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The Trash Trade: Foreign Hazardous Waste as an Object of Commerce in *Chemical Waste Management, Inc. v. Templet*

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INTRODUCTION

According to Chief Justice William Rehnquist, "while many [states] are willing to generate waste . . . few are willing to help dispose of it."[1] This statement seems undeniably accurate in a time when the volume of waste in the United States is increasing dramatically and the disposal space is decreasing rapidly.[2] With the demand for waste disposal sites growing, many states have attempted to protect the interests of their own citizens and local environment by closing their waste disposal sites to out-of-state companies and residents through legislative acts.[3] Consequently, "the proliferation of legislation affecting garbage disposal is more than merely potential. . . .It is symptomatic of a pattern in which Federal and State regulation has reduced the surface area available for landfill use at one and the same time that waste production burgeons."[4] To the dismay of many state governments, courts have repeatedly deemed these statutes unconstitutional due to their conflict with the Commerce Clause of the United States Constitution.[5]

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[1] Fort Gratiot Landfill v. Michigan DONR, 112 S. Ct. 2019, 2028 (1992) (Rehnquist, J., dissenting).

[2] *Id.* at 2028.

[3] *See* City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); 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).

[4] Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia, 435 N.Y.S. 2d 966, 970 (N.Y. 1980) (Fuchsberg, J., dissenting).

[5] U.S. CONST. art. I, § 8, cl. 3; *see also* City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (holding New Jersey statute facially discriminated against waste origi-

In keeping with this pattern of cases, the federal district court in *Chemical Waste Management, Inc. v. Templet*[6] held the Louisiana state statutes banning the importation of hazardous waste unconstitutional, but this case is novel due to its unique combination of factors: the origin of the waste is a foreign country; the waste is hazardous; the court applies the law for importation of domestic waste by analogy to foreign waste; the court includes hazardous waste in its expansive view of commerce; and the statutes at issue implicate both interstate and foreign commerce.[7] This Comment will examine the interesting approach that *Chemical Waste Management, Inc. v. Templet* advances in greater detail and will identify its unique place among the growing trend of state waste disposal statutes that challenge the Commerce Clause.

I. BACKGROUND

A. The Resource Conservation and Recovery Act and Hazardous and Solid Waste Amendments

Congress enacted the Resource Conservation and Recovery Act (RCRA)[8] and the Hazardous and Solid Waste Amendments of 1984 (HSWA)[9] in response to its findings that "the problems of waste disposal . . . have become a matter national in scope and in concern and necessitate federal action . . . to reduce the

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nating from outside the state); National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management, 910 F.2d 713 (11th Cir. 1990) (holding Alabama statute violated the Commerce Clause), *cert. denied*, 111 S. Ct. 2800 (1991); Browning-Ferris, Inc. v. Anne Arundel County, 438 A.2d 269 (Md. 1981) (holding Maryland statutory provision prohibiting disposal in and transportation through the county violated the Commerce Clause).

[6] Chemical Waste Management, Inc. v. Templet, 770 F. Supp. 1142 (M.D. La. 1991), *aff'd*, 967 F.2d 1058 (5th Cir. 1992), *cert. denied sub nom.* 113 S. Ct. 1048 (1993).

[7] Although an appellate decision affirming the district court's holding has been issued (967 F.2d 1058 (5th Cir, 1992)), this Comment will focus on the district court decision (770 F. Supp. 1142 (M.D. La. 1991)) due to the interesting and unique arguments found therein. The U.S. Court of Appeals for the Fifth Circuit relied on the district court's reasoning in affirming the lower court's decision.

[8] Resource Conservation and Recovery Act [hereinafter RCRA], Pub. L. No. 89-272, title II, § 1002, *as added* Pub. L. No. 94-580, § 2, 90 Stat. 2796, *and amended* Pub. L. No. 95-609, § 7(a), 92 Stat. 3081; Pub. L. No. 98-616, title I, § 101(a), 98 Stat. 3224 (codified at 42 U.S.C. §§ 6901-6992 (1988)).

[9] Hazardous and Solid Waste Amendments of 1984 [hereinafter HSWA], 98 Stat. 3221 (1984). The HSWA are now codified throughout RCRA.

amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal practices."[10] Congress authorized "the Administrator [of the federal program], after consultation with State authorities, [to] promulgate guidelines to assist States in the Development of State hazardous waste programs."[11] The Act also provides that each state can develop its own program as long as the Administrator approves and only if the state program is "consistent with Federal [and] State programs applicable in other States."[12] As a result, the Environmental Protection Agency (EPA) drafted the "Requirements for Authorization of State Hazardous Waste Programs," specifying the procedures the EPA will follow in approving and rejecting state programs and presenting the requirements state programs must meet to be approved by the administrator of the RCRA program.[13] Those persons or companies "import[ing] hazardous waste from a foreign country must [also] comply with the requirements of [40 C.F.R. section 262],"[14] which include notifying the "Regional Administrator in writing at least four weeks in advance of the date the waste is expected to arrive at the facility."[15]

B. Louisiana's Foreign-Generated Hazardous Waste Laws

Two Louisiana statutes[16] are at issue in *Chemical Waste Management, Inc. v. Templet*.[17] Title 30, section 2190 of the Louisiana Revised Statutes is entitled "Hazardous wastes from foreign nations; findings; prohibitions" and asserts that the "laws of foreign nations are inadequate to insure that hazardous wastes sought to be exported to the United States do not contain unknown or unauthorized pollutants" and are inadequate to insure proper "containment, labeling, [and] handling during transport."[18] As a result, the legislature reasons that the "[t]he

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

[11] *Id.* at § 6926(a).

[12] *Id.* at § 6926(b).

[13] 40 C.F.R. § 271.2 (1992); *see also* 42 U.S.C. § 6926 (authorizing state hazardous waste programs).

[14] 40 C.F.R. § 262.60(a) (1992) (regarding importation of hazardous waste).

[15] *Id.* at § 264.12(a) (regarding required notices).

[16] LA. REV. STAT. ANN. §§ 30:2190-2191 (West 1991).

[17] Chemical Waste Management, Inc. v. Templet, 770 F. Supp. 1142 (M.D. La. 1991), *aff'd*, 967 F.2d 1058 (5th Cir. 1992), *cert. denied sub nom.* 113 S. Ct. 1048 (1993).

[18] LA. REV. STAT. ANN. § 30:2190A(2) (West 1991).

only practical method for insuring that the environment and the health of the citizens of this state are not endangered . . . is to prohibit the introduction or receipt of such [foreign] wastes into this state for the purpose of treatment, storage, or disposal."[19] This statute, thus, renders it illegal for any person or company to allow waste from a foreign country to be imported into Louisiana.[20]

Title 30, section 2191 of the Louisiana Revised Statutes bears the similar title of "Importation of hazardous waste from foreign countries; prohibition."[21] It stipulates that Louisiana will "deny hazardous waste transporter licenses and hazardous waste treatment, storage, and disposal facility permits to all persons who propose to transport into and dispose of in Louisiana [foreign] hazardous waste."[22] Both statutes, as part of Louisiana's state waste disposal program, were approved by the EPA under the RCRA scheme.[23]

C. 1983 Mexico-United States Agreement to Cooperate in the Solution of Environmental Problems in the Border Area

With Mexico's encouragement of foreign-owned industries called "maquiladoras," industry in Mexico has increased dramatically over the past ten years.[24] "Maquiladoras" are companies predominantly from the United States which are encouraged to locate in Mexico to develop industry with the incentive of no Mexican import taxes.[25] But with this growth in industry has come an expansion in the production of waste materials.[26] Through a series of agreements that culminated in the 1983 Agreement to Cooperate in the Solution of Environ-

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[19] *Id.* at § 2190A(3).

[20] *Id.* at § 2190B-C.

[21] *Id.* at § 2191.

[22] *Id.* at § 2191A.

[23] Chemical Waste Management, Inc. v. Templet, 770 F. Supp. 1142, 1153 (M.D. La. 1991), *aff'd*, 967 F.2d 1058 (5th Cir. 1992), *cert. denied sub nom.* 113 S. Ct. 1048 (1993).

[24] Elizabeth C. Rose, *Transboundary Harm: Hazardous Waste Management Problems and Mexico's Maquiladoras*, 23 INT'L LAW. 223, 223-27 (1989).

[25] *Id.* at 223; *see also Chemical Waste Management, Inc.*, 770 F. Supp. at 1144 n.3 (maquiladoras are allowed to import raw materials without paying Mexican import taxes).

[26] Rose, *supra* note 24, at 224.

mental Problems in the Border Area[27], the United States and Mexico have agreed "to coordinate their efforts, in conformity with their own national legislation and existing bilateral agreements to address problems of air, land and water pollution in the border area."[28] As part of the agreement, "maquiladoras are required to return unused goods and wastes to the country of origin for final disposal."[29] The federal RCRA program specifically provides for foreign hazardous waste to be imported into the United States,[30] directly conflicting with the Louisiana statutes' complete prohibition.

II. SUMMARY OF *Chemical Waste Management, Inc. v. Templet*

In September 1989, Chemical Waste Management, Inc. (hereinafter ChemWaste) advised the EPA of its decision to import into Louisiana foreign hazardous waste produced in Mexico by two maquiladoras.[31] Because Louisiana had an authorized state waste disposal program under RCRA, the EPA directed ChemWaste to notify the Louisiana Department of Environmental Quality (hereinafter LDEQ).[32] The LDEQ, however, objected to the importation of the Mexican hazardous waste on the basis of the prohibition by two Louisiana statutes.[33] In response, ChemWaste filed an action against Paul Templet, Secretary of the LDEQ, claiming inconsistency between the state and federal hazardous waste programs and challenging the constitutionality of the Louisiana statutes.[34]

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[27] Agreement to Cooperate in the Solution of Environmental Problems in the Border Area, Aug. 14, 1983, Mex.-U.S, 22 I.L.M. 1025 [hereinafter Mex.-U.S. Agreement]. Subsequent Annex provisions have been added to the Mex.-U.S. Agreement to specifically address certain problems.

[28] *Id.* at art. 5.

[29] Rose, *supra* note 24, at 228; *see* Annex III, Agreement to Cooperate in the Solution of Environmental Problems in the Border Area, Jan. 29, 1987, Mex.-U.S., 26 I.L.M. 25 [hereinafter Annex III] (addressing transboundary shipment of hazardous waste).

[30] 40 C.F.R. § 262.60 (1992) (stating that "[a]ny person who imports hazardous waste from a foreign country into the United States must comply with the requirements of [§ 262.60]").

[31] *Chemical Waste Management, Inc.*, 770 F. Supp. 1142, 1145 (M.D. La. 1991), *aff'd*, 967 F.2d 1058 (5th Cir. 1992), *cert. denied sub nom.* 113 S. Ct. 1048 (1993).

[32] *Id.* at 1145.

[33] LA. REV. STAT. ANN. §§ 30:2190-2191 (West 1991); *Chemical Waste Management, Inc.*, 770 F. Supp. at 1145.

[34] *Chemical Waste Management, Inc.*, 770 F. Supp. at 1144.

Finding it unnecessary to determine whether the Louisiana statutes were consistent with RCRA, the court instead focused on the Commerce Clause issue in its opinion.[35] The court discussed two important areas of congressional power in commerce: interstate commerce and foreign commerce.[36] Relying on an Eleventh Circuit decision, the court declared domestic hazardous waste an object of commerce because "we cannot say that the dangers of hazardous waste outweigh its worth in interstate commerce."[37] The court in *Chemical Waste Management, Inc.*, therefore, accepted hazardous waste as an object of interstate commerce and extended the Eleventh Circuit's argument, asserting that "the Court believes that the same principles and reasoning apply to the foreign generated hazardous waste involved in this case."[38]

Applying the test set forth by the Supreme Court in *City of Philadelphia v. New Jersey*,[39] the court determined that the Louisiana statutes violated the Interstate Commerce Clause by burdening interstate commerce: "Where simple economic protectionism is effected by the state legislation, a virtually *per se* rule of invalidity has been erected."[40] The court reasoned that the state statutes "create an irrebuttable presumption concerning the sufficiency of other nation's environmental laws . . . based solely on the origin of the hazardous waste," which renders the statutes facially discriminatory.[41] Although the Louisiana legislature only restricts foreign hazardous waste "imported into this state directly from a foreign nation," it still burdens the flow of interstate commerce because the LDEQ misapplies the statutes, by restricting the flow of commerce between Texas and Louisiana.[42]

The Louisiana statutes also violate the Foreign Commerce Clause because "[a]lthough the Congress's regulatory power over

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[35] *Id.* at 1147. The court simply stated, without reason, that it was unnecessary to go beyond the Commerce Clause analysis to hold the statutes unconstitutional. No further explanation for not addressing the inconsistency was given, *id.*

[36] *Id.* at 1147-53.

[37] *Id.* at 1148-49 (citing National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management, 910 F.2d 713, 719 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2800 (1991)).

[38] *Id.*

[39] City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

[40] *Id.* at 1149 (citing City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).

[41] *Chemical Waste Management, Inc.*, 770 F. Supp. at 1150.

[42] *Id.* at 1150-51; LA. REV. STAT. ANN. § 30:2190(D) (West 1991).

interstate commerce may be limited by federalism and state sovereignty, the Supreme Court has not held that such limitations apply to the Congress's power to regulate foreign commerce."[43] With foreign commerce, the court stipulated that it was vitally important that the United States promote a unified foreign policy rather than causing confusion and conflict with fifty independent foreign policies.[44]

The court further asserted its power to declare the statutes unconstitutional because "it is for the courts, and not an executive or legislative body, to determine the constitutionality of the statutes involved in this case."[45] The EPA represents an administrative agency, not a court that determines constitutional issues.[46] In addition, Congress has already authorized the importation of hazardous waste under its RCRA regulations, and a state's program must remain consistent with federal guidelines and other state programs.[47] Because the Louisiana statutes violate both interstate and foreign commerce, the court issued a permanent injunction enjoining the LDEQ from enforcing the statutes.[48]

III. COMMERCE CLAUSE CHALLENGES

A. Dormant Commerce Clause Analysis

The Commerce Clause of the United States Constitution declares that "Congress shall have [the] Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[49] According to the Supreme Court, "[i]t has long been accepted that the Commerce Clause not only [affirmatively] grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce."[50] These "negative implications of the clause have been referred to as the

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[43] *Chemical Waste Management, Inc.*, 770 F. Supp. at 1152-53.

[44] *Id.* at 1152.

[45] *Id.* at 1153.

[46] *Id.*

[47] RCRA, § 1002, 42 U.S.C. § 6926(b) (1988); *Chemical Waste Management, Inc.*, 770 F. Supp. at 1153; *see also* 40 C.F.R. § 262.60 (1991).

[48] *Chemical Waste Management, Inc.*, 770 F. Supp. at 1153.

[49] U.S. CONST. art. 1, § 8, cl. 3.

[50] New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988).

'dormant' or 'negative' commerce clause . . . . [and] apply with equal force to all laws and regulations that affect interstate commerce."[51] The Supreme Court has also recognized this dormant aspect as applying to foreign commerce "as a self-executing limitation on the power of the States to enact laws imposing substantial burdens" on interstate or foreign commerce.[52] The main goal of the dormant Commerce Clause is to "prohibit[] economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[53] By preventing economic protectionism, the United States gains a sense of solidarity as a unified nation rather than merely existing as a loose confederacy of independent states.[54] In recognizing the limit that the Commerce Clause places on the States, the Supreme Court "consistently has distinguished between out-right protectionism and more indirect burdens on the free flow of trade"[55] in state legislation. *City of Philadelphia v. New Jersey* sets out the standard test for facial discrimination: "[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected."[56] The Supreme Court in *Pike v. Bruce Church*, on the other hand, presents a balancing test for those statutes that appear facially neutral: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[57] These tests reflect the context in which

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[51] County Comm'rs v. Stevens, 473 A.2d 12, 14 (Md. 1984); *see* Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35 (1980) (holding that the Court must first ask if the state law burdens commerce and then ask if Congress has preempted the State from legislating at all); Hughes v. Oklahoma, 441 U.S. 322, 326 (1979) (recognizing that the Commerce Clause gives Congress power to act and prevents the States from legislating); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 534-538 (1948) (pointing out that the States can legislate for internal health and safety but cannot legislate commerce because that is a congressional power).

[52] South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984).

[53] *New Energy Co. of Ind.*, 486 U.S. at 273-74; *see also Lewis*, 447 U.S. at 35 (stating that the Supreme Court has long recognized that the Commerce Clause limits the power of the States to erect barriers against interstate trade).

[54] *See H.P. Hood & Sons, Inc.*, 336 U.S. at 535; Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935) (condemning the use of economic restraints on interstate commerce as a means of advancing local economic advantages).

[55] *Lewis*, 447 U.S. at 36.

[56] City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); *see also H.P. Hood & Sons, Inc.*, 336 U.S. 525.

[57] Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

the *Chemical Waste Management, Inc.* Court reached its decision.

B. Hazardous Waste as an Object of Interstate Commerce

According to *City of Philadelphia v. New Jersey*, "[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset."[58] In that case, the Supreme Court held that "[j]ust as Congress has power to regulate the interstate movement of [nonhazardous] wastes, States are not free from constitutional scrutiny when they restrict that movement."[59] *City of Philadelphia v. New Jersey*, however, only addresses nonhazardous waste and suggests that states could prohibit importation if "the articles' worth in interstate commerce was far outweighed by the dangers inhering in their very movement."[60] Nevertheless, the Eleventh Circuit determined that "we cannot say that the dangers of hazardous waste outweigh its worth in interstate commerce" and declared hazardous waste an object of commerce.[61] As the Fifth Circuit Court noted on appeal[62], the Supreme Court has recently supported this view by declaring hazardous waste to be an object of commerce and worthy of protection in *Fort Gratiot Landfill v. Michigan DONR*.[63] In that case, the Court held that it was unconstitutional to make the disposal of waste generated in another county, state, or country contingent upon express authorization by a county's plan.[64]

Chemical Waste Management, Inc. v. Templet extends the Eleventh Circuit decision concerning interstate commerce to foreign commerce because "the same principles and reasoning apply to the foreign generated hazardous waste . . . [and] the same type of hazardous waste is already being transported into and disposed of in Louisiana" by plants located in the United States.[65]

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[58] *City of Philadelphia*, 437 U.S. at 622.

[59] *Id.* at 622-23.

[60] *Id.* at 622.

[61] National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management Ass'n, 910 F.2d 713, 719 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2800 (1991).

[62] Chemical Waste Management, Inc. v. Templet, 967 F.2d 1058, 1059 (5th Cir. 1992), *aff'g* 770 F. Supp. 1142 (M.D. La. 1991), *cert. denied sub nom.* 113 S. Ct. 1048 (1993).

[63] Fort Gratiot Landfill v. Michigan DONR, 112 S. Ct. 2019, 2023 (1992).

[64] *Id.* at 2024.

[65] Chemical Waste Management, Inc. v. Templet, 770 F. Supp. 1142, 1149 (M.D. La. 1991), *aff'd*, 967 F.2d 1058 (5th Cir. 1992), *cert. denied sub nom.* 113 S. Ct. 1048 (1993).

The court, thus, reaches the conclusion that "the foreign generated hazardous waste involved in this case is an object of commerce and subject to the protection of the Commerce Clause of the United States Constitution."[66] Consequently, constitutional protection has been extended to foreign-generated hazardous waste, broadening the definition of hazardous waste as commerce.

C. *The Interstate Commerce Clause Challenge*

The court in *Chemical Waste Management, Inc. v. Templet* adopts the test employed in *City of Philadelphia v. New Jersey*[67] to determine if title 30, sections 2190 and 2191 of the Louisiana Revised Statutes[68] are permissible under the Commerce Clause.[69] Because "[t]he statutes enacted by the Louisiana legislature create an irrebuttable presumption concerning the sufficiency of other nation's environmental laws," the statutes facially discriminate against interstate commerce.[70] In previous cases involving *per se* discrimination against interstate commerce, the analysis centered around statutes that blatantly facially discriminate against *other states*.[71] In this case, by contrast, the discrimination only appears to affect a foreign country.[72] The court extends "the legal principles . . . involving domestic waste [to] also apply when a state limits movement based on the origin of the hazardous waste even if the origin is a foreign country."[73] Moreover, the court claims discrimination exists against Texas, in effect, because sections 2190 and 2191 "restrict the flow of commerce from Texas to Louisiana."[74] Despite the legislature's prohibition against only hazardous waste "imported into this state *directly* from a foreign nation,"[75] the LDEQ uses this statute to prevent waste transported from Mexico through Texas to enter Louisiana. In this manner, "the LDEQ has misapplied

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[66] *Id.* at 1149.

[67] City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

[68] LA. REV. STAT. ANN. §§ 30:2190-2191 (West 1991).

[69] *Chemical Waste Management, Inc.*, 770 F. Supp. at 1149.

[70] *Id.* at 1150.

[71] *See* New Energy Co. of Ind. v. Limbach, 486 U.S. 269 (1988); *City of Philadelphia*, 437 U.S. 617.

[72] LA. REV. STAT. ANN. §§ 30:2190-2191 (West 1991).

[73] *Chemical Waste Management, Inc.*, 770 F. Supp. at 1152.

[74] *Id.* at 1151.

[75] LA. REV. STAT. ANN. § 30:2190(D) (West 1991) (emphasis added).

the statutes, causing them to be unconstitutional 'as applied.'"[76] Through this reasoning, the court seems to adopt the *Pike* test for statutes that appear to regulate in an evenhanded way but discriminate in effect.[77] Discrimination occurs because "Texas environmental laws concerning transportation [of hazardous waste] apply whether the waste is properly categorized as 'directly' or 'indirectly' imported."[78] However, the court relies on *per se* discrimination, rather than on the balancing test, by drawing an analogy between domestic and foreign hazardous waste in order to hold sections 2190 and 2191 unconstitutional.[79] The court can, in this manner, hold the statutes unconstitutional for all times because they are discriminatory on their face, not just discriminatory "as misapplied."[80] By employing this testing method, the court appears to be anticipating future litigation about other "applications" and thwarting these arguments before they arise.

The court rejects LDEQ's "quarantine power" defense because LDEQ bases its discrimination on origin rather than the type of hazardous waste.[81] Although the true objective of the Louisiana legislature may be to protect the health and welfare of its citizens and environment, "the evil of protectionism can reside in legislative means as well as legislative ends."[82] The Eleventh Circuit expanded this theory to apply to protectionism in the form of statutes banning hazardous waste based solely on its out-of-state origin.[83] *Chemical Waste Management, Inc. v. Templet* further extends this doctrine to apply to foreign origins as well as domestic out-of-state origins.[84] Unlike *Maine v. Taylor*, where the Supreme Court determined that banning the importation of fish and wildlife was the least discriminatory means

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[76] *Chemical Waste Management, Inc.*, 770 F. Supp. at 1151.

[77] Pike v. Bruce Church, 397 U.S. 137 (1970).

[78] *Chemical Waste Management, Inc.*, 770 F. Supp. at 1151.

[79] *Id.* at 1152.

[80] *Id.* at 1151-52.

[81] *Id.* at 1151-52. Quarantine powers enable the States to enact legislation aimed at protecting the health of its citizens and the environment. However, mere pretext of such purpose is not sufficient. Here, the court actually found Louisiana to have discrimination as its purpose, *id.*

[82] City of Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978).

[83] 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).

[84] *Chemical Waste Management, Inc.*, 770 F. Supp. at 1151.

to prevent parasites,[85] less discriminatory means exist here for protecting state citizens and the environment, such as prohibiting certain types of hazardous waste that are found in both domestic and foreign waste imports. At first glance, it would seem that the court should defer to legislative judgment concerning the means of protecting its citizens and environment, as the Louisiana legislature would be in a better position than the court in making this determination. However, the blatant purpose of this statute is to discriminate, not to protect its citizens; the court will not defer to biased legislative judgments. Although the LDEQ argues that the statutes prohibit waste based on "lack of adequate controls by foreign nations,"[86] their argument fails due to the fact that "Louisiana's ban is based on the origin of the hazardous waste, rather than the specific type . . . [and] [t]he Louisiana legislature did not provide any exceptions to the absolute ban of foreign generated hazardous waste."[87] This court's reasoning, thus, brings a seemingly foreign commerce issue into the realm of interstate commerce analysis.

D. The Foreign Commerce Clause Challenge

In addition to burdening interstate commerce, sections 2190 and 2191 also violate the Foreign Commerce Clause of the United States Constitution.[88] This issue brings a new analysis to cases dealing with state waste statutes and Commerce Clause conflict because prior cases only involved interstate commerce challenges.[89] The Supreme Court advocates that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments."[90] Consequently, "[t]he need for federal uniformity is no less paramount in ascertaining the negative implications of Congress' power to 'reg-

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[85] Maine v. Taylor, 477 U.S. 131 (1986) (upholding Maine statute that made it a federal crime to import fish or wildlife in violation of state law because the statute had a legitimate and substantial purpose in preventing parasites and there were no less discriminatory means available).

[86] *Chemical Waste Management, Inc.*, 770 F. Supp. at 1152.

[87] *Id.* at 1152.

[88] *Id.* at 1152-53; *see generally* U.S. CONST. art. I, § 8, cl. 3 (stating that Congress has the power to regulate commerce with foreign nations).

[89] *See* Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980); Hughes v. Oklahoma, 441 U.S. 322 (1979); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

[90] Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976).

ulate Commerce with foreign Nations' under the Commerce Clause."[91] *Chemical Waste Management, Inc. v. Templet* advocates "Congress's plenary power to regulate foreign commerce,"[92] and many cases readily support this proposition.[93] The Supreme Court proclaims that the foreign commerce power "is exclusive and plenary . . . . [and] its exercise may not be limited, qualified or impeded to *any* extent by state action."[94]

From the Supreme Court decision in *Japan Line, Ltd. v. County of Los Angeles*, a two-part test has developed for determining the validity of state statutes affecting foreign commerce: the statutes "are invalid if they (1) create a substantial risk of conflicts with foreign governments, or (2) undermine the ability of the federal government to 'speak with one voice' in regulating commercial affairs with foreign states."[95] Both RCRA[96] and the Mexico-U.S. Agreement[97] permit the importation of hazardous waste generated by maquiladoras. Denying importation of this hazardous waste would directly conflict with American and Mexican policies.[98] In addition, it would lead to each state establishing its own foreign policy and would create a conflict among states, as occurred with Texas and Louisiana.[99] Accordingly, "[t]he control of importation does not rest with the State but with the Congress."[100] *Chemical Waste Management, Inc. v. Templet*, therefore, appears to be consistent with prevailing views of foreign commerce policy.[101]

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[91] Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 449 (1979).

[92] *Chemical Waste Management, Inc.*, 770 F. Supp. at 1152.

[93] Bd. of Trustees of Univ. of Ill. v. United States, 289 U.S. 48, 56-57 (1933) (stating that Congress' foreign commerce power is plenary); Louisiana Land & Exploration Co. v. Pilot Petroleum Corp., 900 F.2d 816, 819 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 248 (1990) (stating that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments").

[94] Bd. of Trustees of Univ. of Ill., 289 U.S. at 56-57 (emphasis added).

[95] New Orleans S.S. Ass'n v. Plaquemines Port, Harbor, & Terminal Dist., 874 F.2d 1018, 1022 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 2172 (1990) (citing Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 451 (1979)).

[96] 40 C.F.R. § 262.60 (1992) (authorizing imports of hazardous waste).

[97] Annex III, *supra* note 29. Annex III specifies which hazardous wastes must be readmitted into the exporting country and is comparable to the RCRA export provisions.

[98] 40 C.F.R. § 262.60 (providing for the importation of hazardous waste); Mex.-U.S. Agreement, *supra* note 27 ("[r]ecognizing that the close trading relationship and the long common border between [the U.S. and Mexico] make it necessary to cooperate regarding the transboundary shipments of hazardous waste").

[99] *Chemical Waste Management, Inc.*, 770 F. Supp. at 1151.

[100] *Bd. of Trustees of Univ. of Ill.*, 289 U.S. at 59.

[101] *Chemical Waste Management, Inc.*, 770 F. Supp. at 1152-53.

E. The Power to Determine Constitutionality

The court in *Chemical Waste Management, Inc. v. Templet* makes a definite point of declaring "it is for the courts, and not an executive or legislative body, to determine the constitutionality of the statutes involved in this case."[102] This declaration refutes Louisiana's argument that the state statutes must automatically be valid as part of the EPA-authorized state program. The court asserts that "approval by the EPA does not constitute a declaration that the state's program is constitutional or that such approval is binding on the courts or precludes the courts from determining the constitutionality of the statutes."[103] In previous cases dealing with the relation between state waste disposal statutes and the Commerce Clause, the power to declare statutes unconstitutional was not addressed in this manner.[104] Although the federal district court in this case emphatically claims this power, it does so only by vaguely invoking the Supremacy Clause rather than by explaining the basis for its determination.[105] On appeal, the circuit court helps to clarify the reasons behind this correct assertion of authority.[106] The appellate court refutes Louisiana's argument that authorization by the EPA "render[s] the challenged statutes an exercise of Congress' commerce power rather than an affront to it"[107] by relying on two cases. Focusing on *South-Central Timber Dev., Inc. v. Wunnicke*, the court asserts that states can only legislatively discriminate against interstate commerce if there exists an "unmistakably clear . . . expression of approval by Congress."[108] In the case at hand, neither the district nor the circuit court believed that mere EPA authorization of a state program was evidence of approval to burden interstate commerce.[109] To reinforce its decision, the circuit court also depends on a Fourth Circuit case

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[102] *Id.* at 1153.

[103] *Id.*

[104] *See* City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); 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).

[105] *Chemical Waste Management, Inc.*, 770 F. Supp. at 1153.

[106] Chemical Waste Management v. Templet, 967 F.2d 1058, 1058 (5th Cir. Aug. 10, 1992), *aff'g* 770 F. Supp. 1142 (1991), *cert. denied sub nom.* 113 S. Ct. 1048 (1993).

[107] *Id.* at 1058.

[108] *Id.* (citing South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 91-92 (1984)).

[109] *Id.*

to indicate that clear, unmistakable evidence must be presented to demonstrate "'congressional intent to permit states to burden interstate commerce' in the RCRA."[110] This high standard of proof definitely limits the opportunity for future litigation concerning congressional intent in the area of state waste disposal programs. In this case, no such intent could be derived from a state program that clearly "deviate[d] below RCRA's minimum standards,"[111] because it "is not equivalent to the Federal program."[112]

IV. CONCLUSION

Chemical Waste Management, Inc. v. Templet on one hand appears to pit industry against the environment but, on the other hand, seems to insulate interstate and foreign commerce from economic protectionism.[113] It fits into the well-established pattern of cases involving state statutes that unconstitutionally attempt to isolate a state from the rest of the nation.[114] Given the history of declaring these statutes unconstitutional, the decision reached in this case is far from surprising.[115] However, this case extends laws governing solid waste and interstate commerce to foreign hazardous waste, increasing the negative implications on state regulation of commerce.[116]

Recent Supreme Court decisions point to the growing trend of declaring unconstitutional state statutes that ban the importation of waste.[117] *Chemical Waste Management, Inc. v. Hunt*, for example, affirms hazardous waste as an object of commerce:

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[110] *Id.* (citing Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781 (1991)).

[111] Chemical Waste Management, Inc., 770 F. Supp. at 1147.

[112] RCRA, §1002 (codified at 42 U.S.C. § 6926(b)).

[113] *Id.* at 1142.

[114] *See* Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980); Hughes v. Oklahoma, 441 U.S. 322 (1979); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1948).

[115] *See* cases cited *supra* note 114.

[116] Chemical Waste Management, Inc. v. Templet, 770 F. Supp. 1142, 1148-49 (M.D. La. 1991), *aff'd*, 967 F.2d 1058 (5th Cir. 1992), *cert. denied sub nom.* 113 S. Ct. 1048 (1993).

[117] *See* Fort Gratiot Landfill v. Michigan DONR, 112 S. Ct. 2019 (1992) (holding unconstitutional a county statute that prohibited the importation of solid waste from another county, state or country unless expressly authorized); Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992) (holding unconstitutional an Alabama act that charged an additional fee to dispose of hazardous waste generated outside Alabama).

hazardous waste "is simply a grade of solid waste . . . [involved in] 'commercial transactions [that] unquestionably have an interstate character.'"[118] Although a case about taxes rather than waste importation, *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue* advances the proposition that "a State's preference for domestic commerce over foreign commerce is inconsistent with the Commerce Clause even if the State's own economy is not a direct beneficiary of the discrimination."[119] Both of these Supreme Court cases demonstrate the likelihood that the Supreme Court would uphold the decision of *Chemical Waste Management, Inc. v. Templet*.[120] For now, states, such as Louisiana, are still faced with locating that acceptable, but apparently nonexistent, balance between protection of their citizens and environment and regulation of interstate and foreign commerce.

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[118] Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009, 2012-13 n.3 (1992) (citing *Fort Gratiot Landfill*, 112 S. Ct. at 2023).

[119] Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue, 112 S. Ct. 2365 (1992) (holding that an Iowa statute discriminated against dividends received from foreign subsidiaries because they were included in taxable income while dividends received from domestic subsidiaries were not).

[120] *But see Fort Gratiot Landfill*, 112 S. Ct. at 2030-31 (Rehnquist, J., dissenting) (arguing that permitting interstate transportation of waste encourages "each State to ignore the waste problem in the hope that another will pick up the slack").