforts to avoid restraining the free
flow of commerce across its borders, but it is not required to develop
new and unproven means of protection at an uncertain cost. Appellee,
of course, is free to work on his own . . . [tests]; if and when such
procedures are developed, Maine no longer may be able to justify
its import ban. The State need not join in those efforts, how-
ever. . . .

The Court agreed further with the magistrate's findings concerning the
health effects of parasites and non-native species on the fisheries.115

Justice Stevens, in dissent, pointed out the somewhat relaxed standard
of proof approved by the majority. Specifically, Justice Stevens observed
that if the state had the burden of proving justification for the dis-
crimination, the ambiguities in the record should work against it, rather
than for it: the magistrate, district court, and Supreme Court majority
had found that the ambiguities in the record worked in favor of the
state.116 Justice Stevens' view may indeed be the statement of the most
likely result that would stem from the contradictory factual record below;
the majority, however, simply found that its review under a clearly
erroneous standard prevented close scrutiny of the fact findings at trial.
Interestingly, the Court also voiced support of the district court's notion
that Maine need not risk even negligible environmental harm in the
face of presumed scientific uncertainty.117

Closely following the Maine v. Taylor reasoning, Cresenzi Bird Im-
porters, Inc. v. New York118 upheld a New York statute prohibiting the
sale of wild birds not born in captivity.119 To achieve this end, the state
adopted regulations requiring recordkeeping of breeders and a leg band
system to identify birds from birth.120 In finding that this satisfied the
alternatives analysis of Maine v. Taylor, the United States District Court

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114. Maine, 477 U.S. at 147.
115. Id. Cf. Note, Maine v. Taylor: Natural Resource Statutes Against the Commerce Clause
or When is a Hughes Not a Hughes But a Pike?, 29 NAT. RESOURCES J. 291, 299-300 (1989)
("Maine did not uphold its burden of proof. Maine did not prove that importation of live bait
fish would damage its waterways, it only conjectured possibilities. The state only showed that
there was a possibility of either or both of the two suppositions happening. Allowing conjecture
to undermine Commerce Clause scrutiny may create special dispensation for environmental re-
gulations.") (citing United States v. Taylor, 752 F.2d 757, 762 n.12 (1st Cir. 1985)).
117. Id. at 148.
118. 658 F. Supp. 1441 (S.D.N.Y.), aff'd, 831 F.2d 410 (2d Cir. 1987).
for the Southern District of New York held that the regulations did not ban imports of birds, prohibit New Yorkers from making sales to out-of-state purchasers (provided the sales were consummated outside of New York), or prohibit quarantining of wild birds in New York.121

III. POST-CITY OF PHILADELPHIA SOLID WASTE LITIGATION

Challenges to solid waste regulatory programs invariably address the City of Philadelphia precedent.122 Rarely, however, do these cases consider the significance of record development in justification of quarantine. The general trend is to interpret City of Philadelphia as the final word on quarantine in the solid waste setting—a patently absurd conclusion. Some recent solid waste cases, in fact, do not even raise the issue of quarantine at all.123 This failure of proof leads to decisions that blindly apply the so-called virtual per se rule of City of Philadelphia if the state regulation is facially discriminatory.124 Absent an exception, which Maine v. Taylor teaches, a per se violation will probably not be found without proofs.125 Most solid waste litigation has focused on moving the courts’ inquiries to a lower level of scrutiny, particularly in instances of regulatory control over exports, which, theoretically, should be subject to the same analytical processes as import regulations.126

121. Id. at 1443, 1447-48.


123. See, e.g., Diamond Waste, Inc. v. Monroe County, Ga., 731 F. Supp. 505 (M.D. Ga. 1990); Shayne Bros., Inc. v. Prince George's County, Md., 556 F. Supp. 182 (D. Md. 1983) (In both cases, the City of Philadelphia virtual per se rule was applied with apparently little, if any, record on the quarantine issue.).

124. In Diamond Waste, the district court applied City of Philadelphia to find unconstitutional the application of a Georgia statute giving counties the authority to ban municipalities from shipping out-of-county waste to publicly or privately owned disposal sites within the county’s jurisdiction. The statute at issue stated:

No person, firm, corporation, or employee of any municipality shall transport, pursuant to a contract, whether oral or otherwise, garbage, trash, waste, or refuse across state or county boundaries for the purpose of dumping the same at a publicly or privately owned dump, unless permission is first obtained from the governing authority of the county in which the dump is located and from the governing authority of the county in which the garbage, trash, waste, or refuse is collected.

731 F. Supp. at 506 (quoting GA. CODE ANN. § 36-1-16 (1987)).

125. Id. at 509.

126. See In re Long-Term Out-of-State Waste Disposal Agreement Between the County of Hunterdon and Glendon Energy Co. of Glendon, Pa., 237 N.J. Super. 516, 568 A.2d 547 (Super. Ct. App. Div. 1990) (upholding the state’s disapproval of a long-term waste disposal contract with an out-of-state site on grounds that the local government had failed to secure adequate in-state backup capacity). The court reasoned:

This is not a case of economic protectionism or patent economic discrimination. The policy of [the Department of Environmental Protection] effectuates legitimate local interests usually subsumed by the police powers and invoked to insure health and safety. The thrust of New Jersey’s policy is to protect our environment over
Courts have been reticent to imply that states are under an obligation, legal or otherwise, to address solid waste management in any particular manner. Obviously, the states must do something about solid waste, but it is within their discretion to determine what action to take. The services relationship that states enjoy with out-of-staters is likewise within that prerogative.

Fairly detailed factual records, however, are beginning to appear on the scene. In National Solid Wastes Management Association v. Alabama Department of Environmental Management, a panel of the United States Court of Appeals for the Eleventh Circuit found Alabama's Holley Bill, which banned importation of hazardous waste from certain jurisdictions, unconstitutional as a facially discriminatory measure. This regulation prohibited

the owner or operator of a commercial hazardous waste management facility located in Alabama from treating or disposing of hazardous wastes generated in a state other than Alabama, if the other state either (1) prohibit[ed] the treatment or disposal of hazardous waste within its borders and ha[d] no facility for such; or (2) ha[d] no facility existing within that state for the treatment or disposal of hazardous waste and ha[d] not entered into an interstate or regional agreement for the disposal of its wastes to which Alabama was a signatory.

Alabama asserted that the measure was designed to encourage compliance with the congressional policy favoring state capacity assurance for haz-

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127. This is not to say that the courts are oblivious to the benefits of sound regulatory programs. On the contrary, the courts are generally positive about solid waste management efforts. See, e.g., Swin Resource Systems, Inc. v. Lycoming County, Pa., 883 F.2d 245, 254 (3d Cir. 1989), cert. denied, 110 S. Ct. 1127 (1990): [A] state subdivision has used initiative to build a waste disposal facility to serve its needs. Furthermore, given Lycoming's recycling program, one could say, as the Supreme Court did with respect to Nebraska's water conservation program, that 'the continuing availability of [the landfill] is not simply happenstance; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage.' We also take cognizance of the difficulties often attendant in efforts by municipalities to build waste disposal sites in light of their unpopularity with local residents.

128. See Lefrancois v. Rhode Island, 669 F. Supp. 1204, 1212 (D.R.I. 1987) (The district court refused to adopt a "monopoly exception" to the market participant exception. In rejecting this novel theory, the court observed that other types of governmental services were, in effect, monopolized by the state (e.g., public education), but that "[c]ertainly Rhode Island is not expected to extend these services to out-of-state residents; the same is true of landfill services.").

129. 910 F.2d 713 (11th Cir. 1990), cert. denied, 111 S. Ct. 2800 (1991).

130. Id. at 717 n.7 (citing ALA. CODE § 22-30-11 (1990)).
ardous waste disposal. This congressional policy, embodied in the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), conditioned state receipt of Superfund money for remedial cleanup actions upon the state's certification of "capacity assurance" for twenty years. The court held that hazardous wastes met the threshold articles of commerce standard under the commerce clause. The court also determined that the Holley Bill was discriminatory (subject to application of the virtual per se standard of City of Philadelphia v. New Jersey), and that the action of the state had not been authorized by SARA.

Finding the hazardous wastes banned under the Holley Bill to be objects of commerce, the court rejected the argument that hazardous wastes are too dangerous to qualify as articles of commerce, thus rejecting application of the quarantine exception to the dormant commerce power doctrine. It instead followed an Eleventh Circuit precedent, Alabama v. United States Environmental Protection Agency, which had relied upon City of Philadelphia. That case concluded that City of Philadelphia barred distinctions based upon the category of products. Moreover, the court noted that, as a ban on wastes from only certain jurisdictions, the Holley Bill contradicted any argument that hazardous waste is too dangerous to be an article of commerce.

The district court had found that the waste stream regulation was only an incidental burden on interstate commerce, given the legitimate regulatory goal of complying with the congressional policy embodied in SARA and, indirectly, because of the overall management effort Alabama employed. In rejecting this characterization of the burden on commerce, the Eleventh Circuit panel cited testimony that the types of wastes accepted in Alabama's Emelle facility "did not vary based upon the states in which the wastes were generated." Thus, the Holley Bill distinguished between these wastes solely on the basis of their state of origin.

Discussing arguments that the Holley Bill fit within the purview of the quarantine exception to the commerce clause, the court concluded:

Alabama's selective ban on out-of-state hazardous waste is no quarantine law. Alabama did not ban hazardous wastes from all other states on the ground that the wastes were dangerous to some human

132. 42 U.S.C. § 9604(c)(9) (1980); see National Solid Wastes Management Ass'n, 910 F.2d at 716-17.
134. National Solid Wastes Management Ass'n, 910 F.2d at 718-19.
136. Id.
137. See National Solid Wastes Management Ass'n, 910 F.2d at 719.
139. National Solid Wastes Management Ass'n, 910 F.2d at 720.
140. Id. at 721.
health or environmental aspect which Alabama has a right to regulate. Alabama's ban does not distinguish on the basis of type of waste or degree of dangerousness, but on the basis of the state of generation. The Holley Bill discriminates against interstate commerce.  

Alabama argued congressional authorization on the premise that the capacity assurance feature of SARA redistributed power over interstate commerce. The court, describing SARA as imposing sanctions on non-conforming states, found that SARA did not expressly authorize the restriction of the free flow of commerce in hazardous wastes. The restriction would operate to the extent caused by the stoppage of Superfund assistance to site cleanups, but that was not an express recognition that states could deny all shipments on the premise of the policy. The court noted, "[i]f Congress intended to allow the states to restrict the interstate movement of hazardous wastes as Alabama has tried to do, Congress could (and still can) plainly say so."

In *J. Filiberto Sanitation, Inc. v. New Jersey Department of Environmental Protection*, a panel of the United States Court of Appeals for the Third Circuit discussed, at great length, the record developed in a matter that cleared the hurdle of facial discrimination to be analyzed as an incidental burden. An interstate waste hauler challenged local agency rules mandating transfer station disposal. The hauler asserted injury to itself and its customers because of the doubling of disposal costs effected by the requirement. The hauler had been bypassing the transfer station and taking wastes directly to the same out-of-state disposal site that was the ultimate destination of wastes processed at the transfer station.

The court rejected the application of a line of commerce clause cases which had applied the virtual *per se* rule against facial discrimination. The court noted, "the discrimination prohibited by these cases was the state's direct interference with the market either for the purpose or with the effect of favoring home-state interests against out-of-state competitors."

The county asserted several justifications for the requirement, including reduction of truck traffic and a long-range planning benefit resulting from a change in the destinations of exported waste over time. The

141. Id.
143. *National Solid Wastes Management Ass'n*, 910 F.2d at 721 (the sanction under SARA is withholding of Superfund monies for remedial actions).
144. Id. at 721-22. The court references, for comparison purposes, the Low-Level Radioactive Waste Policy Act, 42 U.S.C. §§ 2021b, 2021e(e)(2) (1982 & Supp. V 1987), which provides that states may enter interstate compacts excluding non-compact states from commerce in the wastes covered under the act.
145. 857 F.2d 913 (3d Cir. 1988).
146. Id. at 921.
147. Id. at 920. These authorities include *South-Central Timber Dev., Inc. v. Wunnincke*, 467 U.S. 82 (1983), which invalidated an in-state timber processing requirement for timber sold at state sales.
transfer station, it agreed, would facilitate stable in-county operations while the export operations changed. These kinds of assertions overcame allegations of discriminatory purpose. In the absence of a clear discriminatory purpose, the hauler had to show either that the rule “effected some discrimination against out-of-state economic interests in order to fall under the *per se* invalidity [standard] of the processing cases,” or that it was an impermissible incidental burden on interstate commerce.¹⁴⁹

The hauler failed to demonstrate either facial or impermissible incidental interference with interstate commerce and thus did not demonstrate commerce clause injury of any kind. Because the receiving landfill in Pennsylvania received the same material with or without the transfer station, the brunt of the discrimination was felt in-state in the form of added costs for using the transfer station in lieu of direct hauling to Pennsylvania. Thus, in finding the mandatory transfer station rule non-discriminatory, the Third Circuit relied upon the well-established maxim of commerce clause jurisprudence that the existence of substantial in-state interests harmed by a regulation is “a powerful safeguard” against legislative discrimination.¹⁵⁰

The Third Circuit also found that the hauler had shown “no cognizable burdens on interstate commerce” and, therefore, the court was not required to balance the effects of incidental burdens against the local benefits.¹⁵¹ Nevertheless, the court observed that the local benefits to the county were substantial; therefore, the balancing test, if applied, would probably be satisfied.¹⁵² The local benefits were substantial because this transfer station was the county’s only disposal site. In addition, it formed the basis of the county’s ability to enter long-term waste disposal contracts with landfills located outside of the county. In essence, the transfer station was the centerpiece of the county’s waste disposal plan, and it was a financially precarious centerpiece at that: “On the record before us, there can be no doubt that the transfer station could not adequately perform these functions without the Rule, . . . the Rule therefore directly promotes the county’s effective response to the crisis in solid waste management.”¹⁵³

In *Bill Kettlewell Excavating, Inc. v. Michigan Department of Natural Resources*,¹⁵⁴ the district court upheld against a dormant commerce power doctrine challenge a state statutory prohibition on landfills accepting out-of-county solid waste unless pursuant to an approved county solid waste management plan.¹⁵⁵ On summary judgment motion, the court denied the plaintiffs’ request for a declaration that the statute was

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¹⁴⁹. *Id.* at 921.
¹⁵⁰. *Id.* (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 n.17 (1981)).
¹⁵¹. If interstate commerce had been burdened, the courts would have been required to balance the effects of the burden against the benefits of the regulation. *See* *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).
¹⁵³. *Id.*
¹⁵⁵. *Id.* at 762 (citing MICH. COMP. LAWS ANN. §§ 299.413a, 299.430(2) (West 1978)).
unconstitutional because it pertained to importation of out-of-state solid waste for disposal in Michigan.\textsuperscript{156}

The court reviewed \textit{City of Philadelphia} and \textit{Maine v. Taylor}\textsuperscript{157} but, contrary to the findings in those cases, concluded that the state statute did not facially discriminate against interstate commerce.\textsuperscript{158} Although, arguably, the statute as applied did discriminate,\textsuperscript{159} the court applied the \textit{Pike v. Bruce Church, Inc.}\textsuperscript{160} balancing approach to find that the incidental impacts on interstate commerce were not excessive in relation to local benefits. These benefits included the ubiquitous "protect[ion] of public health and the environment"\textsuperscript{161} and facilitation of comprehensive planning and management of solid waste disposal at the local government level.\textsuperscript{162} The court found that the requirement of plan approval prior to import burdened interstate commerce; however, because the plaintiff did not allege that such approval was a practical impossibility, the court concluded that the burden was not excessive.\textsuperscript{163} Thus, it is apparent that only minimal proofs were put forward by the parties.

A facial challenge to the Illinois Spent Fuel Act\textsuperscript{164} in \textit{Illinois v. General Electric Co.}\textsuperscript{165} led to a panel of the United States Court of Appeals for the Seventh Circuit finding that provisions banning storage in Illinois of out-of-state-originated spent nuclear fuel violated the commerce clause. The court adhered closely to \textit{City of Philadelphia}, distinguishing the quarantine cases relied upon by the state.\textsuperscript{166} It is not clear to what extent the state, as part of its summary judgment defense below, attempted proofs regarding the hazards of nuclear fuel. The court of appeals did not examine evidence concerning environmental hazards in

\[\textsuperscript{156} \text{Id.} \]
\[\text{The plaintiff also sought declaration that the St. Clair County governmental entities unconstitutionally applied the terms of the statute in denying its permit application for import of waste from out of the county. Id. The plaintiff sought injunctive relief on both claims. Id.}\]
\[\text{157. Id. at 763 ("For every rule, however, there exists an exception. Respecting commerce clause/police power analysis, the exception is illustrated in Maine v. Taylor. . . ").}\]
\[\text{158. Id. at 763-64. The court states, in part, "the requirement that importers appear in a county waste disposal plan applies equally to Michigan counties outside of the county adopting the plan as well as to out-of-state entities. The court therefore finds that the [act] does not discriminate against interstate commerce on its face." Id. at 764.}\]
\[\text{159. The actions that precipitated the litigation were a local government’s denial of a waste import permit. At that point, the discrimination is certainly facial (i.e., all imported waste is outlawed). The court did not so find, concluding that the county’s policy banning all waste imports was evenhanded (treated all counties in Michigan and out-of-state sources the same) and consistent with the act. It relied upon Evergreen Waste Systems, Inc. v. Metropolitan Serv. Dist., 820 F.2d 1482 (9th Cir. 1987), which, although argued by plaintiff to be a “market participant” case, in this court’s view had affirmed the district court’s finding of evenhandedness. Bill Kettlewell Excavating, Inc., 732 F. Supp. at 765-66 n.2.}\]
\[\text{160. 397 U.S. 137, 142 (1970).}\]
\[\text{162. Id.}\]
\[\text{163. Id.}\]
\[\text{164. ILL. ANN. STAT. ch. 111-1/2, paras. 230.1, 230.22 (Smith-Hurd 1988).}\]
\[\text{165. 683 F.2d 206 (7th Cir. 1982), cert. denied, 461 U.S. 913 (1982). This appeal was from an order of summary judgment; there is no reported district court opinion. See id. at 208 (district court granted summary judgment motion).}\]
\[\text{166. Id. at 214.}\]
depth. It did, however, note that spent fuel posed a long-term risk of radioactivity and that spent fuel was stored indefinitely following removal from nuclear reactors. The court made its determination on the basis of lack of evenhandedness. The court inferred evenhandedness was present in the older quarantine cases but was lacking in City of Philadelphia. A similar nuclear waste case, Washington State Building & Construction Trades v. Spellman, follows the same reasoning.

IV. CASE PRESENTMENT STRATEGIES

On the basis of the foregoing, litigators faced with dormant commerce power doctrine challenges to state regulations should take care to consider the possible ramifications of a substantial proof effort at trial. Many of the cases actually reach the appellate courts with a precariously thin record of factual findings, and dangerously, we think, the appellate courts are inclined to accept a thin record without considering a remand to develop the record.

The application of the clearly erroneous standard in Maine v. Taylor shows that even facially discriminatory "fishy" cases can survive constitutional challenge if the trial court makes appropriate factual findings. Likewise, a strong factual showing by the plaintiffs can kick the case into the strict scrutiny arena, making the state's job that much more difficult.

The proof question, of course, cuts several ways. The challengers, in order either to establish discrimination or to overcome findings that "incidental burdens" are outweighed by "putative benefits," must establish market impacts. If discrimination is shown and the burden shifts to the state to justify its statute under the Maine v. Taylor formulation, the state must meet a proof comparable in scope to the most difficult health injury cases. This proof, of course, will support a finding that incidental burdens are outweighed by the benefits. Mere incantation of the mystical words "environmental protection" will not meet the test, other than to establish a valid public purpose, which in any event should not be difficult. It is in this latter context that legislative history or codified findings are relevant—certainly language from some source tending to show that the statute has an economically protectionist purpose can be very dangerous to the state's case.

It probably makes little sense for a litigator in this area to spend too much time contemplating the case precedents. As we said at the

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167. Id. at 208.
168. Id. at 214.
169. 684 F.2d 627, 631-32 (9th Cir. 1982), cert. denied, 461 U.S. 913 (1982) (Washington initiative prohibiting import of low-level radioactive waste on asserted environmental protection grounds paralleled the provisions found unconstitutional in City of Philadelphia and therefore violated the commerce clause).
170. This is Justice Stevens' apt description in Maine v. Taylor, 477 U.S. 131, 152 (1986) (Stevens, J., dissenting).
outset, that is an activity with little to recommend it.\textsuperscript{171} The fact presentments at trial are sufficiently important that "good" facts, in our view, should overcome the "bad" law most of the time (witness \textit{Maine v. Taylor}).

From these impressions, we recommend the following trial outline:

I. \textit{For the Plaintiff challenging the constitutionality of state regulations under the dormant commerce power doctrine:}
   A. Proof of federal preemption
   B. Proof of discrimination
      1. If successful, rebuttal of \textit{Maine v. Taylor} justifications
      2. If unsuccessful, proof of incidental burden impacts

II. \textit{For the State defending its regulations from dormant commerce power attack:}
   A. Proof of congressional consent
   B. Rebuttal of discrimination claim
      1. If successful, proof of incidental benefits
      2. If unsuccessful, proof of \textit{Maine v. Taylor} justifications
      3. Possible proof of health impacts and lack of market value of quarantined goods.

We presume that each step, other than preemption or congressional consent issues, will entail a \textit{substantial} factual proof effort.

\textsuperscript{171} See discussion \textit{supra} notes 8-9 and accompanying text.