FROM SEWER TO FARMLAND: DOES THE DORMANT COMMERCE CLAUSE REQUIRE A FARMING COMMUNITY TO ACCEPT BIG CITY SLUDGE AS A FERTILIZER FOR CROPS?

I. INTRODUCTION

Most people in the United States ("U.S.") do not think twice about what they flush down the toilet or send down the drain. They would be surprised and possibly horrified to know that much of that waste ends up on American farmland, used as a fertilizer to grow crops.[1] Residents of rural communities, like Kern County, California, are upset that big cities use their land to dump sewage, along with the chemicals and pathogens that it contains.[2] Part II of this Comment will explain the events leading to the current legal conflict between urban Southern California cities, including Los Angeles, and their agriculturally based neighbor, Kern County. Part III will discuss the debate over the safety of using sewage sludge as a fertilizer. Part IV and V will examine the applicable laws associated with the application of sewage sludge to land, including federal regulations,[3] which encourage this type of disposal,[4] an ordinance passed by Kern County that restricted the use of sewage sludge within the County's jurisdiction, a more recent Kern County ordinance that banned the practice outright,[5] and the August 2007 federal court decision

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[1] Seema Mehta, *Orange County Finds Distant Taker for Sludge*, L.A. TIMES, March 11, 2002, at M5.

[2] *See id.*

[3] 40 CFR Part 503 (1993) (defines "apply" as "to put biosolids on land to take advantage of the nutrient content or soil conditioning properties.").

[4] Michael B. Cook, *Foreward* to U.S. EPA Office of Wastewater Management, U.S. EPA, A PLAIN ENGLISH GUIDE TO THE EPA PART 503 BIOSOLIDS RULE (1994), *available at* http://www.epa.gov/owm/mtb/biosolids/503pe/index.htm [hereinafter *Guide to Part 503*].

[5] Kern County, Cal. Ordinance, 8.05.020 (2006) [hereinafter *Measure E*]. This ordinance also only applied within the County's jurisdiction.

that invalidated the sewage sludge ban based in part on a holding that the ordinance violated the Commerce Clause.[6] Part VI will discuss Kern County's potential liability for Los Angeles' attorney fees based on the Commerce Clause violation. Part VII will analyze whether the decision of the federal court regarding the Commerce Clause claim was correct. Finally, Parts VIII and IX will discuss a possible policy mistake in past Commerce Clause jurisprudence that may have exacerbated the current problems associated with waste disposal.

II. BACKGROUND

A debate is raging over the safety of using sewage sludge as a fertilizer. Sewage sludge is defined differently depending on the source of the definition. The environmental community defines sewage sludge as a "viscous, semisolid mixture of bacteria and virus-laden organic matter, toxic metals, synthetic organic chemicals, and settled solids removed from domestic and industrial waste water at a sewage treatment plant."[7] This contrasts with the definition from the Water Environment Federation ("WEF"),[8] the sewage industry's lobby, which changed the name of sewage sludge to "biosolids" in an attempt to change public perception.[9] The WEF defines biosolids as the "nutrient-rich organic byproduct of the nation's wastewater treatment process."[10] The Environmental Protection Agency ("EPA") defines sewage sludge as a "solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in a treatment works."[11]

The use of human waste as a fertilizer is not a modern practice.[12] In traditional agricultural society human waste[13] was commonly used as a

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[6] *See* City of Los Angeles v. County of Kern (*Kern II*), 509 F. Supp. 2d 865 (2007).

[7] John C. Stauber & Sheldon Rampton, *Secret Ingredients*, PR Watch.org (Center for Media and Democracy, Madison, WI) Third Quarter 1995, 2 PR WATCH NEWSLETTER 3, *available at* http://www.prwatch.org/prwissues/1995Q3/ingredients.html.

[8] Formerly known as the "Federation of Sewage Works Associations," "Federation of Sewage and Industrial Wastes Associations, and "Water Pollution Control Federation."

[9] John C. Stauber & Sheldon Rampton, *Toxic Sludge is Good for You*, 117(Bob Burton ed., Common Courage Press 1995) *available at* http://www.ejnet.org/sludge/sludge.html.

[10] John C. Stauber & Sheldon Rampton, *A R.O.S.E by any Other Name*, PR Watch.org (Center for Media and Democracy, Madison, WI) Third Quarter 1995, 2 PR WATCH NEWSLETTER 3, *available at* http://www.prwatch.org/prwissues/1995Q3/rose.html.

[11] *Guide to Part 503*, *supra* note 5, at 4.

[12] John C. Stauber & Sheldon Rampton, *A Brief History of Slime*, PR Watch.org (Center for Media and Democracy, Madison, WI) Third Quarter 1995, 2 PR WATCH NEWSLETTER 3, *available at* http://www.prwatch.org/prwissues/1995Q3/slime.html.

[13] Stauber, *supra* note 13 (in ancient Chinese society human waste was called night soil and prized for its fertilizing characteristics).

fertilizer for crops.[14] After the Industrial Revolution people were concentrated in small, urban areas and water became the principal means for the disposal of waste.[15] This method led to the pollution of rivers, lakes, and oceans in the early twentieth century.[16] The current disposal system in the U.S. is set up to allow biological wastes from the public to combine with industrial and business waste in one sewage system.[17] This system "collects, mixes, and concentrates" a wide range of materials and potentially harmful chemicals.[18]

In Southern California, the focus of this Comment, sewage disposal has gone through several changes during the past half-century.[19] Currently, Los Angeles uses two wastewater treatment plants that produce sewage sludge: the Hyperion Treatment Plant ("HTP") and the Terminal Island Treatment Plant.[20] From 1957 until 1987, sewage sludge produced in Los Angeles' treatment plants was disposed of in the ocean.[21] Dumping sewage sludge into the ocean was prohibited in the late 1980s[22] because it caused nitrogen pollution, which created "dead zones"[23] or hypoxic zones.[24] From 1987 until 1989, sewage sludge was diverted from the ocean into landfills.[25] In 1989, Los Angeles began an "extensive

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[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* (including Polychlorinated Byphenyls, chlorinated pesticides [DDT, dieldrin, aldrin, endrin, chlordane, heptachlor, lindane, mirex, kepone, 2,4,5,-T, 2,4-D], chlorinated compounds such as dioxins, polynuclear aromatic hydrocarbons, heavy metals such as arsenic, cadmium, chromium, lead, mercury, and bacteria, viruses, protozoa, parasitic worms, and fungi).

[19] This comment will specifically discuss Los Angeles because the availability of information regarding the city's practices; History of reuse Timeline Los Angeles city website http://www.lacity.org/SAN/biosolidsems/index.htm (last visited Oct. 15, 2007).

[20] The City of Los Angeles Biosolids Environmental Management System (EMS), Los Angeles city website http://www.lacity.org/SAN/biosolidsems/index.htm (last visited Oct. 15, 2007).

[21] *See* Los Angeles city website http://www.lacity.org/SAN/biosolidsems/index.htm (last visited Oct. 15, 2007).

[22] 33 USCS § 1414(b) (1972).

[23] Excess nutrients introduced in the water cause algae to grow. When the algae die it is digested by bacteria that consume the oxygen that is dissolved in the water. This leaves an insufficient amount of oxygen to sustain the life of other animals in the water. Ocean Color, http://disc.gsfc.nasa.gov/oceancolor/scifocus/oceanColor/dead_zones.shtml (last visited Feb. 6, 2008).

[24] USGS website, http://toxics.usgs.gov/definitions/hypoxia.html (last visited Feb. 6, 2008).

[25] Los Angeles city website, http://www.lacity.org/SAN/biosolidsems/index.htm (last visited on Oct. 15, 2007).

beneficial reuse program,"[26] which included application on farmland and composting of sewage sludge.[27]

Currently, the cheapest way for Los Angeles to dispose of its sewage sludge is to transport it to Kern County, located approximately 120 miles away.[28] Prior to 1994, Los Angeles hauled treated sludge to Arizona for application on farmland.[29] To reduce the costs involved with transport, Los Angeles began applying sludge, as fertilizer, at a farm in Kern County called Green Acres.[30] Los Angeles applies at least 200,000 tons of biosolids to Green Acres each year.[31] The city of Los Angeles bought Green Acres in 2000 for $9.6 million and spent $35 million upgrading its sewage treatment plant in order to meet environmental standards passed by Kern County in 1999.[32] Los Angeles spends approximately $7 million per year to haul its sludge to Kern County.[33] It would cost the city of Los Angeles an additional $21 million per year to send its sewage to Arizona.[34]

In addition to applying sludge on Kern County land, Los Angeles uses sewage sludge to produce compost at its Griffith Park composting facility.[35] Sludge is mixed with green waste[36] and manure from the Los Angeles Zoo to produce a product that is used on city-owned property for landscaping, sold to farmers, or donated to civic organizations.[37] Nonetheless, Los Angeles uses only 0.1% of their composted sludge within the city while 99.9% of it is sent to Kern County.[38]

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[26] Los Angeles city website, http://www.lacity.org/SAN/biosolidsems/index.htm (last visited on Oct. 15, 2007).

[27] Los Angeles city website, http://www.lacity.org/SAN/biosolidsems/index.htm (last visited Oct. 15, 2007).

[28] John Krist, *High Stakes War Over Sludge*, VENTURA COUNTY STAR, July 27, 2000, at BO6.

[29] Thomas E. Wilson, Ph.D., Reza Iranpour, Ph.D., & Thomas D. Windau, *Thermophilic Anaerobic Digestion in the US: Selected Case Histories*, 1, EARTHTECH, http://www.earthtech.com/documents/Thermophilic_Anaerobic_Digestion.pdf.

[30] *Id.*

[31] City of Los Angeles v. County of Kern (*Kern I*). 462 F.Supp.2d 1105, 1109 (2006).

[32] Kerry Cavanaugh, *Green Acres Aint the Place To Be: L.A. Sludge Farm Facing Ire of Kern County Voters*, DAILY NEWS OF LOS ANGELES, Feb. 19, 2006, at N1.

[33] *Id.*

[34] *Id.*

[35] Los Angeles city website, http://www.lacity.org/SAN/biosolidsems/about.htm (last visited Oct. 15, 2007).

[36] Green waste includes yard trimmings, grass clipping, and small branches trimmed from trees. Green Waste, http://www.bcswd.com/green.htm (last visited Nov. 25, 2007).

[37] Los Angeles city website, http://www.lacity.org/SAN/biosolidsems/about.htm (last visited Oct. 15, 2007).

[38] Los Angeles city website, http://www.lacity.org/SAN/biosolidsems/about.htm (last visited Oct. 15, 2007).

Kern County currently does not dispose of its sewage sludge within its borders.[39] Kern County sends its sewage sludge to a private composting firm, San Joaquin Composting ("SJC").[40] However, incorporated cities within Kern County do apply sewage sludge on land inside their boundaries, outside of Kern County's legal jurisdiction.[41]

III. IS SEWAGE SLUDGE SAFE?

A discussion of the debate over the safety of sewage sludge is important to put the Kern County conflict in the proper context. In the U.S. and throughout the world there are differing views regarding the safety of sewage sludge and the regulations required for its safe use. Compared to Europe and all other developed countries, the U.S. has the most relaxed standards for metal content in sewage sludge.[42] The U.S. standards for heavy metal content are up to one hundred times the maximum allowance proposed by any other country.[43] Although the heavy metals in sewage sludge may not cause problems initially, as the metals accumulate they may irreversibly damage the soil.[44] Most scientists in Europe and the U.S. are unsure how long it will take to cause irreversible soil damage.[45] In 1993, the United Kingdom formed an independent scientific review committee, which recommended the standard for zinc in sewage sludge be reduced from 300mg/kg to 200mg/kg because heavy metals do not degrade in soils.[46] The comparable U.S. standard for zinc is seven times the concentration recommended by the scientific review committee, at 1400mg/kg.[47]

Even within the EPA there are differing opinions regarding the safety of land application of sewage sludge. With all of the uncertainty elsewhere, one EPA advisor said, "We know more than enough to say with confidence that high-quality sludge can be used practically forever on farmland without any adverse effects."[48] In contrast, an EPA research microbiologist claims there is evidence that bacteria and chemicals in

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[39] *Kern II*, 509 F.Supp 2d 865, 875 (2007).
[40] *Id.*
[41] *Id.* at 876.
[42] Rebecca Renner, *Sewage Sludge, Pros & Cons*, ENVIRONMENTAL SCIENCE & TECHNOLOGY, Oct. 1, 2000, http://www.mindfully.org/Pesticide/Sewage-Sludge-Pros-Cons.htm.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* at 5.
[47] *Id.*
[48] *Id.*

sludge pose a health risk, possibly causing gastrointestinal, skin, and respiratory infections, and other illnesses.[49] Some argue there is a lack of research to ensure that sewage sludge is safe to apply to land.[50] Others claim there is a lack of manpower in the EPA to oversee, investigate and keep track of complaints, creating additional risk.[51] Critics are also concerned that over time chemicals and medical wastes will combine and create contaminants that could affect the water situated under Green Acres.[52]

There is little definitive evidence of negative health effects associated with sewage sludge but critics are skeptical because they believe "the absence of evidence is not the evidence of absence."[53] There have been many complaints of illness and even fatalities related to the application of sewage sludge on farmland, but none of these complaints have been conclusively linked to sludge.[54] Considering the potential harm associated with application of sewage sludge to land, some claim that the EPA standards for regulating sewage sludge may be too lenient.[55]

IV. PART 503: THE FEDERAL REGULATION OF SEWAGE SLUDGE

Title 40 of the Code of Federal Regulations ("CFR") Part 503[56] regulates the disposal of sewage sludge.[57] This regulation was enacted after the Clean Water Act Amendments of 1987, which prohibited ocean disposal of sewage sludge.[58] Part 503 is consistent with the EPA's policy of promoting the beneficial use of sewage sludge.[59]

Part 503 sets forth three ways[60] of disposing of sewage sludge, one of which is application to land.[61] The EPA defines "apply" as "to put biosolids on land to take advantage of the nutrient content or soil conditioning properties."[62] Several types of land can benefit from the application

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[49] Seema Mehta, *Riverside's Sludge Ban Puts O.C. in Tough Spot*, L.A. TIMES, ORANGE COUNTY ED., June 27, 2001, at MD1.

[50] *EPA Inspector Questions OK of Sludge as Fertilizer*, DAILY NEWS OF LOS ANGELES, Feb. 8, 2002, at AV1.

[51] *Id.*

[52] Steve Chawkins, *Sludge Ban Is Primed to Pass*, L.A. TIMES, May 2, 2006.

[53] *Id.*

[54] *EPA Inspector Question's OK of Sludge as Fertilizer, supra* note 51.

[55] Chawkins, *supra* note 53.

[56] 40 CFR §503 *et seq* (1993).

[57] *Guide to Part 503, supra* note 5, at 1.

[58] *Id.*

[59] *Id.* at 2.

[60] Land application, surface disposal, and incineration. *Id.* at 6.

[61] *Id.*

[62] *Id.*

of biosolids, including non-public[63] and public contact[64] sites.[65] To protect the public and the environment, land applied biosolids must meet risk based pollutant limits and operational standards specified in Part 503.[66] The purposes of the standards are to control pathogens, which cause disease, and reduce the attraction of vectors, which are organisms that carry pathogens.[67]

There are four options for land application of biosolids under subpart B of Part 503, all of which are, according to the EPA, "equally protective of human health."[68] Only two of these options, Exceptional Quality ("EQ") biosolids, and Pollutant Concentration ("PC") biosolids, will be discussed in this Comment.[69] For biosolids to be land applied, no matter which option is chosen, they must meet the ceiling concentration limits, which are the maximum allowable concentration of ten heavy metals[70] found in biosolids.[71]

EQ biosolids are subject to the most lenient rules for use.[72] They must meet low pollutant levels, achieve Class A pathogen reduction requirements, which require a virtual absence of pathogens, and must have a reduced level of degradable compounds that attract vectors.[73] EQ biosolids are virtually unregulated for use and can be applied as freely as other fertilizers.[74] Part 503 recommends, but does not require, EQ biosolids be applied at the appropriate agronomic rate, which is the rate designed to provide the amount of nitrogen needed by a crop or vegetation, while minimizing the amount of nitrogen that will pass below the root zone of the crop or vegetation to ground water.[75]

PC biosolids must meet the same pollutant concentration limits as EQ biosolids, but are only required to meet Class B pathogen reduction.[76] Class B pathogen reduction requires that the level of pathogens be sub-

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[63] *Id.* at 25 (areas not often visited by the public, including agricultural land, forests, and reclamation sites).

[64] *Id.* at 25 (areas where people are likely to come into contact with biosolids if applied, such as public parks, plant nurseries, roadsides, golf courses, lawns, and home gardens).

[65] *Id.*

[66] *Id.* at 28.

[67] *Id.*

[68] *Id.* at 6-7.

[69] *Id.*

[70] *Id.* at 29-30 (regulated pollutants are arsenic, cadmium, chromium, copper, lead, mercury, molybdenum, nickel, selenium and zinc).

[71] *Id.*

[72] *Id.* at 7.

[73] *Id.*

[74] *Id.* at 34.

[75] *Id.* at 34, 47.

[76] *Id.* at 7.

stantially reduced, but does not require them to be completely eliminated. [77] The majority of the biosolids generated in the United States are PC biosolids.[78] This type of biosolids is subject to general requirements[79] and management practices,[80] including monitoring, recordkeeping, and reporting.[81]

Although Part 503 is predominantly self-implementing, the EPA or an approved state agency may take enforcement actions directly against persons who violate the requirements.[82] Regulatory authorities have the right to inspect biosolids application operations, review and evaluate reports and records, sample biosolids at regulated facilities, and respond to complaints.[83] The EPA has the authority to sue violators in civil court, seek remediation and penalties, and prosecute willful or negligent violations of the regulation as criminal acts.[84] Where the EPA is unable to take an enforcement action, Section 505 of the CWA authorizes any citizen to bring a civil action.[85]

V. KERN COUNTY BIOSOLIDS ORDINANCES

A. 1999 Ordinance Bans All Except Class A Sewage Sludge

In January 1998, the California Biosolids Conference was held and participants discussed the negative public perception, cultural stigmas, and concerns about soil and water pollution associated with the land application of sewage sludge.[86] Based on these concerns, Kern County released a draft ordinance restricting the land application of sewage sludge in the unincorporated areas in the county.[87] Prior to this legisla-

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[77] *Id.*

[78] *Id.* at 36.

[79] General requirements include that the preparer notify and provide information such as the total nitrogen concentration of the biosolids (*Id.* at 44), to the applier, or person who provides further preparation. *Id.* at 47. The applier is responsible for determining that the biosolids are applied at a rate that does not exceed the agronomic rate for that site, based on the information reported by the biosolids preparer. *Id.*

[80] *Id.*at 7. Management practices include regulation of application in the appropriate agronomic rate for the crop to be grown. *Id.* at 45.

[81] *Id.* at 35.

[82] *Id.* at 11.

[83] *Id.* at 14.

[84] *Id.*

[85] *Id.* at 15.

[86] Steven Mayer, *California Addresses Controversial Use of Sewage Sludge as Fertilizer*, BAKERSFIELD CALIFORNIAN, Jan. 22, 1998.

[87] Steven Mayer, *Kern County, California, Releases Biosolids Ordinance*, BAKERSFIELD CALIFORNIAN, Feb. 8, 1998.

tion the county had relatively little authority to regulate the spreading of sewage sludge.[88] The draft ordinance required permits and inspections be performed at the county level, in addition to other restrictions.[89] The ordinance was expected to transfer control over the regulation of sewage sludge application from the California Water Quality Control Board to the Kern County Agricultural Commissioner's office.[90] At a meeting in the spring of 1998, some speakers complained that the draft ordinance did not do enough to limit the amount of sludge that would be imported into the county.[91]

In 1999, the county passed the ordinance and phased out land application of PC biosolids in the unincorporated areas of Kern County over a three year period.[92] At the end of the three years, only EQ biosolids were allowed to be applied on Kern County land.[93] The ordinance was adopted to impose more stringent requirements on the disposal of sewage sludge to protect public health and the environment from any adverse effects caused by its use.[94]

Several sanitation agencies filed suit challenging the ordinance on the grounds that it violated the Commerce Clause, and was preempted by the federal Clean Water Act and the California Porter-Cologne Act.[95] The Court of Appeals rejected these claims and upheld the 1999 ordinance.[96]

Passage of this law motivated the city of Los Angeles to begin the Class A Biosolids Program, with an investigation of thermophilic[97] anaerobic digestion of sewage sludge.[98] Prior to the passage of the ordinance, Los Angeles' HTP produced PC biosolids by mesophilic[99] an-

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[88] *Id.*

[89] *Id.*

[90] Steven Mayer, Friday. *Public Hearing in Bakersfield, Calif., Addresses Sewage Waste Problems*, BAKERSFIELD CALIFORNIAN, Apr. 3, 1998.

[91] *Id.*

[92] City of Los Angeles v. County of Kern (*Kern*), CV 06-5094, 2006 U.S. Dist. LEXIS 81417, at *6 (Dist. Ct., Central Dist. Of Ca. Oct. 24, 2006).

[93] *Id.*

[94] *Measure E*, *supra* note 6, at 3.

[95] *Kern*, 2006 U.S. Dist. LEXIS 81417 at *6.

[96] *Id. at* *7 (*citing* County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern, 127 Cal.App.4th 1544, 1568, 27 Cal.Rptr.3d 28 (Ct. App. 2005)).

[97] California Energy Commision website, http://www.energy.ca.gov/pier/renewable/biomass/anaerobic_digestion/index.html (takes place at elevated temperatures between 50 and 60 degrees Celsius).

[98] Wilson, Iranpour, & Windau, *supra* note 30, at 1.

[99] California Energy Commision website, http://www.energy.ca.gov/pier/renewable/biomass/anaerobic_digestion/index.html (takes place at temperatures between 30-40 degrees Celsius).

aerobic digestion.[100] This investigation resulted in the implementation of a process that successfully produced EQ biosolids.[101]

B. Measure E- An Outright Ban on Land Application of Sewage Sludge

Three years after implementation of the ordinance that restricted application of biosolids in Kern County, opponents of the practice launched the "Keep Kern Clean" campaign to pass Measure E.[102] Measure E exercises Kern County's police power to forbid the application of all biosolids in the unincorporated parts of Kern County.[103] Kern County needed less than 16,000 signatures in order to place the measure on the ballot[104] but gathered more than 24,000.[105] The campaign to pass Measure E consisted of several anti-Los Angeles advertisements.[106]

Los Angeles officials were concerned about the likely election results and the additional cost to the city of Los Angeles if they were no longer allowed to apply sludge in Kern County.[107] By January 2006, the city of Los Angeles had already consulted with attorneys about protecting the use of Green Acres.[108] City officials claimed there were no legal or environmental problems with the application of sludge and through their own campaign attempted to convince Kern's voters not to pass the ordinance.[109]

Los Angeles' campaign was unsuccessful and in June of 2006, Kern County voters overwhelmingly adopted the initiative.[110] Although Measure E was effective immediately upon its passage, it gave preexisting permit holders a grace period of six months.[111] The application of sew-

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[100] Wilson, Iranpour, & Windau, *supra* note 30, at 1.

[101] *Id.*

[102] Kerry Cavanaugh, *Petition Would Divert Los Angeles Sludge*, DAILY NEWS OF LOS ANGELES, VALLEY ED., Dec. 10, 2005, at N5.

[103] *Kern*, CV 06-5094, 2006 U.S. Dist. LEXIS 81417 at *7 (Dist. Ct., Central Dist. Of Ca. Oct. 24, 2006).

[104] Patrick McGreevy, *Voters Seek to Block Sludge; Kern county residents qualify a measure to stop Los Angeles From Dumping Sewage on Farmland, Forcing the City to Look at Costly Alternatives*, L.A. TIMES, January 2, 2006, at Metro Desk Part B 1.

[105] Cavanaugh, *Petition Would Divert Los Angeles Sludge*, *supra* note 103.

[106] *Kern II*, 509 F.Supp 2nd 865, 875 (2007).

[107] McGreevy, *supra* note 105.

[108] *Id.*

[109] *Id.*

[110] *Kern*, CV 06-5094, 2006 U.S. Dist. LEXIS 81417 at *7 (Dist. Ct., Central Dist. Of Ca. Oct. 24, 2006).

[111] *Id. at* *8.

age sludge to land in Kern County's jurisdiction was to end on January 21, 2007.[112]

i. Litigation of Measure E

After passage of Measure E, Los Angeles and other plaintiffs filed suit in Federal Court in the Central District of California to stop the ban from taking effect.[113] The plaintiffs in the case included government entities such as the City of Los Angeles, Orange County Sanitation District, County Sanitation District No. 2 of Los Angeles, and private businesses and individuals that apply biosolids to land in Kern County.[114] The court granted the plaintiffs' motion for a preliminary injunction against Measure E. [115] The court held that the ban would cause irreparable harm to the plaintiffs if the injunction was not issued and damages would not sufficiently compensate for the costs of procuring alternate disposal methods.[116] The court also found that "public interest favors an injunction because shifting the biosolids currently applied to land in Kern County would have detrimental environmental effects, while there is no indication that the land currently in use has been harmed by the practice."[117] The motion for a preliminary injunction was granted based on the likelihood of success of Los Angeles' claims that Measure E violated the Dormant Commerce Clause, was preempted by the California Integrated Waste Management Act ("CIWMA"), and exceeded Kern's police power under the California Constitution.[118]

ii. The Opinion in The Battle Over Measure E

On August 9, 2007, the U.S. District Court for the Central District of California issued its decision regarding Measure E.[119] The court found that although Measure E appeared on its face to ban all sewage sludge application in the entire county, it actually imposed relatively few burdens on in-county interests.[120] Even though Kern County ships its sludge to a composting facility for sale to private firms outside of Kern County's jurisdiction, the cities within Kern County continue to apply

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[112] *Id.*
[113] *See Generally, Kern I*, 462 F.Supp.2d 1105 (2006).
[114] *Id.* at 1109.
[115] *Id.* at 1108-1109.
[116] *Id.* at 1108.
[117] *Id.*
[118] *Kern II*, 509 F.Supp.2d 865, 869 (2007).
[119] *Id.* at 865.
[120] *Id.* at 869.

the sludge to farms within the incorporated areas that are outside Kern County's jurisdiction.[121] Los Angeles requested summary judgment on the Dormant Commerce Clause claim, the preemption claim, and the police power claim.[122] Los Angeles' Equal Protection claim failed as a matter of law, because the ordinance furthers a legitimate local interest in guarding against potential environmental harm and nuisance associated with biosolids application.[123] Plaintiffs failed to show that the ordinances' purposes were an attempt to conceal their true purpose, even in light of the anti-Los Angeles rhetoric.[124]

iii. The Court's Commerce Clause Analysis

The Commerce Clause of the United States Constitution[125] gives Congress the power to regulate commerce and restricts the authority of states and local governments to implement laws that affect interstate commerce "even when legislating in areas of legitimate local concern, such as environmental protection and resource conservation."[126] Since Congress has complete authority to regulate commerce, it can "legislatively exempt local ordinances from the Commerce Clause's restrictions" if it specifically authorizes the exemption.[127] In order for an exemption to apply, Congress must explicitly order the authorization.[128] In the absence of such authorization, courts must not presume that Congress has allowed a "discriminatory or burdensome local regulation."[129] In situations where the Commerce Clause applies, the level of scrutiny used to determine if the ordinance violates the clause "depends on whether the ordinance at issue 'discriminates' against interstate commerce."[130] "Laws that discriminate against interstate commerce face a 'virtually per se rule of invalidity.'"[131] Discriminatory laws are subject to strict scrutiny and upheld only if the enacting body can prove that the statute "serves a legitimate local purpose" and the "purpose could not be served as well by

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[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] U.S. CONST. art. 1, § 8, cl. 3.
[126] *Kern II*, 509 F.Supp.2d at 881-882 (*quoting* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981)).
[127] *Id.* at 882 (*citing* White v. Massachusetts Council of Construction Employees, Inc., 460 U.S. 204, 213 (1983)).
[128] *Id.* (*citing* Hillside Dairy Inc. v. Lyons, 539 U S. 59, 66 (2003)).
[129] *Id.* (*citing* Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 66 (2003)).
[130] *Id.* (*citing* Granholm v. Heald, 544 U.S. 460, 476 (2005)).
[131] *Id.* (*quoting* Granholm, 544 U.S. at 476).

available non-discriminatory means."[132] There are three ways to prove discrimination: discrimination on the face of the statute; discriminatory purpose; or discriminatory effect.[133] "Discrimination simply means deferential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[134] Laws that have incidental effects on interstate commerce, but do not discriminate, are valid unless the burden on interstate "commerce is clearly excessive" relative to the local benefits.[135]

After an overview of the applicable law, the court began its analysis by discussing whether biosolids are articles in commerce. The regulation of waste and waste disposal by a local government is the "regulation of interstate commerce" when the regulation's economic effects reach beyond the locality.[136] The court noted the scarcity of disposal sites for biosolids and found that if Kern County sites are no longer available for biosolids application, the material likely will be diverted to Arizona.[137] This was sufficient to bring the ordinance under the authority of the Commerce Clause.[138] Although Kern County is a county and not a state, the Commerce Clause is still applicable.[139]

Next, the court discussed whether Congress exempted Measure E from the limits imposed by the Commerce Clause. In support of its argument that Measure E was exempt, Kern County cited a provision in the Clean Water Act, which provides:

> The determination of the manner of disposal or use of sludge is a local determination, except that it shall be unlawful for any person to dispose of sludge from a publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been estab-

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[132] *Id.* (*citing* Maine v. Taylor 477 U.S. 131, 138 (1986)).

[133] *Id.* at 884. (*citing* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 n.15 (1981)).

[134] *Id.* at 882. (*quoting* Oregon Waste System, Inc. v. Oregon Department of Environmental Quality, 511 U.S. 93, 99 (1994)).

[135] *Id.* (*citing* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

[136] *Id.* (*citing* C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 389 (1994); *also citing* Conservation Force, Inc. v. Manning, 301 F.3d 985, 993 (9th Cir. 2002) ("To determine whether the dormant Commerce Clause is applicable, we ask . . . whether the activity regulated . . . has a 'substantial effect' on interstate commerce such that Congress could regulate the activity.")).

[137] *Id.*

[138] *Id.* at 882-883.

[139] *Id.* at 883 (*citing* Fort Gratiot Sanitary Landfill, Inc. v. Mich. Department of Natural Resources, 504 U.S. 353, 361(1992) ("[A] State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through [**45] subdivisions of the State, rather than through the State itself.")).

> lished pursuant to subsection (d) of this section, except in accordance with such regulations.[140]

The court rejected this argument because although Congress authorized local regulation of biosolids, it did not expressly authorize local legislation that discriminates against interstate commerce.[141] "[C]ongressional approval for local regulation in general does not render the Commerce Clause inapplicable."[142] In order for Congress to exempt an ordinance from Commerce Clause restrictions it must make its intent to do so "unmistakably clear."[143]

Next, the court discussed whether Measure E's effect was to discriminate against interstate commerce. The court began its analysis by noting that Measure E was not discriminatory on its face, because it banned all biosolids without considering their origin.[144] However, a court may find a violation of the Commerce Clause based on either a "discriminatory effect" or a "discriminatory purpose."[145] The plaintiffs argued that the ordinance violated the Commerce Clause because its purpose and effect was to discriminate against Los Angeles and other Southern California cities.[146] The court agreed.[147]

The court held that, although in the equal protection context Kern's antagonism toward the Southern California communities did not negate the legitimate environmental concern involved, the concerns relevant to Commerce Clause jurisprudence did not allow the court to ignore the negative campaign rhetoric involved in the passage of Measure E.[148] The Measure E campaign included statements such as "Measure E will stop Los Angeles from dumping on Kern" and "[W]e've got a bully next door, flinging garbage over his fence into our yard."[149] The court found, "While these sorts of statements do not suggest that Measure E was enacted for the purpose of protecting local industry at the expense of outside businesses, they amply demonstrate that the initiative was not so

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[140] *Id.* (*quoting* 33 U.S.C §1345(e)).

[141] *Id.*

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

[143] *Id.* (*quoting* Maine v. Taylor, 477 U.S. 131,138-139 (1986)).

[144] *Id.*

[145] *Id.* (*citing* Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 471 n. 15 (1981)).

[146] *Id.*

[147] *Id.*

[148] *Id.* at 885 ("Even though for Equal Protection purposes the antagonism toward Los Angeles in particular and Southern California in general fails to negate a legitimate environmental concern about land application of biosolids in Kern County, Commerce Clause jurisprudence focuses on a different set of concerns—the discriminatory impact of the legislation on commerce or articles in commerce.").

[149] *Id.*

subtly animated by a specific desire to exclude Plaintiff's biosolids from the County."[150]

In a footnote, the court rejected Kern County's argument that campaign rhetoric was irrelevant because it was not included in the official ballot materials.[151] The court pointed out that the authorities cited by Kern County concerned a "reluctance to resolve statutory ambiguities by looking to materials not before the voters."[152] The court differentiated the use of the materials in the *Kern* case because the materials were before the voters.[153] They were disseminated through the internet, on the campaign website, and the websites of the mainstream media.[154] In *Kern*, the campaign rhetoric was not used to resolve statutory ambiguities, but to "assess voters' potentially wrongful intent."[155] The court cited *Washington v. Seattle School District No. 1*, an Equal Protection case, as authority to use the "potentially wrongful intent" of the voters in its analysis.[156] It also cited an Eighth Circuit case saying that "at least one federal court of appeals has, in a dormant Commerce Clause case, been willing to assess the intent of a local ordinance by looking directly to the intent of its drafters."[157]

The court went on to point out that although Measure E's drafters and supporters may have been motivated by environmental concern, their response was to ban biosolids application by out-of-county entities, while still allowing in-county entities to continue the practice.[158] The court found the resulting disparity was the intended effect, rather than merely an incidental one, based on a "campaign with the theme of independence from Southern California bullies."[159] The court held that Measure E was subject to strict scrutiny because it was intended to and did have a dis-

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[150] *Id.*

[151] *Id.* at 885 n.12.

[152] *Id.* (*citing In re* First Trust Deed & Investment, Inc., 253 F.3d 520, 530 (9th Cir. 2001) (Under California rule of statutory construction, courts may not "consider the motives or understandings of an individual legislator even if he or she authored the statute"); Horwich v. Superior Court, 21 Cal. 4th 272, 277 n.4 (1999) (declining to resolve ambiguity in Proposition 213 by looking to "matters [that] were not directly presented to the voters.").

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.* (*citing* Washington v. Seattle School District. No. 1, 458 U.S. 457, 471 (1982)).

[157] *Id.* (*citing* South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 596 (8th Cir. 2003)).

[158] *Id.* at 885.

[159] *Id.*

criminatory effect,[160] not because of an illegitimate purpose.[161] The court also held that the ordinance "plainly discriminat[ed] and was intended to discriminate, against out-of-county sludge."[162]

The court rejected Kern's argument that the ordinance "regulates even-handedly within the unincorporated areas of the County" because out-of-county interests were the only ones applying biosolids to land affected by the ordinance, and therefore they would be the only ones to incur the costs associated with the relocation of their Kern County operations.[163] The court noted that no cities within Kern County were sending their biosolids to land in the unincorporated parts of the city and Kern County sends its biosolids to SJC composting facility.[164] Essentially, the arrangement between Kern County and SJC insulated Kern County from the burden of the ordinance.[165] The continued ability of incorporated cities to apply biosolids within Kern County, coupled with the evidence of intent to exclude out-of-county biosolids as a whole, compelled the court to conclude that Measure E's practical effect was to allow in-county interests to apply biosolids while preventing out-of-county interests from doing so.[166] The court then held, "It may not be appropriate to consider the extra-jurisdictional effects of legislation in every case, but ignoring the conduct of Kern County municipalities would impose an artificiality on the analysis that would undermine the very purpose of long-standing Commerce Clause jurisprudence."[167]

The court was also concerned that such a high percentage of the decision-makers were willing to tolerate the application of locally generated biosolids but not the same activity by outside interests.[168] Nearly sixty-one percent of the registered voters in Kern County were residents of the incorporated cities in the County.[169] The court held "[t]his constitutes a

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[160] *Id.* at 885-886 (*citing* Spoklie v. Montana, 411 F.3d 1051, 1060 (9th Cir. 2005) (noting that the rule of strict scrutiny for Commerce Clause claims applies "where legislation results in 'patent discrimination against interstate trade.'" (*quoting* City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978))).

[161] *Id.* at 885 (*citing* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 470 nn.7, 15(1981)) ("presence of a genuine environmental purpose precludes application of strict scrutiny on purpose grounds").

[162] *Id.* at 886.

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.*

discriminatory effect far too conspicuous to hide behind the jurisdictional limits of Kern itself."[170]

Discrimination is present when the cost of regulation is shifted to another state that is not protected by the political process of the law-making state.[171] Measure E invalidly shifted the costs of the regulation "almost entirely to out-of-county interests through a process that was unchecked by the operation of the normal political restraints."[172] Kern County argued that Measure E was not discriminatory because plaintiffs were free to apply biosolids to the incorporated lands in Kern County.[173] The court responded to this argument by referring to the evidence in the record that Measure E would likely result in Los Angeles sending its biosolids to Arizona.[174] The court inferred that Los Angeles' "undisputed willingness to accept the greater distance to Arizona" led to the conclusion that it could not dispose of its sludge in the incorporated areas of Kern County.[175]

As additional evidence of this conclusion, the court noted a staff report that stated if SJC stopped accepting Kern County biosolids, Kern County would be forced to "find an incorporated city in the County that would accept [Kern] generated biosolids."[176] According to the court, this statement suggested that the incorporated cities in Kern County "exercise[d] some de facto control over imports."[177] The "de facto control," coupled with the anti-Los Angeles rhetoric, implied that the incorporated cities within Kern County would not be willing to accept Los Angeles biosolids, "leading to a County-wide import ban in practical effect."[178]

As further evidence of Measure E's intended effect, the court noted the campaign materials that claimed the ordinance would kick Los Angeles sludge out of Kern County.[179] It is bizarre to think that the residents of

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[170] *Id.* (*citing* Healy v. Beer Inst., 491 U.S. 324, 336 (1989) (holding that the courts must consider the practical effects of the law, including how it interacts with the laws of other jurisdictions, in considering Commerce Clause analysis)).

[171] *Id.* at 886-887 (*citing* United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Authority, 127 S.Ct. 1786, 1797 (2007) (explaining that Commerce Clause does not allow locales to further legitimate environmental purposes by forcing outsiders to "bear the brunt of conservation program for no apparent reason other than that they lived and voted in other" jurisdictions)).

[172] *Id.* at 887.

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *Id.* (*citing* Pls' Ex. 9 [McCutheon Decl.]; *quoting* Ex. A [Memo to Kern Board of Supervisors] at 299).

[177] *Id.*

[178] *Id.*

[179] *Id.*

the County were willing to accept sludge in the more populated areas of Kern while adamantly objecting to its acceptance in the unincorporated parts of the city.[180] The only reasonable inference based on the evidence is that the ordinance would force Southern California cities out of Kern altogether, not just diverting them to the incorporated parts.[181] In contrast to any argument otherwise, there was no evidence tending to indicate the plaintiffs could have used the incorporated areas of the County.[182] Therefore, the court held that the plaintiffs proved, as a matter of law, that Measure E had a discriminatory effect and must be analyzed under strict scrutiny.[183]

Strict scrutiny required that Kern County prove there were no feasible non-discriminatory means to address its legitimate environmental concern.[184] Kern County could have "regulated the volume, location, and quality" of the biosolids being applied within the County, rather than instituting an absolute ban.[185] For that reason, Measure E failed strict scrutiny.[186] The court noted that Kern County presented no argument that these other methods were infeasible or insufficient to deal with their environmental concerns.[187] Based on this analysis the court granted the plaintiffs' motion for summary judgment on the Commerce Clause claim.[188]

The court also held that the plaintiffs' argument regarding their CIWMA claim was successful as a matter of law.[189] The "CIWMA expresses a statewide policy of promoting recycling over other disposal methods for 'solid waste,' " which includes biosolids.[190] The plaintiffs successfully argued that a ban on land application frustrated the statutory objective and was invalid due to conflict preemption.[191]

The court was unable to summarily resolve the police powers claim based on the evidence presented.[192] Considering the expense of litigating the police powers claim and the fact that the Commerce Clause claim and the CIWMA preemption claims already entitled the plaintiff to the relief

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[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Id.* at 887-888.
[186] *Id.* at 888.
[187] *Id.*
[188] *Id.*
[189] *Id.* at 870.
[190] *Id.*
[191] *Id.*
[192] *Id.*

sought, the court granted the plaintiffs' request for entry of final judgment.[193]

VI. KERN COUNTY'S LIABILITY FOR ATTORNEY'S FEES

The court's holding that Kern County violated the Commerce Clause may lead to potentially costly consequences for Kern County.[194] A court has discretion to grant a prevailing party reasonable attorney's fees in an action to enforce a provision under 42 U.S.C §1983.[195] "A prevailing party under §1988 is one who obtains actual relief on the merits" of the claim and the relief "materially alters the legal relationship between the parties and modifies the non[-]prevailing party's behavior in a way that directly benefits the prevailing party."[196] A prevailing party should generally receive attorney's fees unless "special circumstances" are present that would make the award unfair,[197] and the burden is on the non-moving party to prove the special circumstances.[198] The non-prevailing party's financial inability to pay his own attorney's fees is not grounds on which to deny the award.[199] The calculation of reasonable attorney's fees should be based on the number of hours expended on the action multiplied by a reasonable hourly rate,[200] but the court does have discretion to adjust this amount where it is appropriate to do so.[201]

In the *Kern* case, the court found that the plaintiffs were prevailing parties under §1988 based on the Commerce Clause violation and therefore entitled to attorney's fees unless "special circumstances" exist.[202] Kern County failed to prove that special circumstances exist.[203] The plaintiffs claimed attorney's fees in the amount of $1,772,980 and costs of $146,858.[204] Nonetheless, the court denied the plaintiffs' claim for attorney fees, without prejudice, because they did not provide proof of the amount of hours reasonably spent on the claim and the reasonable

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[193] *Id.*

[194] *See Generally,* City of Los Angeles v. County of Kern (*Kern III*), No CV 06-5094, U.S. Dist LEXIS 81696 (Dist. Ct., Central Dist. Of Ca. Oct. 26, 2007).

[195] *Id.* at *6 (*citing* 42 U.S.C. §1988(b)).

[196] *Id.* (*citing* Farrar v. Hobby, 506 U.S. 103, 111-12 (1992)).

[197] *Id.* (*citing* Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968)).

[198] *Id.* (*citing* Herrington v. County of Sonoma, 883 F.2d 739, 744 (9th Cir. 1989).

[199] *Id.* at *7 (*citing* Herrington, 883 F.2d at 743).

[200] *Id.* at *8 (*citing* Miller v. Los Angeles County Bd. Of Education, 827 F.2d 617, 621 (9th Cir. 1987)).

[201] *Id.* (*citing* Miller, 827 F.2d at 621).

[202] *Id.* at *9.

[203] *Id.*

[204] *Id.* at *11.

hourly fee of the attorneys.[205] The plaintiffs may renew their claim for attorney's fees if they provide the court with the required evidence to substantiate the fee award.[206]

VII. DISCUSSION OF THE COURT'S COMMERCE CLAUSE ANALYSIS

In light of current Commerce Clause jurisprudence dealing with waste disposal, the ruling of the court in *Kern* is not surprising. The courts' interpretation of the Dormant Commerce Clause has evolved from a prohibition against economic protectionism and the protection of fair representation, to the defense of an unfettered market.[207] This shift comes at the expense of the constitutional balance of federalism and environmental concerns.[208] Even in light of Commerce Clause jurisprudence, the court in the Kern case erred in its Commerce Clause analysis in several respects.

First, the court's analysis in the *Kern* decision in finding discrimination is confusing. The court held that the basis of discrimination was not a discriminatory purpose but a discriminatory effect.[209] Nonetheless, its analysis is centered on the intent of the voters,[210] which would be more appropriate for a discriminatory purpose analysis.

The *Kern* court cited *Washington v. Seattle School Dist. No. 1*,[211] and *S.D. Farm Bureau, Inc. v. Hazeltine*,[212] as authority to use the potential wrongful intent of the voters in its Commerce Clause analysis.[213] However, in *Washington*, the Supreme Court used the intent of the legislators to analyze an Equal Protection claim.[214] In *Hazeltine*, the federal appellate court used the intent of the drafters of an ordinance in its Commerce

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[205] *Id.*

[206] *Id.* at *12.

[207] Robert R.M. Verchick, *The Commerce Clause, Environmental Justice, and the Interstate Garbage Wars*, 70 S.CAL.L.REV. 1239, 1243, 1270 (1997).

[208] *Id.* at 1243.

[209] *Kern II*, 509 F. Supp 2d 865, 885 ("...[I]t follows that Measure E must be subjected to strict scrutiny not because of an illegitimate purpose, *Minnesota*, 449 U.S. at 463, 470 nn.7, 15 (presence of genuine environmental purpose precludes application of strict scrutiny on purpose grounds), but rather because the legislation was intended to and does have a discriminatory effect.").

[210] *Id.*

[211] *See generally* Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982).

[212] *See generally* South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003).

[213] *Kern II*, 509 F. Supp 2d at 885 (*citing* Washington, 458 U.S. at 471; Hazeltine, 340 F.3d at 596).

[214] *Washington*, 458 U.S. at 472.

Clause analysis.[215] Even so, this case is distinguishable from the *Kern* case because it relied on the intent of the drafters for the purpose of proving a discriminatory purpose rather than a discriminatory effect.[216] Also, in *Hazeltine*, the legislators had no support to conclude the ordinance would protect the legitimate purpose that they claimed, and "scant evidence in the record to suggest the drafters made an effort to find such information."[217] Essentially, the lack of an actual legitimate purpose coupled with the campaign rhetoric was enough to show a discriminatory purpose.[218] The court in *Kern* erred because there is no precedent that allows the court to use the intent of the legislators to prove a discriminatory effect.

Secondly, the court claimed the intent of the voters, coupled with the allowance of sludge disposal in the incorporated parts of the city, proved that the effect of the ordinance was intentional, not incidental, and therefore subject to strict scrutiny.[219] "A state law that is challenged on Dormant Commerce Clause grounds is subject to a two-tiered analysis. First, the court considers whether the challenged law discriminates against interstate commerce."[220] "If the law is not discriminatory, the second analytical tier provides that the law will be struck down only if the burden it imposes on interstate commerce 'is clearly excessive in relation to its putative local benefits.'"[221] In its analysis, the court failed to apply the two-tiered test appropriately. It used the second prong to prove that the first prong applied, rather than using the analytical framework set forth in past precedent.

Third, the court in the *Kern* case cited *Healy v. Beer Inst.* for the premise that the court must analyze the ordinance by considering how it interacts with the law of other jurisdictions.[222] *Healy* is distinguishable from the *Kern* case because in *Healy* "the critical inquiry was whether the practical effect of the statute [was] to control conduct beyond the boundaries of the State."[223] The *Healy* case was based on a Connecticut statute that required beer importers to verify their posted prices were no higher than the prices in neighboring states, including any discounts not

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[215] *Hazeltine*, 340 F.3d at 593-595.

[216] *Id.* at 593.

[217] *Id.* at 594.

[218] *Id.* at 593-596.

[219] City of Los Angeles v. County of Kern 509 F.Supp 2d 865, 885 (2007).

[220] Hazeltine, 340 F.3d at 593 (*citing* Oregon Waste Sysems, Inc. v. Department of Environmental Quality, 511 U.S. 93, 99 (1994)).

[221] *Hazeltine*, 340 F.3d at 593 (*citing* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

[222] *Kern II*, 509 F. Supp 2d at 886 (*citing* Healy v. Beer Inst., 491 U.S. 324, 336 (1989)).

[223] *Healy*, 491 U.S. at 336.

permitted in Connecticut.[224] The statute in question had the effect of controlling the prices an importer was allowed to charge for beer in neighboring states.[225] Measure E is distinguishable because it did not restrict any activity outside of the unincorporated parts of the County.[226]

In a previous decision decided in the Fifth Appellate District, Kern's ordinance that banned application of Class B sewage sludge was analyzed under the Commerce Clause.[227] Plaintiffs had a similar argument that the ordinance was discriminatory based on the fact that the ordinance did not apply to the incorporated cities within Kern County.[228] The court rejected the plaintiffs' argument that the Commerce Clause applied.[229] The court held, "[p]laintiffs' claim of discrimination in practical effect is based on an incorrect comparison of the impacts of different regulations, rather than different impacts caused by the challenged ordinance."[230] The court noted that the incorporated areas of Kern are outside the jurisdiction of Kern County.[231] The appropriate comparison is "between the impact of the ordinance on sewage sludge generated outside the jurisdictional authority of the County and the impact on sewage sludge generated within that area."[232]

Lastly, the court in *Kern* jumped to an unlikely inference that was inappropriate under the summary judgment standard of review. In response to Kern County's suggestion that Los Angeles was not barred from applying its sewage sludge in the incorporated parts of Kern County, the court referred to a staff report written to Kern County's Board of Supervisors that opined if Kern County was no longer able to dispose of its sewage sludge at the composting facility it was using, the County would be in a position to "find an incorporated city in the County that would accept [Kern] generated biosolids."[233] The court found that this report "suggests that the cities themselves exercise some de facto control over imports, which, in combination with the anti-Los Angeles rhetoric, suggests they would not accept Plaintiff's biosolids, thereby

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[224] *Id.* at 326, 335, 338.

[225] *Id.* at 338.

[226] *Measure E*, *supra* note 6.

[227] County Sanitation District No. 2 of Los Angeles County *et al.* v. County of Kern, 127 Cal.App.4th 1544, 1607-1614 (2005).

[228] *Id.* at 1607.

[229] *Id.* at 1614.

[230] *Id.* at 1612.

[231] *Id.*

[232] *Id.* (*citing* Associated Industries of Missouri v. Lohman, 511 U.S. 641, 650 (1994) ("discrimination is appropriately assessed with reference to the specific subdivision in which applicable laws reveal differential treatment.")

[233] *Kern II*, 509 F.Supp.2d 865, 887 (2007).

leading to a County-wide import ban in practical effect."[234] A more literal interpretation of the memo is that Kern County also faces a potential burden created by Measure E. If SJC refuses to accept Kern County's sludge, it will be in the same position as Los Angeles, where it would need to find a place to apply its biosolids.[235] It is only proper for a court to grant a motion for summary judgment if the court finds "there is no genuine issue as to any material fact."[236] The court's inference, in the context of a summary judgment motion, was inappropriate because there was a "genuine issue" regarding the implications of the memo. Nonetheless, based on current Commerce Clause jurisdiction that protects an unfettered market, the decision of the court in the *Kern* case would likely not be overturned based on the errors of the court.

VIII. RECOMMENDATION

In light of the present Commerce Clause jurisprudence, the probability of a Commerce Clause case being reversed by the appellate court is unlikely. However, courts should overturn precedent in light of current environmental concerns. The court should rethink Commerce Clause jurisprudence with regard to waste disposal and consider adopting the dissent in *City of Philadelphia v. New Jersey*. *Philadelphia* invalidated a New Jersey statute prohibiting the importation of waste for disposal in New Jersey landfills.[237]

In his dissent, Justice Rehnquist[238] criticized the majority's interpretation of the Commerce Clause.[239] He began the analysis by noting the growing problem of the Nation's treatment and disposal of waste.[240] He also noted known health and safety issues related to the disposal of solid waste in sanitary landfills, such as the inevitable leachate of pollution and the buildup of methane gas.[241] Based on the majority's interpretation, New Jersey was faced with a "Hobson choice."[242] It must prohibit all waste from disposal in New Jersey landfills and face the problem of disposing of waste generated within the State, or accept waste from "every portion of the United States," and substantially increase the safety

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[234] *Id.*

[235] *Id.*

[236] *Id.* at 878 (*citing* Fed. R.Civ P. 56(c)).

[237] Philadelphia v. New Jersey, 437 U.S. 617, 630 (1978) (Rehnquist J., dissenting).

[238] The dissent was written prior to his elevation to Chief Justice.

[239] *See Philadelphia*, 437 U.S. at 630-633.

[240] *Id.* at 630 (*citing* Resource and Conservation Recovery Act of 1976 90 Stat.2795 as Congress' recognition of the problem of waste disposal).

[241] *Id.*

[242] *Id.* at 631.

risks associated with its disposal.[243] "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."[244]

Justice Rehnquist noted the longstanding exception to the Commerce Clause that allows states to prohibit the importation of items "'which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of small-pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption.'"[245] He argued that the quarantine exception applied to the New Jersey statute.[246] Under Commerce Clause precedent prior to the *Philadelphia* case, New Jersey should have been free to prohibit the importation of waste while remaining free to dispose of its own waste within the State.[247]

The majority in *Philadelphia* claimed that quarantine laws were distinguishable from the New Jersey statute because the quarantine laws "banned the importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils."[248] New Jersey's concern was not with the movement of the item but with the ability to safely dispose of it once it reached the State.[249] Justice Rehnquist questioned the logic of the court regarding the distinction when both are clearly dangerous.[250] "I do not see why a State may ban the importation of items whose movement risks contagion, but cannot ban the importation of items which, although they may be transported into the State without undue hazard, will then simply pile up in an ever increasing danger to the public's health and safety."[251]

The fact that New Jersey allowed disposal of in-State waste did not demonstrate that solid waste was not innately harmful, or that the statute was enacted for reasons other than health and safety.[252] New Jersey must treat waste out of necessity, just like diseased animals under the excep-

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[243] *Id.*

[244] *Id.* at 632.

[245] *Id.* at 631 (*quoting* Bowman v. Chicago & Northwestern Railway Co., 125 U.S. 465, 489 (1888); *also citing* Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511, 525 (1935); Sligh v. Kirkwood, 237 U.S. 52, 59-60 (1915); Asbell v. Kansas, 209 U.S. 251 (1908); Railroad Co. v. Husen, 95 U.S. 465, 472 (1878).

[246] *Id.* at 632.

[247] *Id.*

[248] *Id.*at 628-629. (majority opinion) (*quoting Bowman*, 125 U.S. at 628-629).

[249] *Id.* at 629.

[250] *See Id.* at 632 (Rehnquist J., dissenting).

[251] *Id* at 632-633.

[252] *Id.* at 633.

tion of the quarantine laws, and should not be forced to accept waste from outside its borders.[253]

IX. CONCLUSION

Societal attitudes regarding waste have not changed since we first decided to dispose of waste through water. People are still accustomed to sending their waste away to be dealt with by those living down river. In this case, Kern County is burdened by the effects of society's attitude. Commerce Clause precedent helped to create an environment that permits this attitude to continue.

The current Commerce Clause jurisprudence regarding waste disposal is not appropriate for the country's environmental future. Government entities should be free to dispose of waste generated within their borders without being forced to also dispose of their neighbor's waste. Rather, states should become accountable for their own waste and the potential environmental harm associated with it. Once this occurs, other technologies and alternatives will inevitably be created and utilized.[254] While the reduction of sewage sludge may not be a feasible task at this time, Southern California should beneficially use more sewage sludge within its borders and reduce other areas of waste[255] so that the problem of waste disposal becomes more manageable, thereby reducing its reliance on neighboring cities and counties.

BRIANNA ELLIS

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[253] *Id.*

[254] Measure E may have spurred Orange County's decision to dispose of its waste within its borders, and Los Angeles is considering a potential alternative to disposal on farmland through injection into wells dug one mile deep, which would produce methane that could be caught for future use. Stacey Shepard, *Los Angeles to Give Underground Sludge Storage a Shot*, BAKERSFIELD CALIFORNIAN, December 20, 2006. Available at http://bakersfield.com/102/story/90459.html.

[255] Los Angeles could implement a more vigorous recycling program, educate residents, and possibly place restrictions on the production of consumer goods that create waste.