

# PRUDENTIAL STANDING AND THE DORMANT COMMERCE CLAUSE: WHY THE “ZONE OF INTERESTS” TEST SHOULD NOT APPLY TO CONSTITUTIONAL CASES

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## INTRODUCTION

In a unique decision, the Fifth Circuit in *National Solid Waste Management Ass’n v. Pine Belt Regional Solid Waste Management Authority*<sup>1</sup> (“NSWMA”) used the prudential “zone of interests”<sup>2</sup> standing test to bar the plaintiffs, who met constitutional standing requirements, from filing a facial, per se challenge under the dormant Commerce Clause.<sup>3</sup> Six Mississippi counties and cities that are members of the Pine Belt Regional Solid Waste Management Authority (“the Authority”) had enacted “flow control” ordinances that required all solid waste collected in their six jurisdictions be sent to the Authority’s facilities, and, thus, prohibited the export of waste to alternative, cheaper, in-state or out-of-state sites.<sup>4</sup> Under the dormant Commerce Clause, the Supreme Court had invalidated as facially discriminatory a similar flow control ordinance requiring all local waste be processed by a government-approved processor.<sup>5</sup> This Article will demonstrate that applying the murky “zone of interests” standing test to the ill-defined dormant Commerce Clause doctrine is counterproductive.<sup>6</sup> In general, courts should require Commerce Clause plaintiffs and most other constitutional litigants to show only that they have constitutional standing without the additional hurdle of meeting the “zone of interests” standing test. Courts should recognize that intrastate waste carriers harmed by a discriminatory ordinance that

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1. 389 F.3d 491 (5th Cir. 2004), *cert. denied*, 126 S. Ct. 332 (2005).

2. See *infra* notes 87–91 and accompanying text.

3. See *Nat’l Solid Waste Mgmt. Ass’n*, 389 F.3d at 493–503; *infra* notes 29–30 and accompanying text.

4. See *Nat’l Solid Waste Mgmt. Ass’n*, 389 F.3d at 494–96.

5. See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *infra* notes 62, 72 and accompanying text.

6. See *infra* notes 43–46, 99–102, 137–53, 248–57, 262–86 and accompanying text.

discriminates against both intrastate and interstate commerce are usually “reliable” plaintiffs that may raise dormant Commerce Clause challenges. If the Court abolishes the “zone of interests” test for constitutional cases, its Article III standing requirements are sufficiently restrictive to prevent frivolous constitutional suits, and courts could still apply other prudential limitations to standing.

The Fifth Circuit held that the two plaintiffs’ allegations of financial harm met the Constitution’s Article III standing requirements to sue because invalidating the ordinances would provide a remedy for their injuries.<sup>7</sup> Rejecting First and Ninth Circuit decisions allowing intrastate waste shippers to sue under the Commerce Clause,<sup>8</sup> however, the Fifth Circuit concluded that the plaintiffs lacked prudential standing under the “zone of interests” test to challenge the laws as facially or per se discriminatory.<sup>9</sup> Conversely, because the ordinances imposed higher costs on the plaintiffs’ parent companies<sup>10</sup> that affected their national and regional competitive interests, the Fifth Circuit held that the plaintiffs had “zone of interests” standing to challenge whether the ordinances imposed excessive burdens on interstate commerce under the “*Pike* balancing test.”<sup>11</sup> The Fifth Circuit’s fine distinction between standing under the *Pike* and per se tests is unconvincing because the Supreme Court has conceded that there is often no clear line between the two.<sup>12</sup>

More broadly, it makes little sense to impose “zone of interests” barriers in constitutional cases because the Supreme Court has never provided a clear test for when a plaintiff has a relevant interest.<sup>13</sup> Since 1970, the Court has decided only one constitutional case involving the zone of interests on the merits. In subsequent cases it has, however, discussed in dicta how and whether to apply the

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7. *Nat’l Solid Waste Mgmt. Ass’n*, 389 F.3d at 498.

8. *Id.* at 500 n.16 (discussing disagreement with *On the Green Apartments L.L.C. v. City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001) and *Houlton Citizens’ Coal. v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999)).

9. *Id.* at 498–500 & n.14.

10. *Id.* at 501 & n.18 (describing Waste Management, Inc. as the “parent” company of Waste Management of Mississippi, Inc. and implying the same relationship between BFI Waste Systems of Mississippi LLC and BFI Waste Systems). “Houston-based BFI is the third-largest waste disposal company in the country. It is a subsidiary of the second-largest such company, Allied Waste Industries of Scottsdale, Ariz.,” which is now also named Waste Industries USA, Inc. Jeffrey Scott, *Atlanta Trash Bids Due this Month: Garbage Must Go Elsewhere as Dump Closes*, ATLANTA JOURNAL-CONST., Mar. 3, 2004, at 3B. Waste Management is the largest waste disposal company in the United States. Diane Freeman, *Area Collectors Talking Trash Rate Cuts*, ROCKY MOUNTAIN NEWS, Mar. 18, 2004, at 1B.

11. *See Pike v. Bruce Church*, 397 U.S. 137 (1970); *infra* notes 31, 41–42 and accompanying text. On the merits of the *Pike* claim, the Fifth Circuit required the plaintiffs to show that the ordinances had a “disparate impact” on interstate commerce greater than the laws’ impact on intrastate commerce. *See Nat’l Solid Waste Mgmt. Ass’n*, 389 F.3d at 500–03. Because the ordinances had approximately the same impact on both intrastate and interstate waste hauling, the court held that the ordinances did not violate the Commerce Clause under the *Pike* test. *Id.* A discussion of the Fifth Circuit’s decision on the merits is beyond the scope of this Article, which focuses on standing issues.

12. *See infra* notes 43–46, 248–57 and accompanying text.

13. *See infra* notes 99–102, 137–53 and accompanying text.

test to constitutional issues.<sup>14</sup> In *Clarke v. Securities Industry Ass'n*,<sup>15</sup> a case involving the Administrative Procedure Act (“APA”),<sup>16</sup> Justice White’s majority opinion argued in dicta that the “zone of interests” test should primarily apply to APA cases and focus on whether Congress intended to allow plaintiffs to use the APA to sue to enforce specific federal statutory provisions.<sup>17</sup> He stated that it is difficult to fashion a comprehensive “zone of interests” test that applies to all statutory and constitutional issues, and therefore, he implied that the test should be limited to APA cases where it might be possible to fashion a workable standard.<sup>18</sup>

By contrast, Justice Scalia in his dissenting opinion in *Wyoming v. Oklahoma*<sup>19</sup> argued that the test should apply in dormant Commerce Clause cases, and more generally in all constitutional cases, as a way to reduce the load of constitutional cases in federal courts.<sup>20</sup> Based on his argument that the State of Wyoming did not meet the test because it had only an indirect interest in collecting taxes from interstate trade and not a direct interest in selling coal in other states, Justice Scalia would apparently apply the test so that only direct beneficiaries of interstate trade are within the zone of interests, thereby further narrowing the category of people with standing. His direct-indirect approach as to which plaintiffs meet the test is contrary to precedent, he failed to demonstrate why the test should not include indirect beneficiaries, and he did not offer a workable test for distinguishing between direct and indirect beneficiaries.<sup>21</sup>

If a plaintiff’s suit serves the purposes of a constitutional provision, whether the plaintiff directly benefits from the suit’s invalidation of an unconstitutional law or only indirectly benefits from the invalidation should be irrelevant as long as the plaintiff meets Article III’s standing test and does not raise other prudential concerns.<sup>22</sup> In *Boston Stock Exchange v. State Tax Commission*, its only “zone of interests” test involving the Constitution and the dormant Commerce Clause, the Court held that the plaintiff’s allegations that a New York transfer tax “indirectly” affected their ability to engage in interstate commerce was sufficient to give them zone of interests standing.<sup>23</sup> This holding appeared to

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14. See *Boston Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 320 n.3 (1977); *infra* notes 23, 110, 124, 181, 206, 273 and accompanying text.

15. 479 U.S. 388 (1987).

16. 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000).

17. See *infra* notes 103–07 and accompanying text.

18. See *infra* notes 108–09 and accompanying text.

19. 502 U.S. 437 (1992).

20. See *id.* at 473 (Scalia, J., dissenting); *infra* notes 121–31, 146–53, 268–89 and accompanying text.

21. See *infra* notes 121–25, 150–51, 273–74 and accompanying text.

22. See *infra* notes 141–52, 268–89 and accompanying text.

23. 429 U.S. 318, 320 n.3 (1977) (stating that the plaintiffs “are asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business and they allege that the transfer tax indirectly infringes on that right. Thus, they are ‘arguably within the zone of interests to be protected . . . by the . . . constitutional guarantee in question’” (quoting *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970))); see *infra* notes 110, 123–25, 181, 206, 273–74 and accompanying text.

include indirect beneficiaries within the dormant Commerce Clause's zone of interests. Because of these varying definitions of who falls within the zone of interests, the test is difficult to apply to constitutional issues, and federal courts should presumptively vindicate the constitutional rights of those who meet Article III's three-part standing test. Therefore, the Court should adopt a new rule that limits the test to statutory claims only.<sup>24</sup>

Part I of this Article will discuss the dormant Commerce Clause and flow control ordinances to provide necessary background in understanding the Fifth Circuit's decision. Part II will discuss standing and the prudential "zone of interests" test. Part III will compare the Fifth Circuit's zone of interests analysis with other circuits to demonstrate that the Fifth Circuit's approach to prudential standing is flawed.

## I. THE DORMANT COMMERCE CLAUSE AND FLOW CONTROL ORDINANCES

Subpart A will review the dormant Commerce Clause doctrine. Subpart B will discuss flow control ordinances. Subpart C will examine the *Carbone* decision, which struck down a facially discriminatory flow control ordinance.<sup>25</sup> And Subpart D will examine the Mississippi flow control ordinances at issue before the Fifth Circuit.

### A. Dormant Commerce Clause

The Commerce Clause provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."<sup>26</sup> The Supreme Court has also interpreted the Clause to contain implicit or "dormant" limits that authorize federal courts to invalidate local laws that burden the flow of interstate commerce.<sup>27</sup> The dormant Commerce Clause "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."<sup>28</sup>

The Court has used a two-part test to determine whether a law violates the dormant Commerce Clause. First, a court applies a "virtually *per se* rule of invalidity"<sup>29</sup> against laws that facially, purposefully, or effectively discriminate against interstate trade. Such laws are invalid unless no nondiscriminatory alternatives exist to achieve an important local purpose unrelated to economic

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24. See *infra* notes 137–52, 268–89 and accompanying text.

25. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

26. U.S. CONST. art. I, § 8, cl. 3.

27. *Cf. Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179–80 (1995); *infra* notes 28–42 and accompanying text. A minority of the Court, including Justices Scalia and Thomas, has proposed to eliminate the dormant Commerce Clause doctrine either because it is not explicitly in the text of the Constitution or the doctrine is too inconsistent. See *infra* notes 46, 253, 277 and accompanying text.

28. *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992).

29. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

protectionism.<sup>30</sup> Second, “[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental,” a court uses the *Pike* balancing test to examine whether a law’s burdens on interstate commerce are “clearly excessive in relation to the putative local benefits.”<sup>31</sup>

In applying the *per se* test, the Court has used three different, sometimes overlapping grounds for finding that a statute discriminates against interstate commerce.<sup>32</sup> First, the easiest example of invalid discrimination is a local law that facially discriminates by “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”<sup>33</sup> Second, a local law that appears to be facially neutral is invalid if it was enacted by a legislative body with the purpose of economic discrimination.<sup>34</sup> Third, courts apply the *per se* test against statutes with clearly discriminatory effects.<sup>35</sup>

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30. See *Carbone*, 511 U.S. at 392 (“Discrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.”); *Fort Gratiot Sanitary Landfill v. Mich. Dep’t of Natural Res.*, 504 U.S. 353, 366 (1992) (“Because those provisions unambiguously discriminate against interstate commerce, the State bears the burden of proving that they further health and safety concerns that cannot be adequately served by nondiscriminatory alternatives.”); Natasha Ernst, *Flow Control Ordinances in a Post-Carbone World*, 13 PENN. ST. ENVTL. L. REV. 53, 55 (2004); Douglas T. Kendall, *Redefining Federalism*, 35 ENVTL. L. REP. 10445, 10459 (2005).

31. See *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970); *infra* notes 41–46 and accompanying text.

32. See *McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 442 (6th Cir. 2000) (“When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [the Supreme Court has] generally struck down the statute without further inquiry.”); Julian Cyril Zebot, *Awakening a Sleeping Dog: An Examination of the Confusion in Ascertaining Purposeful Discrimination Against Interstate Commerce*, 86 MINN. L. REV. 1063, 1076 (2002) (“A statute is *per se* invalid if it discriminates against interstate commerce on its face, in its purpose, or in its effect.” (citing *Wyoming*, 502 U.S. at 454–55)).

33. *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994); see also *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992) (“At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.” (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979))).

34. *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (“A finding that state legislation constitutes ‘economic protectionism’ may be made on the basis of . . . discriminatory purpose . . . .”); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 336 (4th Cir. 2001) (“We conclude the record in this case establishes that no reasonable juror could find that in enacting the statutory provisions at issue Virginia’s General Assembly acted without a discriminatory purpose.”); Zebot, *supra* note 32, at 1077–84 (discussing cases and observing that the law is not clear regarding what constitutes discriminatory purpose under dormant Commerce Clause).

35. See *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194, 196 (1994) (“Massachusetts’ pricing order is clearly unconstitutional. Its avowed purpose and its undisputed effect are to enable higher cost Massachusetts dairy farmers to compete with

In *Chemical Waste Management, Inc. v. Hunt*,<sup>36</sup> the Court invalidated an Alabama statute that imposed extra fees only on out-of-state waste. The Court reasoned that: “Because the additional fee discriminates both on its face and in practical effect, the burden falls on the State ‘to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.’”<sup>37</sup> In its first “garbage” case, *City of Philadelphia v. New Jersey*,<sup>38</sup> the Court struck down as per se unconstitutional a New Jersey statute that prohibited the import of out-of-state waste because the law reflected clear economic protectionism, and the state failed to demonstrate that out-of-state waste was more dangerous than in-state waste.<sup>39</sup> In its only case upholding a facially discriminatory statute, the Court held that the State of Maine could prohibit the importation of out-of-state baitfish because the prohibition provided the only practicable means to prevent contamination of Maine’s rivers by parasites and alien fish species.<sup>40</sup>

If it is not facially, purposefully, or effectively discriminatory against out-of-state interests, courts analyze a law using the *Pike* balancing test. Under the *Pike* test, if a “statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>41</sup> The *Pike* Court further explained that:

If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.<sup>42</sup>

The Court has acknowledged that it is often not clear whether a local law with alleged discriminatory purposes or effects should be analyzed under the per se

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lower cost dairy farmers in other States.”); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 275–76 (1988) (invalidating reciprocal tax credit because it, “in effect, tax[es] a product made by [Indiana] manufacturers at a rate higher than the same product made by Ohio manufacturers”); *Bacchus Imports, Ltd.*, 468 U.S. at 270 (“A finding that state legislation constitutes ‘economic protectionism’ may be made on the basis of either discriminatory purpose . . . or discriminatory effect . . .”); *Kendall*, *supra* note 30, at 10460; *Zebot*, *supra* note 32, at 1065 n.15, 1081–82.

36. 504 U.S. 334 (1992).

37. *Id.* at 342 (quoting *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 353 (1977)).

38. 437 U.S. 617 (1978).

39. *Id.* at 624–28; Paula C. Murray & David B. Spence, *Fair Weather Federalism and America’s Waste Disposal Crisis*, 27 HARV. ENVTL. L. REV. 71, 76–77 (2003).

40. *Maine v. Taylor*, 477 U.S. 131, 148–52 (1986); *Kendall*, *supra* note 30, at 10459 n.117 (stating that *Maine v. Taylor* is the only case where the Supreme Court did not invalidate a state law under the per se, strict scrutiny approach).

41. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970); *see also* Ernst, *supra* note 30, at 58; Murray & Spence, *supra* note 39, at 76–77.

42. *Pike*, 397 U.S. at 142; Murray & Spence, *supra* note 39, at 76–77.

or the *Pike* test.<sup>43</sup> The *Pike* decision itself set forth the balancing test, but then analyzed the challenged law using a strict scrutiny, per se approach. Subsequent cases that applied the *Pike* test have often focused on issues of discriminatory purposes or effects—issues that arguably should be analyzed under the per se test.<sup>44</sup> Justice Souter has argued that the Court does not “balance” competing local and interstate interests when it applies the *Pike* test:

Although this analysis of competing interests has sometimes been called a “balancing test,” it is not so much an open-ended weighing of an ordinance’s pros and cons, as an assessment of whether an ordinance discriminates in practice or otherwise unjustifiably operates to isolate a State’s economy from the national common market.<sup>45</sup>

Justice Scalia has also argued that the *Pike* test provides no guidance to judges on how to balance competing local and national interests and likened the balancing to “judging whether a particular line is longer than a particular rock is heavy.”<sup>46</sup>

### ***B. Solid Waste Problems and Flow Control Solutions***

There has been a significant increase in the amount of household municipal solid waste (“MSW”) since 1960.<sup>47</sup> To address increasing amounts of

43. See *infra* notes 44–46 and accompanying text.

44. *Pike*, 397 U.S. at 145 (assuming the legitimacy of the asserted state interest, but nevertheless concluding that “[e]ven where the State is pursuing a clearly legitimate local interest, this particular burden on commerce [requiring business operations to be performed in the home State that could more efficiently be performed elsewhere] has been declared to be virtually per se illegal”); Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1, 43 n.271 (2003) (observing that *Pike* did not apply a balancing test in assessing constitutionality of the challenged law, and that scholars have questioned whether the Court actually applies a *Pike* balancing test).

45. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 423 (1994) (Souter, J., dissenting); see also Michael A. Lawrence, *Towards a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL’Y 395, 428–29 (1998) (discussing criticism of *Pike* balancing test by Justice Souter); Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1092 (1986) (“Despite what the Court has said, it has not been balancing. . . . In the central area of dormant commerce clause jurisprudence, comprising what I shall call ‘movement-of-goods’ cases (*Pike v. Bruce Church, Inc.* may be taken as paradigmatic), the Court has been concerned exclusively with preventing states from engaging in purposeful economic protectionism.”).

46. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring); see also Lawrence, *supra* note 45, at 427–29 (discussing criticism of *Pike* balancing test by Justice Scalia, other justices, and commentators).

47. The U.S. Environmental Protection Agency (“EPA”) defines municipal solid waste (“MSW”) as nonhazardous household waste as well as some household hazardous waste; “MSW—more commonly known as trash or garbage—consists of everyday items such as product packaging, grass clippings, furniture, clothing, bottles, food scraps, newspapers, appliances, paint, and batteries.” See U.S. ENVTL. PROT. AGENCY, MUNICIPAL SOLID WASTE—BASIC FACTS, available at <http://www.epa.gov/garbage/facts.htm> (last visited Jan. 30, 2006) [hereinafter EPA, BASIC FACTS]. In 1960, the average American generated 2.7 pounds of MSW per day, for a total of 88.1 million tons; by the year 2003, the

MSW, many local governments adopted comprehensive programs to recycle or incinerate waste in addition to disposing it in landfills.<sup>48</sup>

More stringent federal legislation has also led many local governments to adopt regulatory programs to manage MSW.<sup>49</sup> In the Resource Conservation and Recovery Act of 1976 (“RCRA”),<sup>50</sup> as amended by the Hazardous and Solid Waste Amendments of 1984 (“HSWA”),<sup>51</sup> Congress gave state, regional, and local governments the primary role in managing household MSW. Congress declared that “the collection and disposal of solid wastes should continue to be primarily the function of state, regional, and local agencies . . . .”<sup>52</sup> At the same time, Congress placed a greater burden on local governments to insure the safe disposal of MSW by stating that “disposal of solid waste . . . without careful planning and management [was] a danger to human health and the environment.”<sup>53</sup>

HSWA required the Environmental Protection Agency (“EPA”) to issue more stringent environmental rules for the operation of MSW landfills.<sup>54</sup> More stringent federal landfill regulations caused many older landfills to close because they could not afford to upgrade their facilities in order to comply with the new regulations.<sup>55</sup> New MSW landfills, which are more efficient at disposing waste, are also larger and more expensive than the older landfills that they replaced.<sup>56</sup> Lastly, more expensive landfill costs encouraged governments to build new waste incinerators or recycling facilities as substitutes.<sup>57</sup>

After HSWA took effect in the 1980s, many local governments either built or financed a centralized waste management facility and then imposed “flow control ordinances” to control all the MSW in the jurisdiction. The flow control

average American created about 4.5 pounds of MSW per day, for a total of 236.2 million tons in 2003. *Id.*

48. *See id.* “Currently, in the United States, 30 percent of MSW is recovered and recycled or composted, 14 percent is burned at combustion facilities, and the remaining 56 percent is disposed of in landfills.” *Id.*

49. Ernst, *supra* note 30, at 53–54; Murray & Spence, *supra* note 39, at 74–75.

50. 42 U.S.C. §§ 6901–6992k (2000).

51. Pub. L. No. 98-616, 98 Stat. 3221.

52. 42 U.S.C. § 6901(a)(4); *see id.* § 6941 (giving states and local governments the primary role in managing nonhazardous waste); Murray & Spence, *supra* note 39, at 74.

53. Ernst, *supra* note 30, at 53 (citing 42 U.S.C. § 6901(b)(2)).

54. 42 U.S.C. § 6942(b); Murray & Spence, *supra* note 39, at 74. If states did not adopt a Subtitle D permit program to enforce the EPA’s rules, the EPA could enforce its own criteria. 42 U.S.C. § 6945(c); Murray & Spence, *supra* note 39, at 74.

55. Jeff Bailey, *Waste Yes, Want Not; Rumors of a Shortage of Dump Space Were Greatly Exaggerated*, N.Y. TIMES, Aug. 12, 2005, at 1.

56. The number of landfills in the United States has decreased from 8000 in 1988 to 1767 in 2002, but the total capacity of landfills has remained relatively constant because new landfills are much larger on average than older landfills. *See* EPA, BASIC FACTS, *supra* note 47; Murray & Spence, *supra* note 39, at 74–75, 84. Larger landfills are typically more expensive overall, but their cost of disposing a ton of waste is usually much lower. Bailey, *supra* note 55, at 1 (“A 10,000-ton-a-year dump would cost \$83 a ton to operate, estimates Solid Waste Digest, while a 300,000-ton-a-year site’s cost would be \$14 a ton.”).

57. Murray & Spence, *supra* note 39, at 84.

ordinances were designed to provide governments with adequate revenues to pay for expensive new landfills, recycling programs, or incinerators.<sup>58</sup> Flow control schemes often restricted both in-state and out-of-state waste firms by requiring all generators or haulers of local waste to take it exclusively to designated facilities for processing or disposal.<sup>59</sup> By 1994, more than twenty states had enacted statutes authorizing local or regional flow control ordinances.<sup>60</sup>

### C. Carbone: *The Supreme Court Strikes Down a Flow Control Ordinance*

In *C & A Carbone, Inc. v. Town of Clarkstown*,<sup>61</sup> the Town of Clarkstown (“the Town”) had enacted an ordinance that required all nonhazardous solid waste within the Town to be deposited at the designated, privately owned transfer station for processing, even if the waste was not originally generated within the Town.<sup>62</sup> The ordinance imposed fines of up to \$1000 and a maximum of fifteen days in jail for any hauler who took MSW from the Town without first having it processed at the station.<sup>63</sup>

Carbone operated a recycling facility in Clarkstown that accepted waste from both within and outside the Town, including from out-of-state sources.<sup>64</sup> The Town sued Carbone in New York state court after it discovered that Carbone was shipping waste from its facility within the Town to out-of-state landfills without having it processed first at the transfer station. The Town sought an injunction that would require Carbone to ship waste to the town’s facility.<sup>65</sup> The state courts held that the ordinance did not violate the dormant Commerce Clause.<sup>66</sup>

The U.S. Supreme Court held that the ordinance facially discriminated against interstate commerce and was invalid under the per se standard because the Town “hoard[ed] solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility.”<sup>67</sup> Since the ordinance required Carbone to send the nonrecyclable portion of any out-of-state waste to the transfer station at an additional cost, the Court found that the “flow control ordinance drives up the cost for out-of-state interests to dispose of their solid waste.”<sup>68</sup> Even for waste

58. Ernst, *supra* note 30, at 53–54; Jason M. King, Note, *Standing in Garbage: Flow Control and the Problem of Consumer Standing*, 32 GA. L. REV. 1227, 1227 (1998).

59. See Ernst, *supra* note 30, at 54; King, *supra* note 58, at 1228–29.

60. See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 406 (1994) (O’Connor, J., concurring).

61. 511 U.S. 383.

62. The Town entered a contract in which a private firm would build within the town limits a solid waste transfer station to separate recyclable from nonrecyclable items and operate the facility for five years, with the Town guaranteeing the firm a minimum waste stream flow and a minimum tipping fee for the five years, when the Town would buy the facility for one dollar. *Id.* at 386–87, 395–400 (appendix containing Town of Clarkstown, Local Law No. 9 of the year 1990; a local law entitled, “Solid Waste Transportation and Disposal”); Ernst, *supra* note 30, at 56.

63. *Carbone*, 511 U.S. at 387.

64. *Id.* at 388–89.

65. *Id.* 388.

66. *Id.* at 388–89.

67. *Id.* at 390–92.

68. *Id.* at 389.

originating in Clarkstown, the Court concluded that the ordinance discriminated by “prevent[ing] everyone except the favored local operator from performing the initial processing step. The ordinance thus deprives out-of-state businesses of access to a local market.”<sup>69</sup> The ordinance did not qualify for the necessity exception to the per se rule because the Town had alternative, nondiscriminatory methods to advance its legitimate interest in health and safety.<sup>70</sup> Furthermore, the Town’s interest in providing sufficient revenue to amortize the cost of the facility was an insufficient justification for the ordinance’s overt discrimination against out-of-state interests because “the town may subsidize the facility through general taxes or municipal bonds.”<sup>71</sup>

Because it concluded that the law was invalid under the per se standard, the majority did not analyze the ordinance under the *Pike* balancing test.<sup>72</sup> Justice O’Connor in her concurring opinion argued that the ordinance was not facially discriminatory, but did conclude that the ordinance was unconstitutional under the *Pike* test.<sup>73</sup> Lower courts, including Judge Guirola, the Federal Magistrate who originally decided *NSWMA*, have examined her concurring opinion for guidance in applying the *Pike* test to flow control ordinances.<sup>74</sup>

#### D. The Mississippi Scheme

The Mississippi Regional Solid Waste Management Authority Act permits local governments to form regional waste management authorities.<sup>75</sup> In 1992, some cities and counties formed the Authority, and in 1997 they built a regional landfill.<sup>76</sup> The landfill attracted less waste than was necessary to operate profitably. Consequently, in 2002, six cities and counties enacted separate flow control ordinances requiring that all solid waste collected within these six Members’ territories be disposed of at the Authority’s landfill or transfer stations.<sup>77</sup>

After enactment of the ordinances, the three primary plaintiffs, National Solid Waste Management Association (a trade association that does not ship waste), BFI Waste Systems of Mississippi, L.L.C. (“BFI”) and Waste Management of Mississippi, Inc. (“Waste Management”) filed suit against the Authority and its Members under the dormant Commerce Clause.<sup>78</sup> Federal Magistrate Judge Guirola decided that the six ordinances were unconstitutional under both the per se

69. *Id.*

70. *Id.* at 392–93.

71. *Id.* at 393–94.

72. *Id.* at 390 (“As we find that the ordinance discriminates against interstate commerce, we need not resort to the *Pike* test.”).

73. *See id.* at 401–10 (O’Connor, J., concurring).

74. *E.g.*, *Nat’l Solid Waste Mgmt. Ass’n. v. Pine Belt Reg’l Solid Waste Mgmt. Auth.*, 261 F. Supp. 2d 644, 650–51 (S.D. Miss. 2003) (Guirola, Magistrate Judge), *rev’d on other grounds*, 389 F.3d 491 (5th Cir. 2004), *cert. denied*, 126 S. Ct. 332 (2005).

75. MISS. CODE ANN. §§ 17-17-301 through 17-17-349 (2005).

76. *Nat’l Solid Waste Mgmt. Ass’n.*, 389 F.3d at 494.

77. In 2002, the Authority was made up of three counties (Covington, Jones, and Perry) and three cities (Petral, Laurel, and Hattiesburg). *Id.* at 495. Each ordinance provided that noncompliance with the flow control rule would constitute a misdemeanor. *Id.*

78. *Id.* They sued using 42 U.S.C. § 1983 (2000). *Id.*

test and the *Pike* test and permanently enjoined their enforcement.<sup>79</sup> On appeal, however, the Fifth Circuit *sua sponte* raised the issue of whether the plaintiffs met the “zone of interests” test.<sup>80</sup>

## II. STANDING

All plaintiffs in federal courts must establish standing to sue. First, there are constitutional standing requirements under Article III.<sup>81</sup> Additionally, the Court has self-imposed nonconstitutional “prudential” limits on standing to avoid suits that raise policy concerns about the appropriateness of federal judicial resolution of a case.<sup>82</sup>

### A. Constitutional Standing

The Constitution does not contain express standing requirements. The Supreme Court, however, has interpreted Article III<sup>83</sup> of the Constitution to limit suits in federal courts to plaintiffs who can demonstrate that they have:

- (1) . . . suffered “an injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.<sup>84</sup>

79. *Nat’l Solid Waste Mgmt. Ass’n*, 261 F. Supp. 2d at 644–52. After the district court judge originally assigned to the case recused himself, Federal Magistrate Judge Guirola was accepted by all the parties to decide the case. *Nat’l Solid Waste Mgmt. Ass’n*, 389 F.3d at 496.

80. *Nat’l Solid Waste Mgmt. Ass’n*, 389 F.3d at 497–98; *see also* *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (“[W]e have an obligation to assure ourselves that [petitioner] had Article III standing at the outset of the litigation.”).

81. *See infra* note 84 and accompanying text.

82. *Allen v. Wright*, 468 U.S. 737, 751 (1984) (“Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.” (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 474–75 (1982))); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978) (stating that a court may deny standing if a suit would raise “general prudential concerns ‘about the proper—and properly limited—role of the courts in a democratic society’ . . . Thus, we have declined to grant standing where the harm asserted amounts only to a generalized grievance shared by a large number of citizens in a substantially equal measure” (citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)); *Bradford C. Mank, Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENVTL. L. 1, 21–22, 28 (2005).

83. U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases [and] Controversies.”).

84. *Friends of the Earth*, 528 U.S. at 180–81 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)); *see also* *Mank, supra* note 82, at 22; *Robert V.*

Plaintiffs have the burden of meeting all three factors.<sup>85</sup> The Fifth Circuit held that the plaintiffs in *NSWMA* met this three-part standing test.<sup>86</sup>

### *B. The Prudential “Zone of Interests” Requirement*

In addition to mandatory constitutional standing requirements, federal courts have “judicially self-imposed limits on the exercise of federal jurisdiction.”<sup>87</sup> Courts use nonconstitutional “prudential” limitations on standing to decline cases involving generalized grievances that are better suited to resolution by the political branches of government. These prudential limitations serve the general rule that third parties may not raise another person’s legal rights, absent special circumstances.<sup>88</sup> The goal of the prudential standing requirements is to determine whether the plaintiff “is a proper party to invoke judicial resolution of the dispute and the exercise of the court’s remedial powers.”<sup>89</sup>

To insure a plaintiff has an appropriate statutory or constitutional interest in a suit, “a plaintiff’s suit must fall within the ‘zone of interests’ protected by the relevant statutory or constitutional provision.”<sup>90</sup> Most “zone of interests” cases are concerned with whether Congress intended to allow or prohibit certain types of statutory suits pursuant to the APA.<sup>91</sup>

In *Association of Data Processing Service Organizations v. Camp*<sup>92</sup> (“*Data Processing*”), the Court first required plaintiffs suing under the APA to demonstrate that their suit is “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”<sup>93</sup> Justice Douglas’ opinion suggested that he added the term “constitutional guarantee” to

Percival, “*Greening*” the Constitution—*Harmonizing Environmental and Constitutional Values*, 32 ENVTL. L. 809, 827 (2002); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 170–75 (1992).

85. See *Lujan*, 504 U.S. at 561 (“The party invoking federal jurisdiction bears the burden of establishing these elements.”).

86. Nat’l Solid Waste Mgmt. Ass’n v. Pine Belt Reg’l Solid Waste Mgmt. Auth., 389 F.3d 491, 498 (5th Cir. 2004) (“[P]laintiffs have an injury (higher operating costs) that is traceable to the ordinances enacted by defendants and which would be remedied if we rule that the ordinances are unconstitutional.”), *cert. denied*, 126 S. Ct. 332 (2005).

87. *Allen*, 468 U.S. at 751; see also *Bennett v. Spear*, 520 U.S. 154, 162–63 (1997) (discussing prudential limitations on standing); Mank, *supra* note 82, at 21–22, 28 (same).

88. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (discussing prudential standing doctrine); Mank, *supra* note 82, at 21–22, 28.

89. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 n.8 (1986) (citing *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

90. Mank, *supra* note 82, at 28; see also *Bennett*, 520 U.S. at 162–63 (describing the zone of interest standard as a prudential limitation rather than a mandatory constitutional requirement).

91. See *infra* notes 104, 106 and accompanying text.

92. 397 U.S. 150 (1970).

93. *Id.* at 153 (emphasis added); William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After Bennett v. Spear*, 49 ADMIN. L. REV. 763, 778–79 (1997) (“The ‘zone of interests’ test was first articulated in *Association of Data Processing*.”); Mank, *supra* note 82, at 23.

the “zone of interests” test as a way to include a broader range of noneconomic interests. He stated:

A person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause . . . . We mention these noneconomic values to emphasize that standing may stem from them as well as from the economic injury in which petitioners rely here.<sup>94</sup>

Responding to Justice Brennan’s dissenting opinion, which argued that the majority’s “zone of interests” test implicitly examined the merits of the case,<sup>95</sup> Justice Douglas in *Data Processing* emphasized that the “zone of interests” test does not look at the merits, but is a threshold determination.<sup>96</sup> Rejecting the legal right or legal interest test, which did require an examination of the merits of a case, the *Data Processing* Court stated that the “zone of interests” test was intended to make standing a threshold jurisdictional issue separate from the merits of a case.<sup>97</sup> After deciding the standing issues in the case, the *Data Processing* Court refused to address the merits and remanded that issue to the lower court.<sup>98</sup>

In *Data Processing*, Justice Brennan, joined by Justice White, dissented from the adoption of the “zone of interests” test.<sup>99</sup> First, Justice Brennan criticized the majority for failing to explain or define when a plaintiff meets the “zone of interests” test, which is a problem that continues today.<sup>100</sup> Additionally, he argued

94. *Data Processing*, 397 U.S. at 154.

95. See *infra* notes 99–102 and accompanying text.

96. See *Data Processing*, 397 U.S. at 153, 156, 158 (emphasizing that the standing and “zone of interests” tests do not look to the merits of a case); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 234 (1988).

97. *Data Processing*, 397 U.S. at 153 (“The ‘legal interest’ test goes to the merits. The question of standing is different. It concerns, apart from the ‘case’ or ‘controversy’ test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”).

98. *Id.* at 157–58 (“Whether anything in the Bank Service Corporation Act or the National Bank Act gives petitioners a ‘legal interest’ that protects them against violations of those Acts, and whether the actions of respondents did in fact violate either of those Acts, are questions which go to the merits and remain to be decided below.”); Fletcher, *supra* note 96, at 234.

99. *Data Processing*, 397 U.S. at 167–78 (Brennan, J., concurring & dissenting); Sanford A. Church, Note, *A Defense of the “Zone of Interests” Standing Test*, 1983 DUKE L.J. 447, 456–57 (discussing Justice Brennan’s dissenting opinion in *Data Processing*).

100. Justice Brennan wrote:

What precisely must a plaintiff do to establish that ‘the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute’? How specific an ‘interest’ must he advance? Will a broad, general claim, such as competitive interest, suffice, or must he identify a specific legally protected interest? When, too, is his interest ‘arguably’ within the appropriate ‘zone’? Does a mere allegation that it falls there suffice?

*Data Processing*, 397 U.S. at 177 (Brennan, J., concurring & dissenting); see also Church, *supra* note 99, at 456.

that the “zone of interests” test confused the issue of standing with whether Congress intended an issue to be reviewable and with the merits of a case.<sup>101</sup> Accordingly, he argued that the Court should abandon the murky “zone of interests” test and simply use constitutional standing criteria.<sup>102</sup>

### C. Should the “Zone of Interests” Test Apply to Constitutional Cases?

#### 1. Clarke: No Zone of Interests for Constitutional Cases

In *Clarke*, the Court in 1987 stated that “[t]he principal cases in which the ‘zone of interest’ test has been applied are those involving claims under the APA, and the test is most usefully understood as a gloss on the meaning of § 702 [of the APA].”<sup>103</sup> According to the *Clarke* court, the APA normally presumes the availability of judicial review, but that presumption can be “overcome whenever the congressional intent to preclude judicial review is ‘fairly discernible in the statutory scheme.’”<sup>104</sup> The *Clarke* Court stated that the main purpose of the “zone of interests” test is to bar suits where it is clear that Congress intended to preclude judicial review.<sup>105</sup> In APA or other federal statutory cases, federal courts use the zone of interests standard to determine whether Congress either explicitly or implicitly imposed standing restrictions on particular plaintiffs or overrode possible zone of interests limits by, for example, providing an express private right of action.<sup>106</sup> In determining when Congress intended to preclude judicial review, Justice White stated that courts should apply a liberal approach to the “zone of interests” test that would allow standing unless there is strong evidence that Congress intended to bar a suit or a plaintiff has interests that are “marginal[]” to or “inconsistent” with the statute.<sup>107</sup>

101. *Data Processing*, 397 U.S. at 177 (Brennan, J., concurring & dissenting).

102. *Id.* at 178; Church, *supra* note 99, at 456.

103. *See Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 395, 400 n.16 (1987) (discussing the APA, 5 U.S.C. § 702 (2000)); Jonathan R. Siegel, *Zone of Interests*, 92 GEO. L.J. 317, 318, 327–28 (2004) (observing that most, but not all, of the Court’s zone of interests cases have involved the APA).

104. *Clarke*, 479 U.S. at 399 (quoting *Block v. Cmty. Nutrition Insts.*, 467 U.S. 340, 351 (1984)).

105. *Id.* at 395–401; Siegel, *supra* note 103, at 325–26.

106. *Bennett v. Spear*, 520 U.S. 154, 162–66 (1997) (holding that “unlike their constitutional counterparts, [prudential limits on standing] can be modified or abrogated by Congress,” and concluding that a citizen suit provision abrogated the zone of interests limitation); *Warth v. Seldin*, 422 U.S. 490, 501 (1975); Mank, *supra* note 82, at 28, 78.

107. As the Court explained:

The “zone of interest” test is a guide for deciding whether, in view of Congress’ evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.

The *Clarke* Court appeared to question *Data Processing*'s statement that constitutional guarantees are subject to the "zone of interests" test, stating:

While inquiries into reviewability or prudential standing in other contexts may bear some resemblance to a "zone of interest" inquiry under the APA, it is not a test of universal application. *Data Processing* speaks of claims "arguably within the zone of interests to be protected or regulated by the statute *or constitutional guarantee* in question." We doubt, however, that it is possible to formulate a single inquiry that governs all statutory and constitutional claims.<sup>108</sup>

Justice White implied that the Court had not applied the test in many non-APA cases where it was theoretically applicable.<sup>109</sup>

The Court has decided on the merits only one constitutional case involving the zone of interests. In *Boston Stock Exchange*, the plaintiffs were out-of-state stock exchanges that challenged facially discriminatory taxation that taxed out-of-state securities transactions more heavily than in-state transactions.<sup>110</sup> The Court, in an opinion by Justice White, stated in a footnote that the plaintiffs were arguably within the zone of interests of the dormant Commerce Clause because the "transfer tax indirectly infring[ed]" their ability to engage in interstate commerce and thus appeared to include indirect beneficiaries within the dormant Commerce Clause's zone of interests.<sup>111</sup> The *Clarke* decision strongly implied that the Court should not routinely apply that test in constitutional cases, stating that:

While the decision that there was standing in *Boston Stock Exchange* was undoubtedly correct, the invocation of the "zone of interest" test there should not be taken to mean that the standing inquiry under whatever constitutional or statutory provision a

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*Clarke*, 479 U.S. at 399–400 (footnote and internal citation omitted).

108. *Id.* at 400 n.16 (internal citations omitted) (emphasis added). Justice White's majority opinion acknowledged that the Court had "occasionally listed the 'zone of interest' inquiry among general prudential considerations bearing on standing, and have on one occasion conducted a 'zone of interest' inquiry in a case brought under the Commerce Clause." *Id.* (internal citations omitted); *see also* Charles D. Kelso & R. Randall Kelso, *Standing to Sue: Transformations in Supreme Court Methodology, Doctrine and Results*, 28 U. TOL. L. REV. 93, 145–46 & n.340 (1996).

109. *See* Fletcher, *supra* note 96, at 258 (stating "the Court after *Data Processing* has often neglected the zone of interests," and citing *Clarke* as demonstrating that the Court has limited the test mainly to APA cases).

110. 429 U.S. 318 (1977).

111. *Id.* at 320 n.3 (stating that the plaintiffs "are asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business and they allege that the transfer tax indirectly infringes on that right. Thus, they are 'arguably within the zone of interests to be protected . . . by the . . . constitutional guarantee in question'" (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970))).

plaintiff asserts is the same as it would be if the “generous review provisions” of the APA apply.<sup>112</sup>

Justice White’s discussion of the “zone of interests” test in Part II of the *Clarke* decision was joined by Justices Brennan, Marshall, Blackmun, and Powell. Justice Stevens’ concurring opinion, which was joined by Chief Justice Rehnquist and Justice O’Connor, stated that the “respondent is well within the ‘zone of interest’ as that test has been applied in our prior decisions,” and, therefore, “I do not join Part II of the Court’s opinion, which, in my view, engages in a wholly unnecessary exegesis on the ‘zone of interest’ test.”<sup>113</sup> Justice Scalia did not participate in the *Clarke* case.<sup>114</sup>

## 2. Justice Scalia: Apply the Zone of Interests to Constitutional Cases

In 1992, Justice Scalia in his dissenting opinion in *Wyoming v. Oklahoma*,<sup>115</sup> which was joined by Chief Justice Rehnquist and Justice Thomas, argued that the “zone of interests” test should apply in dormant Commerce Clause cases and more generally in all constitutional cases.<sup>116</sup> The State of Wyoming brought an action in the Supreme Court to enjoin the enforcement of an Oklahoma statute that required Oklahoma electric utilities, which previously had exclusively used less expensive Wyoming coal, to use at least ten percent Oklahoma-mined coal. The Court concluded that Wyoming’s loss of severance tax revenues was sufficient to provide standing.<sup>117</sup> The *Wyoming* Court relied heavily on *Hunt v. Washington State Apple Advertising Commission*,<sup>118</sup> which found standing in a Commerce Clause suit by a state agency that did not grow or sell apples. The agency, however, received assessments based on the volume of apples sold and would potentially receive smaller assessments if restrictions on interstate commerce reduced the interstate sale of Washington apples.<sup>119</sup> Justice White’s majority opinion did not directly address the “zone of interests” test, which is not surprising in view of his *Clarke* opinion’s limitation of the test to APA cases.<sup>120</sup>

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112. *Clarke*, 479 U.S. at 400 n.16 (citing *Data Processing*, 397 U.S. at 156); Kelso & Kelso, *supra* note 108, at 145–46 & n.340.

113. *Clarke*, 479 U.S. at 409–10 (Stevens, J., concurring).

114. *Id.* at 409.

115. 502 U.S. 437 (1992). The case was brought within the Court’s original jurisdiction to settle disputes between states. *See id.*

116. *Id.* at 468–73 (Scalia, J., dissenting); Kelso & Kelso, *supra* note 108, at 146 n.340; King, *supra* note 58, at 1249.

117. *Wyoming*, 502 U.S. at 440–46; King, *supra* note 58, at 1249.

118. 432 U.S. 333 (1977).

119. *Wyoming*, 502 U.S. at 448–50 (“That the commission was allowed to proceed in *Hunt* necessarily supports Wyoming’s standing against Oklahoma, where its severance tax revenues are directly linked to the extraction and sale of coal and have been demonstrably affected by the Act.” (discussing *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 341–45 (1977))). Justice Scalia argued that *Hunt* was inapposite because that decision had not used the “zone of interests” test to determine whether the apple commission had standing, but instead had used “associational standing” on the theory that the commission represented the interests of its members, apple growers, and sellers who had standing. *Wyoming*, 502 U.S. at 471 (Scalia, J., dissenting).

120. *See supra* notes 103–09 and accompanying text.

In his *Wyoming* dissenting opinion, Justice Scalia argued that the zone of interests should apply to constitutional cases, including dormant Commerce Clause cases, and that the test is more stringent in constitutional cases than APA cases.<sup>121</sup> Justice Scalia argued that Wyoming's interest in tax revenues failed to meet the test because it was not directly related to the Clause's protection of interstate commerce.<sup>122</sup> He appeared to suggest that only direct beneficiaries of interstate trade, such as the coal sellers themselves, are within the Clause's zone of interests, but that indirect beneficiaries of that trade, such as Wyoming with its interest in tax revenues, are not. He did not, however, offer a clear test for distinguishing between direct and indirect beneficiaries or an explanation of why the test does not reach indirect beneficiaries.<sup>123</sup> He failed to reconcile his approach with *Boston Stock Exchange*'s holding that the plaintiffs' allegations that a New York transfer

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121. Justice Scalia wrote that:

The "zone-of-interests" formulation first appeared in cases brought under § 10 of the Administrative Procedure Act, 5 U.S.C. § 702, see *Association of Data Processing . . .* but we have subsequently made clear that the same test similarly governs claims under the Constitution in general, see, e.g., *Valley Forge . . .* and under the negative Commerce Clause in particular, see *Boston Stock Exchange . . .* Indeed, we have indicated that it is *more* strictly applied when a plaintiff is proceeding under a "constitutional . . . provision" instead of the "generous review provisions of the APA."

*Wyoming*, 502 U.S. at 469 (Scalia, J., dissenting) (quoting *Clarke*, 479 U.S. at 400 n.16).

122. *Wyoming*, 502 U.S. at 470–74 (Scalia, J., dissenting); Kelso & Kelso, *supra* note 108, at 146 n.340; King, *supra* note 58, at 1249; see *infra* notes 123–25, 181, 206, 273–74 and accompanying text.

123. Justice Scalia argued that:

The coal companies, of course, would pass the zone-of-interests test. So would Wyoming if it bought or sold coal, or otherwise directly participated in the coal market. It would then be "asserting [its] right . . . to engage in interstate commerce free of discriminat[ion]," *Boston Stock Exchange . . .* But Wyoming's right to collect taxes presents an entirely different category of interest, only marginally related to the national market/free trade foundation of our jurisprudence in this area; indeed, it is in a sense positively antagonistic to that objective, since all state taxes, even perfectly constitutional ones, burden interstate commerce by reducing profit. Thus, when state taxes have been at issue in our prior negative Commerce Clause cases they have been the object of the plaintiff's challenge rather than the basis for his standing; and we have looked upon the State's interest in tax collection as a value to be *weighed against* the purposes of our Commerce Clause jurisprudence. Thus, Wyoming's interest in this case falls far shorter of meeting the zone-of-interests test than did that of the plaintiff postal union in *Air Courier Conference . . .*: Whereas the latter's interest in securing employment for postal workers, although distinct from the statute's goal of providing postal services to the citizenry, at least coincided with that goal a good amount of the time, here the asserted interest (tax collection) and the constitutional goal invoked to vindicate it (free trade) are antithetical.

*Wyoming*, 502 U.S. at 470–71 (Scalia, J., dissenting); see also Kelso & Kelso, *supra* note 108, at 146 n.340; King, *supra* note 58, at 1249; *infra* notes 181, 206, 273–74 and accompanying text.

tax “indirectly” affected their ability to engage in interstate commerce gave them zone of interests standing, or with that Court’s implication that indirect beneficiaries are within the dormant Commerce Clause’s zone of interests.<sup>124</sup> Indeed, the *Wyoming* majority’s use of *Hunt* implied that indirect beneficiaries of interstate trade, such as a state agency, can meet the prudential “zone of interests” test, although the majority never explicitly addressed the test.<sup>125</sup>

The clearest reason why Justice Scalia favors a strong “zone of interests” test in addition to constitutional standing tests is simply to reduce the number of constitutional cases.<sup>126</sup> He has generally supported a narrow view of standing because he strongly favors leaving policy issues to the political branches of government.<sup>127</sup> Five months after the Court decided *Wyoming*, Justice Scalia wrote the majority opinion in *Lujan v. Defenders of Wildlife*, which adopted a generally

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124. 429 U.S. 318, 320 n.3 (1977) (stating that the plaintiffs “are asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business and they allege that the transfer tax indirectly infringes on that right. Thus, they are ‘arguably within the zone of interests to be protected . . . by the . . . constitutional guarantee in question’” (quoting *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970))); see *supra* notes 23, 110 and accompanying text; *infra* notes 181, 206, 273–74 and accompanying text.

125. See King, *supra* note 58, at 1250 (“In *Wyoming v. Oklahoma*, the state of Wyoming was two steps removed from the Oklahoma statute—the statute regulated Oklahoma utility companies, which then purchased less coal from mining companies in Wyoming, which in turn impacted Wyoming’s severance tax revenues. Wyoming nevertheless satisfied the zone of interests test.”).

126. *Wyoming*, 502 U.S. at 473 (Scalia, J., dissenting).

In abandoning the zone-of-interests test, the Court abandons our chosen means of giving expression, in the field of constitutional litigation, to the principle that “the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing.” *Associated General Con., of Cal., Inc. v. Carpenters*, 459 U.S. 519, 536 . . . (1983). . . . When courts abolish such limitations and require, as our opinion does today, nothing more than a showing of *de facto* causality, exposure to liability becomes immeasurable and the scope of litigation endless. If today’s decision is adhered to, we can expect a sharp increase in state against state Commerce Clause suits; and if its rejection of the zone-of-interests test is applied logically, we can expect a sharp increase in all constitutional litigation.

*Id.*

127. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–78 (1992) (Scalia, J., majority and plurality opinions) (arguing standing is limited to plaintiffs who have “concrete” injury because broader standing would threaten separation-of-powers in violation of both Article III’s limits on judicial power and Article II’s exclusive grant of executive authority to “faithfully execute” laws); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983) (favoring narrow approach to standing because standing doctrine was a “crucial and inseparable element” of separation-of-powers principles, and more restrictive standing rules would limit judicial interference with the popularly elected legislative and executive branches); Mank, *supra* note 82, at 29–40 (discussing Justice Scalia’s view that separation of powers principles limit standing).

stricter approach to the three-part Article III standing test.<sup>128</sup> Ironically, in *Lujan*, Justice Scalia's majority opinion concluded that the plaintiffs did not have standing because they had essentially only an ideological interest in protecting endangered species in foreign countries and did not allege any concrete injury to themselves.<sup>129</sup> By contrast, in *Wyoming*, Justice Scalia's dissenting opinion argued that Wyoming could not sue because its economic interest in collecting tax revenues was only indirectly related to the ideological imperative of the Commerce Clause in protecting interstate commerce.<sup>130</sup> Many commentators have criticized Justice Scalia's narrow approach to standing for making it too difficult for plaintiffs to meet standing requirements in cases involving the violation of significant constitutional rights.<sup>131</sup>

Although Justice Scalia lost the zone of interests battle in *Wyoming*, in *Bennett v. Spear*, which involved standing under the APA and the Endangered Species Act,<sup>132</sup> his opinion rejected Justice White's view that the "zone of interests" test mainly applies to suits under the APA. By 1997, Justice White and the four justices who had joined Part II of his *Clarke* majority opinion had retired from the Court.<sup>133</sup> Justice Scalia stated that while *Data Processing* had "applied the zone of interests test to suits under the APA, . . . later cases have applied it also in suits not involving review of federal administrative action . . ."<sup>134</sup> Furthermore, he observed that prior decisions of the Court had "specifically listed [the zone of interests test] among other prudential standing requirements of general application,"<sup>135</sup> including constitutional claims. These issues were not at issue in *Bennett*; therefore, his views are dicta. Citing *Clarke*, Justice Scalia suggested that the Court should more strictly apply the test in non-APA cases.<sup>136</sup>

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128. See *Lujan*, 504 U.S. at 559–78 (Scalia, J., majority and plurality opinions).

129. See *id.* at 562–67, 571–78; Mank, *supra* note 82, at 30–35.

130. See *supra* notes 121–25 and *infra* notes 273–74 and accompanying text.

131. See generally Percival, *supra* note 84, at 847–50 (criticizing Justice Scalia's view that separation of powers principles limit standing); Sunstein, *supra* note 84, at 163–68, 200–36 (same).

132. *Bennett v. Spear*, 520 U.S. 154, 164–72 (1997) (concluding the requirement under 16 U.S.C. § 1533(b)(2) that the Fish and Wildlife Service use "the best scientific data available" and "consider[] the economic impact, and any other relevant impact, of specifying any particular area as critical habitat" gave plaintiffs standing to sue under the statute's citizen suit provision, 16 U.S.C. § 1540(g)); *id.* at 172–79 (holding that plaintiffs had standing under APA to challenge whether agencies violated § 7 of the ESA, which requires, inter alia, that each agency "use the best scientific and commercial data available" (citing 16 U.S.C. § 1536(a)(2))); Mank, *supra* note 82, at 77–80.

133. Justice White retired in 1993, Justice Powell in 1987, Justice Brennan in 1990, Justice Marshall in 1991, and Justice Blackmun in 1994. THE WORLD ALMANAC AND BOOK OF FACTS 2006 at 53 (2006).

134. *Bennett*, 520 U.S. at 163 (citing *Dennis v. Higgins*, 498 U.S. 439, 449 (1991) and *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977)).

135. *Id.* (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984) and *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474–75 (1982)).

136. *Id.* ("We have made clear, however, that the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of

3. *Problems with Applying the “Zone of Interests” Test to Constitutional Cases*

There are serious problems with applying the “zone of interests” test to constitutional questions. Even in statutory cases, the Court has had serious difficulties in defining the “zone of interests” test. In 1998, in its most recent major zone of interests case, the Supreme Court acknowledged that its “prior cases have not stated a clear rule for determining when a plaintiff’s interest is ‘arguably within the zone of interests’ to be protected by a statute . . . .”<sup>137</sup> A 2004 article by Professor Siegel on the “zone of interests” doctrine described it as “a mystery” and the law in a “confused state.”<sup>138</sup> Professor Siegel would change the “zone of interests” test to a statutory standing requirement that presumes that plaintiffs injured by agency action have standing unless Congress in a statute other than the APA “prescribes a more restrictive role.”<sup>139</sup> Under his statutory approach, there is little sense in applying the “zone of interests” test to constitutional cases.

In 1996, Professors Kelso and Kelso questioned “what role remains for the zone of interests test in constitutional cases.”<sup>140</sup> In 1970, *Data Processing’s* inclusion of constitutional guarantees in the “zone of interests” test may have made sense because the Court had not yet fully developed its Article III standing test.<sup>141</sup> The Court’s current three-part test for constitutional standing is more stringent than the “zone of interests” test used in *Data Processing*, and, therefore, there is little reason to use the “zone of interests” test except in statutory cases.<sup>142</sup> Furthermore, the Court has decided only one constitutional case involving the zone of interests on the merits,<sup>143</sup> and most of its zone of interests cases focus on discerning congressional intent to allow or prohibit suits under a particular statute. As a result, the “zone of interests” test is not helpful in addressing constitutional challenges.<sup>144</sup> Professors Kelso and Kelso agreed with the *Clarke* Court and

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interests of a statute for purposes of obtaining judicial review of administrative action under the “‘generous review provisions’” of the APA may not do so for other purposes.” (citing *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 400 n.16 (1987)).

137. *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 488 (1998), *superseded by statute*, Credit Union Membership Access Act, Pub. L. No. 105-219, § 2, 112 Stat. 913, 914–15 (1998) (amending 12 U.S.C. § 1759(b), *as recognized in* *Am. Bankers Ass’n v. Nat’l Credit Union Admin.*, 271 F.3d 262 (2001)).

138. Siegel, *supra* note 103, at 317, 319; *see also* Petition for a Writ of Certiorari at 9, *National Solid Wastes Mgmt. Ass’n v. Pine Belt Reg’l Solid Waste Mgmt. Auth.*, 389 F.3d 491 (5th Cir. 2004), *cert. denied* 126 S. Ct. 332 (2005) (No. 04-1333), 2005 WL 770660 [hereinafter *Cert. Petition*] (quoting Siegel, *supra* note 103, at 317, 319).

139. Siegel, *supra* note 103, at 319, 368.

140. Kelso & Kelso, *supra* note 108, at 146.

141. *Id.* at 144–46 (“Since *Data Processing* was decided in 1970, the Court has tightened the Article III constitutional test by requiring a concrete injury caused by the challenged conduct and redressable by the court. . . . As elaborated by Justice White, the ‘not especially demanding’ zone of interests test would appear to be far less demanding than the current version of the injury-in-fact test that is now declared to be a constitutional minimum.”).

142. Kelso & Kelso, *supra* note 108, at 146.

143. *See supra* notes 23, 92, 104, 106 and accompanying text.

144. Kelso & Kelso, *supra* note 108, at 146.

concluded their discussion of the “zone of interests” test by observing that it would be difficult to develop “a workable zone of interests analysis in constitutional cases that would add coherence and consistency to the law.”<sup>145</sup>

Justice Scalia is correct that a stringent “zone of interests” test would decrease the number of constitutional suits. Nevertheless, federal courts should vindicate the constitutional rights of those who meet the three-part constitutional standing test unless there are prudential objections other than the “zone of interests” test to bar the suit.<sup>146</sup> First, as Justice White argued in *Clarke*, it is difficult to apply the “zone of interests” test to constitutional issues because of their variety.<sup>147</sup> Justice Scalia himself has described the Court’s dormant Commerce Clause cases and doctrine as confusing, and that increases the difficulties in applying the zone of interests in such cases.<sup>148</sup>

Second, suits under the dormant Commerce Clause usually promote the Supreme Court’s long-held view that federal courts should serve the Clause’s implicit goal of eliminating economic protectionism among states by removing local barriers to interstate trade. Consequently, courts should liberally construe standing requirements to encourage such suits as long as the plaintiff can meet constitutional standing requirements.<sup>149</sup> Nevertheless, in *Wyoming*, Justice Scalia argued that Wyoming did not meet the “zone of interests” test because state taxes generally reduce interstate commerce. Justice Scalia failed to acknowledge that Wyoming’s indirect and parochial interest in collecting more taxes did in fact promote the goals of the dormant Commerce Clause because invalidating the Oklahoma law would generally promote interstate trade.<sup>150</sup>

The Supreme Court should abolish the confusing “zone of interests” test for constitutional cases. Courts should generally find that the plaintiff meets the “zone of interests” test, if the plaintiff’s suit challenges a law under the dormant Commerce Clause and the suit will promote interstate commerce, even if the plaintiff’s interest is in intrastate trade or a parochial concern unrelated to interstate

145. *Id.* at 146 (discussing *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 395, 400 n.16 (1987)).

146. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11–12 (2004) (stating that the Court must balance the duty to exercise jurisdiction in constitutional cases against the duty not to address constitutional questions that are not necessary for resolution in light of Article III and prudential standing doctrines).

147. *See supra* notes 108–09 and accompanying text; *infra* notes 270, 286 and accompanying text.

148. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 536 n.33 (1983) (rejecting three different standing tests used by lower courts, including “zone of interests” test, because “these labels may lead to contradictory and inconsistent results,” and instead adopting a multifactor standing test); C. Douglas Floyd, *Antitrust Victims Without Antitrust Remedies: The Narrowing of Standing in Private Antitrust Actions*, 82 MINN. L. REV. 1, 2–12, 19–26, 31–32, 36–50, 72 (1997) (discussing the Associated General Contractors court’s abandonment of the “zone of interests” test in antitrust cases, its use of multifactor balancing test, and the importance of competitor or noncompetitor status in determining antitrust standing).

149. *See infra* notes 268–89 and accompanying text.

150. *Wyoming v. Oklahoma*, 502 U.S. 437, 469–70 (1992) (Scalia, J., dissenting).

trade. The plaintiff should have standing, unless the plaintiff fails to meet constitutional standing requirements or there are other serious policy objections to such a suit. Instead of the murky “zone of interests” test, courts may use other prudential requirements such as the general prohibition against third-party suits or generalized suits. These prudential requirements will stop suits by plaintiffs who have only marginal interests in pursuing such suits and who may not adequately represent the Clause’s interest in removing local barriers to interstate trade.<sup>151</sup>

#### *D. Applying a Liberal Approach to the “Zone of Interests”*

Even if the Court does not abolish it for constitutional cases, courts should liberally construe the “zone of interests” test. Courts should generally allow plaintiffs in dormant Commerce Clause cases who meet constitutional standing requirements to also meet the test unless there are special concerns about whether a particular plaintiff can represent the Clause’s goal of removing barriers to interstate trade. If a plaintiff’s suit meets Article III standing and supports interstate trade, the “zone of interests” test does not require the plaintiff to show that it is involved in interstate trade. One commentator has argued that:

[T]he zone of interests test turns on the interests sought to be protected by the lawsuit, not the harm suffered by the plaintiff. In this regard, the zone of interests test is distinct from the injury-in-fact requirement, which independently requires adequate harm to the plaintiff to permit standing as a matter of constitutional law.<sup>152</sup>

That same commentator also states:

This distinction [between the zone of interests test and the injury-in-fact requirement] is suggested by the test’s very name, as well as by its formulation by the Supreme Court: “[The zone of interests test] concerns . . . the question whether the *interest* sought to be protected by the complainant is arguably . . . protected or regulated by the statute or constitutional guarantee in question.”<sup>153</sup>

#### *1. Oregon Waste Systems and Carbone Focused on a Law’s General Harm to Interstate Commerce and Not on the Plaintiff’s Trade*

In dormant Commerce Clause cases, the Court has focused on the impact of the challenged law on interstate markets in general, rather than any injury to the plaintiff in the case. The Court has not usually required individual plaintiffs to prove a law causes them specific harm or that invalidating it will increase their

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151. Allen v. Wright, 468 U.S. 737, 751 (1984) (“Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches . . .”); Mank, *supra* note 82, at 21–22, 28 (discussing the prudential bar against third-party suits and suits alleging generalized grievances).

152. King, *supra* note 58, at 1251 (quoting Ass’n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970)).

153. *Id.* at 1251 n.154 (emphasis added).

interstate trade.<sup>154</sup> In *Oregon Waste Systems v. Department of Environmental Quality*,<sup>155</sup> the Court struck down a facially discriminatory Oregon law that imposed a higher in-state disposal surcharge on waste generated outside the state than waste generated in-state.<sup>156</sup> According to Professor Heinzerling, “In deciding that the [Oregon] law was facially discriminatory . . . the Court noted only that the plaintiffs were involved in transporting or disposing of out-of-state waste. It did not ask whether the surcharge had hurt the plaintiffs’ business, or whether it had generally reduced interstate shipments of waste.”<sup>157</sup> The Court stated that in facial discrimination cases it did not examine the extent of a law’s impact on interstate commerce, but simply applied “the virtually *per se* rule of invalidity” and that “[t]he State’s burden of justification is so heavy that ‘facial discrimination by itself may be a fatal defect.’”<sup>158</sup> The majority rejected Chief Justice Rehnquist’s dissenting opinion, which it characterized as “argu[ing] that the \$2.25 per ton surcharge is so minimal in amount that it cannot be considered discriminatory, even though the surcharge expressly applies only to waste generated in other States.” The majority quoted the *Wyoming* decision to demonstrate that the Court’s facial discrimination precedents “clearly establish that the degree of a differential burden or charge on interstate commerce ‘measures only the *extent* of the discrimination’ and ‘is of no relevance to the determination whether a State has discriminated against interstate commerce.’”<sup>159</sup>

*Oregon Waste Systems* implies that at least in facial or purposeful discrimination cases a waste shipper should be able to file suit under the dormant Commerce Clause to challenge a law without having to prove personal harm from it or benefit from its invalidation. Similarly, in *Carbone*, the Court was more concerned with potential injuries to hypothetical out-of-state firms that were not parties in that case than the actual impact on the plaintiff, Carbone.<sup>160</sup> Accordingly, an intrastate waste shipper whose economic interests are injured by a flow control ordinance, thus meeting constitutional injury-in-fact requirements, should be able to file a dormant Commerce Clause challenge to invalidate a facially or purposefully discriminatory law. The plaintiff should have standing even if it cannot prove that it will immediately benefit from ending discrimination against

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154. See Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 224–25; *id.* at 264–65.

155. 511 U.S. 93 (1994).

156. *Id.* at 96–101.

157. Heinzerling, *supra* note 154, at 224–25; *id.* at 264–65.

158. *Or. Waste Sys.*, 511 U.S. at 100–01 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979)).

159. *Id.* at 100 n.4 (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992)).

160. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389 (1994) (stating that the ordinance “deprive[d] *out-of-state businesses* of access to a local market” (emphasis added)); *id.* at 392 (stating “[t]he essential vice in laws of this sort” is that “[o]ut-of-state [processors] . . . are deprived of access to local demand for their services” (emphasis added)); *id.* (stating the ordinance “squashes competition in the waste-processing service altogether, leaving no room for investment from outside”); see also *Cert. Petition*, *supra* note 138, at 11–13; Heinzerling, *supra* note 154, at 264–67.

interstate trade because the Court does not require plaintiffs to prove how they will benefit from the invalidation of such a law.<sup>161</sup>

## 2. Tax and Rebate Cases Presume Harm to In-State Wholesalers

In dormant Commerce Clause cases involving taxes on out-of-state goods or preferential rebates to favored in-state firms, the Supreme Court has presumed in-state wholesalers have standing to challenge such laws. The plaintiff has standing even if it was only indirectly affected by the tax or rebate by a possible reduction in sales or a worsened competitive position.<sup>162</sup> First, in *Bacchus Imports, Ltd. v. Dias*,<sup>163</sup> the Court held that in-state liquor wholesalers had standing to file a dormant Commerce Clause challenge to a Hawaii law that exempted certain alcohols produced in-state from liquor taxes.<sup>164</sup> The wholesalers could in theory pass on to their customers any taxes on out-of-state liquor producers. Nevertheless, the Court concluded that the wholesalers suffered economic injury both because they were directly liable for the tax and because the tax harmed their competitive position by raising the price of their imported goods relative to the exempted in-state beverages.<sup>165</sup> Because of the tax's discriminatory purpose or effect, the Court presumed that the law had some negative effects on out-of state liquor sales and

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161. In discriminatory effects cases, a plaintiff should not have to allege personal harm if a law has clear discriminatory effects under the per se test, but she might need to show some personal harm under the *Pike* balancing test where the harm to interstate trade in general is less obvious, perhaps necessitating a plaintiff to show personal harm. *See supra* notes 29–46, 154–60 and accompanying text; *infra* notes 162–74 and accompanying text.

162. Arguably, tax or rebate cases under the dormant Commerce Clause are different than laws restricting trade, but the spirit of the tax or rebate cases is at least helpful in understanding trade cases.

163. 468 U.S. 263 (1984).

164. Hawaii imposed a twenty percent excise tax on all wholesale liquor sales, but exempted fruit wine manufactured in Hawaii and okolehao, a brandy distilled from the root of a shrub indigenous to Hawaii. *Id.* at 265–67. On the merits, the Court held that the law was unconstitutional because it “had both the purpose and effect of discriminating in favor of local products.” *Id.* at 273.

165. The Court explained:

The State . . . claim[s] . . . that the wholesalers have no standing to challenge the tax because they have shown no economic injury from the claimed discriminatory tax. The wholesalers are, however, liable for the tax. Although they may pass it on to their customers, and attempt to do so, they must return the tax to the State whether or not their customers pay their bills. Furthermore, even if the tax is completely and successfully passed on, it increases the price of their products as compared to the exempted beverages, and the wholesalers *are surely entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business*. The wholesalers plainly have standing to challenge the tax in this Court.

*Id.* at 267 (emphasis added).

declined to consider Hawaii's argument that the tax had almost no competitive impact on the wholesalers because it affected only a small percentage of liquor.<sup>166</sup>

Although it did not directly address prudential standing, *Bacchus* clearly concluded that standing is appropriate where an in-state firm's competitive position is harmed by a local law that discriminates against interstate commerce. The Court stated that "the wholesalers *are surely entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business.*"<sup>167</sup> Similarly, because plaintiffs BFI and Waste Management alleged that extra costs caused by the ordinances harmed their regional and national competitive positions, the Fifth Circuit, in *NSWMA*, should have held that they met the "zone of interests" test not only for a *Pike* challenge, but also for a per se challenge.<sup>168</sup>

In *West Lynn Creamery, Inc. v. Healy*,<sup>169</sup> two in-state milk wholesale dealers<sup>170</sup> challenged a Massachusetts tax and subsidy scheme that required a "premium payment" on all milk sold by licensed Massachusetts milk dealers to state retailers, regardless of whether the milk was produced in state or out of state. Massachusetts then distributed the revenue from the tax as a subsidy to in-state dairy farmers.<sup>171</sup> Although it did not explicitly address standing, the Court apparently assumed the dealers had standing because they paid the premium even though the same fee applied to in-state or out-of-state milk, and the dealers might have been able to pass the burden of the tax to retailers or consumers.<sup>172</sup> The Court rejected Massachusetts' argument "that since the Massachusetts milk dealers who pay the order premiums are not competitors of the Massachusetts farmers, the pricing order imposes no discriminatory burden on commerce."<sup>173</sup> The Court never

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166. *Id.* at 267–71. The Court remanded to the Hawaii courts the issue of whether the state must refund the taxes collected by the wholesalers, an issue that would require analysis of the impact of the tax on the wholesalers. *Id.* at 276–77.

167. *Id.* at 267 (emphasis added).

168. *See Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 500–01 (5th Cir. 2004) (concluding plaintiffs BFI and Waste Management had met the prudential zone of interests standing test because the challenged flow control ordinances allegedly increased their cost of doing business and thus harmed their regional and national competitiveness), *cert. denied*, 126 S. Ct. 332 (2005).

169. 512 U.S. 186 (1994).

170. The petitioner, West Lynn Creamery, Inc., was a milk dealer licensed to do business in Massachusetts. *Id.* at 188. It purchased raw milk, which it processed, packaged, and sold to wholesalers, retailers, and other milk dealers, including the second petitioner LeComte's Dairy, Inc. About ninety-seven percent of the raw milk West Lynn purchased was produced by out-of-state farmers. *Id.*

171. *Id.* at 188–91.

172. *Id.*

173. The Court stated:

This argument cannot withstand scrutiny. Is it possible to doubt that if Massachusetts imposed a higher sales tax on milk produced in Maine than milk produced in Massachusetts that the tax would be struck down, in spite of the fact that the sales tax was imposed on consumers, and consumers do not compete with dairy farmers? For over 150 years, our cases have rightly concluded that the imposition of a differential burden on any part of the stream of commerce—from wholesaler to retailer to

addressed the extent to which the Massachusetts tax and subsidy scheme harmed the milk dealers, but instead focused on the impact of the subsidy on out-of-state dairies that were not parties to the suit.<sup>174</sup>

Similarly, in *NSWMA*, BFI and Waste Management were sufficiently harmed by the ordinances to serve as suitable plaintiffs on behalf of out-of-state waste sites or haulers who did not sue. In *Bacchus* and *West Lynn Creamery*, the Supreme Court allowed plaintiffs who were in-state wholesalers to bring dormant Commerce Clause challenges because of possible and unsubstantiated impacts on their competitive position even though only out-of-state interests were directly affected.<sup>175</sup> The financial impact of the six ordinances on BFI and Waste Management's regional and national contracts was clearer than the impact on the in-state wholesalers in *Bacchus* and *West Lynn Creamery*. Because of these impacts, the Fifth Circuit should have recognized that both plaintiffs met the "zone of interests" test to challenge the ordinances under both the *Pike* and the per se tests.

*3. Intrastate Waste Firms Harmed by a Flow Control Ordinance Often Have Sufficient Interest in Challenging the Law's Interstate Discrimination*

Under Article III, a plaintiff has to demonstrate an injury-in-fact that is traceable to a challenged law and that is redressable by judicial action.<sup>176</sup> Article III standing requirements are sufficient to protect federal courts from nuisance suits by marginal plaintiffs with no real stake in suing. In two per se challenges under the dormant Commerce Clause, *Oregon Waste Systems* and *Carbone*, the Court invalidated the discriminatory law based on its harm to interstate commerce in general without considering whether it actually harmed the plaintiffs in that case.<sup>177</sup> If a plaintiff in a per se challenge does not have to prove that a local law actually harmed its interstate trade or would increase its future interstate trade, then why should courts use a "zone of interests" test to limit suits to plaintiffs who actually make interstate shipments of waste?

Intrastate waste firms that are directly regulated by and financially injured by a flow control ordinance meet the three-part test for standing under Article III and should not be denied the opportunity to facially challenge an ordinance

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consumer—is invalid, because a burden placed at any point will result in a disadvantage to the out-of-state producer.

*Id.* at 202 (internal citations omitted).

174. *Id.* at 194 ("Like an ordinary tariff, the tax is thus effectively imposed only on out-of-state products.").

175. Neither *Bacchus* nor *West Lynn Creamery* explicitly addressed prudential standing, although the doctrine was applicable at the time of each decision. *See id.* at 196–97; *Bacchus Imps. Ltd. v. Dias*, 468 U.S. 263 (1984); *supra* notes 163–75 and accompanying text.

176. *See supra* notes 83–87 and accompanying text.

177. *See Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992) ("Once a state [law] is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry."); Cert. Petition, *supra* note 138, at 15–17; *supra* notes 61–73, 154–61 and accompanying text.

restricting both intrastate and interstate commerce under the dormant Commerce Clause. These firms clearly have a genuine interest in invalidating such an ordinance and thus are not the “marginal” plaintiffs that the *Clarke* Court sought to exclude from suing under the “zone of interests” test.<sup>178</sup> A recent D.C. Circuit decision stated that a competitor motivated by commercial interests normally meets the “zone of interests” test if its interests are “congruent” with the statute and its suit will advance the operation of the statute even if its underlying motivations are different from the statute.<sup>179</sup> Intrastate firms are direct competitors of the government or private facilities privileged by the ordinance. Furthermore, intrastate firms often directly compete with interstate firms, and could enter interstate markets if they succeed in invalidating an ordinance.

The better approach to serving the values of the dormant Commerce Clause is to liberally construe standing requirements to allow any party adversely affected by a restrictive local ordinance to challenge it if the party meets Article III standing requirements. An additional zone of interests barrier would be appropriate only if the suit will “hinder” the purposes of the Clause.<sup>180</sup>

Alternatively, if a local law indirectly harms an intrastate shipper’s interstate business or trade, perhaps by harming its interstate parent company, then the shipper should meet the “zone of interests” test not only under *Pike*, but also under the per se test. The Court supported this conclusion in *Boston Stock Exchange* when it held that a transfer tax on regional stock exchanges that “indirectly infring[ed]” on their interstate trade was sufficient to give them zone of interests standing.<sup>181</sup> It makes little practical sense for a court to hold that a plaintiff that ships a small amount of waste to an out-of-state location is within the dormant Commerce Clause’s zone of interests, but that two large Mississippi waste companies that are significantly harmed by the ordinance are not within the zone of interests to mount a per se challenge. The fact that the two waste companies are subsidiaries of the two largest waste companies in the United States, companies whose national and regional contracts are adversely affected by the additional

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178. See *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399–400 (1987) (stating that the “zone of interests test” seeks to preclude suits by “marginal” plaintiffs who lack any genuine interest in filing suit).

179. The court explained its decision as follows:

Our cases have pointed out that a party need not share Congress’ motives in enacting a statute to be a suitable challenger to enforce it; “parties motivated by commercial interests routinely satisfy the zone of interests test,” as “congruence of interests, rather than identity of interests, is the benchmark.” *Amgen v. Smith*, . . . 357 F.3d 103, 108–09 (D.C. Cir. 2004). If there is reason to believe that a party’s interest in statutory enforcement will advance, rather than hinder, the operation of a statute, the court can reasonably assume that Congress intended to permit the suit.

*Honeywell Int’l Inc. v. Env’tl. Prot. Agency*, 374 F.3d 1363, 1370 (D.C. Cir. 2004) (per curiam), modified on other grounds, 393 F.3d 1315 (D.C. Cir. 2005) (per curiam).

180. See *supra* notes 146–53 and accompanying text; *infra* notes 268–89 and accompanying text.

181. See *supra* notes 23, 110, 150 and accompanying text; *infra* notes 206, 273–74 and accompanying text.

costs imposed by the laws, further demonstrates the impracticality of this holding.<sup>182</sup>

### III. THE FIFTH CIRCUIT'S "ZONE OF INTERESTS" ANALYSIS

The Fifth Circuit in *NSWMA* rejected decisions in other circuits that recognized that intrastate waste firms may meet the "zone of interests" test for the dormant Commerce Clause to challenge a flow control ordinance discriminating against both intrastate and interstate trade.<sup>183</sup> The Fifth Circuit analyzed the "zone of interests" test separately for the plaintiffs' per se and *Pike* challenges without acknowledging the lack of a clear line between the two tests.<sup>184</sup>

The Fifth Circuit should have followed the "spirit" of *Clarke*, which broadly interpreted which plaintiffs have sufficient interests to meet the "zone of interests" test for the APA. The Fifth Circuit should have recognized that the plaintiffs had sufficient interest in challenging the six ordinances' discrimination against interstate commerce despite shipping only within the state. The plaintiffs are "reliable," are directly regulated by the ordinances, are clearly "competitors" of the defendant Authority and its members, and could ship the waste to interstate markets if the court had struck down the six ordinances.<sup>185</sup> Additionally, the plaintiffs BFI and Waste Management have more than a "marginal" interest in interstate trade because they are each subsidiaries of national firms whose regional and national contracts are directly affected by the higher costs from the ordinances.<sup>186</sup> The ordinances increased their parent companies' costs and affected their regional and national competitiveness; consequently, the impact of the ordinances on the plaintiffs' related interstate trade in waste should be enough to give them standing not only to bring a *Pike* challenge, as the Fifth Circuit found, but also a per se challenge.<sup>187</sup>

#### A. *Facially Discriminatory*

The Fifth Circuit held that the plaintiffs failed to meet the prudential "zone of interests" standing requirements for a per se, facial challenge to the ordinances because they did not send any waste to out-of-state sites.<sup>188</sup> In a

182. See *supra* notes 7, 10–11 and accompanying text; *infra* notes 186–87, 202–03, 242 and accompanying text.

183. See *infra* notes 189, 191 and accompanying text.

184. See *supra* notes 43–46 and accompanying text; *infra* notes 187, 248–57 and accompanying text.

185. See Cert. Petition, *supra* note 138, at 12–13 (arguing that the plaintiffs BFI and Waste Management were "reliable" plaintiffs as defined by the Supreme Court in *Clarke*).

186. See *supra* notes 10, 182, 185 and accompanying text; *infra* notes 202–03, 242 and accompanying text.

187. See *supra* notes 10, 182, 185 and accompanying text; *infra* notes, 202–03, 242 and accompanying text.

188. Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth., 389 F.3d 491, 499–500 (5th Cir. 2004), cert. denied, 126 S. Ct. 332 (2005).

We conclude that plaintiffs' injury does not fall within the zone of interests to be protected by the dormant Commerce Clause with respect to ordinances that are alleged to facially discriminate against out-of-state

footnote, the Fifth Circuit acknowledged “that our conclusion that plaintiffs do not meet the prudential standing requirement differs from that in two opinions from our sister circuits.”<sup>189</sup> In *On the Green Apartments L.L.C. v. City of Tacoma*,<sup>190</sup> the Ninth Circuit held that an in-state waste hauler could meet the “zone of interests” test for the dormant Commerce Clause. The Fifth Circuit argued that *On the Green*’s holding was flawed because the Ninth Circuit ultimately concluded that an in-state shipper could not win a challenge on the merits.<sup>191</sup>

Its criticism of *On the Green*’s reasoning is itself flawed if the Fifth Circuit meant that a plaintiff cannot have standing if a court eventually rules against it on the merits because standing is a threshold issue that a court should

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economic interests. The flow control ordinances mandate that any waste generated within the Region be transported to the Authority’s landfill or transfer stations. In effect, the ordinances prohibit the export of any waste outside of the Region, including out of state. However, *these* plaintiffs do not ship (and, so far as the record shows, have never shipped) *any* waste they collect within the Region to any location outside of Mississippi . . . . In sum, plaintiffs’ injury is not related to any out-of-state characteristic of their business. Thus, plaintiffs do not have standing to challenge the ordinances on the basis of a claim that they are facially discriminatory against out-of-state interests. As such, we express no opinion about whether the ordinances would pass the facially discriminatory test if challenged by a proper plaintiff.

*Id.* (footnotes omitted). BFI ships waste from a new member of the Authority, Stone County, to Alabama. The Fifth Circuit declined to consider BFI’s shipments to Alabama because Stone County was not a party to the suit, the contract between Stone County and the Authority had not been finalized at the time of the trial, and Stone County had not yet adopted a flow control ordinance. *Id.* at 499 n.14.

189. *Id.* at 500 n.16.

190. 241 F.3d 1235 (9th Cir. 2001).

191. *Nat’l Solid Waste Mgmt. Ass’n*, 389 F.3d at 500 n.16.

In *On the Green*, the Ninth Circuit concluded that because the plaintiff alleged only an *intrastate* burden, the “Commerce Clause [was] not at all implicated.” We fail to see how the plaintiff’s alleged injury could even arguably fall within the zone of interests to be protected by the dormant Commerce Clause when the court concluded that the case *did not even implicate the Commerce Clause*. Further, the Ninth Circuit seems to have confused the redressability requirement for constitutional standing with the zone of interests test. The Ninth Circuit concluded that the plaintiff’s injury was “related to the purposes underlying the Commerce Clause” because the “injury would be *remedied* if [the plaintiff] could take its garbage outside the city.” The fact that an injury would be remedied if the ordinance was struck down does not mean that the grievance falls within the zone of interests to be protected by the dormant Commerce Clause, particularly when there was no allegation of *any interstate* burden. Under the Ninth Circuit’s rationale in *On the Green*, the zone of interest test and the redressability requirement would essentially be the same.

*Id.* (internal citations omitted).

decide before it rules on the merits.<sup>192</sup> The Fifth Circuit itself has warned that courts should not consider the merits of a case when deciding standing.<sup>193</sup> For instance, in *Clarke*, the Supreme Court held that the respondent trade association was arguably within the zone of interests protected by the statute at issue and thus had standing, before the Court ultimately ruled against the respondent on the merits.<sup>194</sup>

In *Houlton Citizens' Coalition v. Town of Houlton*,<sup>195</sup> the First Circuit held that an in-state shipper economically harmed by an ordinance that discriminates against its intrastate trade met the “zone of interests” test to challenge the law’s discrimination against interstate commerce under the dormant

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192. See, e.g., *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (“The standing inquiry focuses on whether the plaintiff is the proper party to bring this suit, . . . although that inquiry ‘often turns on the nature and source of the claim asserted,’ . . .” (internal citation omitted)); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 484 (1982) (“The requirement of standing ‘focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.’” (citing *Flast v. Cohen*, 392 U.S. 83, 99 (1968))); *Warth v. Seldin*, 422 U.S. 490, 517–18 (1975) (“The rules of standing . . . are threshold determinants of the propriety of judicial intervention.”); *Flast*, 392 U.S. at 99 (“[T]he fundamental aspect of standing focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.”); CHARLES A. WRIGHT & ARTHUR R. MILLER, 13 FED. PRACTICE & PROCEDURE JURIS. § 3531 n.2 (2d ed. 1991 & Supp. 2005). It is true that the issues involved in standing and those involved in the merits may sometimes overlap, but standing is still a separate, threshold issue. See *Warth*, 422 U.S. at 500 (“Although standing in no way depends on the merits of the plaintiff’s contention that particular conduct is illegal . . . it often turns on the nature and source of the claim asserted.” (citing *Flast*, 392 U.S. at 99)). But see *Fletcher*, *supra* note 96, at 229 (acknowledging doctrine treating standing as threshold issue decided before merits, but arguing standing “should be seen as a question of substantive law, answerable by reference to the statutory and constitutional provision whose protection is invoked”); Matthew Porterfield, *Public Citizen v. United States Trade Representative: The (Con)fusion of APA Standing and the Merits Under NEPA*, 19 HARV. ENVTL. L. REV. 157, 157–58 (1995) (acknowledging doctrine treating standing as threshold issue decided before merits, but arguing “[n]onetheless, there has always been some overlap between standing and the merits”).

193. See, e.g., *Grant ex rel. Family Eldercare v. Gilbert*, 324 F.3d 383, 387 (5th Cir. 2003) (stating that the district court’s “decision to address the merits as part of the standing inquiry was premature”); *O’Hair v. White*, 675 F.2d 680, 685 (5th Cir. 1982) (“Perhaps the most fundamental aspect of the standing doctrine is that it focuses on the particular plaintiff seeking to bring his claim before the federal court, not on the issues or merits of the case.”).

194. *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 401–04 (1987) (holding that the respondent met zone of interests standing); *id.* 404–08 (denying respondent’s challenge on the merits); *Cert. Petition*, *supra* note 138, at 9 n.4 (observing that *Clarke* recognized that the plaintiffs met the “zone of interests” test, but had ruled against them on merits). But see Porterfield, *supra* note 192, at 157–58 (arguing the “zone of interests” test requires some consideration of merits even though standing is theoretically a threshold issue that is decided before the merits).

195. 175 F.3d 178 (1st Cir. 1999).

Commerce Clause.<sup>196</sup> Disagreeing with *Houlton*, the Fifth Circuit argued that the dormant Commerce Clause only protects interstate trade, not “any economic interests,” such as in-state trade.<sup>197</sup> The Fifth Circuit failed to acknowledge that an intrastate shipper’s suit may advance the interests of the dormant Commerce Clause in protecting interstate commerce from discrimination.<sup>198</sup> If it had addressed the merits of whether the ordinances violated the per se test, the Fifth Circuit clearly would have had to affirm Judge Guirola’s conclusion that the ordinances facially discriminated against interstate waste haulers and facilities.<sup>199</sup>

Just before this Article was published, the Sixth Circuit explicitly disagreed with *NSWMA*’s requirement that a plaintiff must actually ship waste across state lines to satisfy the prudential standing test. In *National Solid Wastes Management Ass’n v. Daviess County*, the Sixth Circuit stated in a footnote:

The fact that Plaintiff has not shown that waste generated within Daviess County has actually crossed state lines is of no import with respect to prudential standing; the Commerce Clause protects the right to contract across state lines, not just the actual movement of goods or services across state lines. . . . While one other circuit has seemingly required such actual movement, *see* [*NSWMA*], the law of this Court recognizes prudential standing where the plaintiff seeks to protect its right to contract for or purchase out-of-state goods or services.<sup>200</sup>

The Sixth Circuit’s approach to prudential standing is not as liberal as the First and Ninth Circuits’, but this recent decision does demonstrate that the Fifth Circuit’s requirement that a plaintiff actually ship goods across state lines is too narrow.

### ***B. Prudential Standing and the Pike Test***

The Fifth Circuit concluded that the plaintiffs met the “zone of interests” test to challenge the ordinances as to their burden on interstate commerce under the *Pike* test. In support of this conclusion, the Fifth Circuit stated that “[a]n

196. In *Houlton*, the First Circuit concluded that the plaintiff met the zone of interests requirement because the plaintiff had “assert[ed] his own economic interests under the Commerce Clause—a constitutional provision specifically targeted to protect those interests . . . .” 175 F.3d at 183. On the merits, the First Circuit held that a flow control ordinance requiring all waste to go to a single facility did not violate the Clause because the town had used a competitive bidding process open to out-of-state contractors. *Id.* at 188; Ernst, *supra* note 30, at 60–61.

197. Nat’l Solid Waste Mgmt. Ass’n v. Pine Belt Reg’l Solid Waste Mgmt. Auth., 389 F.3d 491, 500 n.16 (5th Cir. 2004) (“However, the rationale behind the dormant Commerce Clause is to protect against *local economic protectionism at the expense of out-of-state interests*, *Carbone*, 114 S. Ct. at 1682, not to protect *any economic* interests. In our opinion, the *Houlton* court simply viewed too broadly the zone of interests protected by the dormant Commerce Clause.”), *cert. denied*, 126 S. Ct. 332 (2005).

198. *See supra* notes 7, 10–11, 175, 177–79, 181–82, 185–87 and accompanying text; *infra* notes 205–10, 215, 219, 229–30, 234–47 and accompanying text.

199. Nat’l Solid Waste Mgmt. Ass’n v. Pine Belt Reg’l Solid Waste Mgmt. Auth., 261 F. Supp. 2d 644, 650 (S.D. Miss. 2003) (Guirola, Magistrate Judge), *rev’d on other grounds*, 389 F.3d 491 (5th Cir. 2004), *cert. denied*, 126 S. Ct. 332 (2005).

200. 434 F.3d 898, 902 n.1 (6th Cir. 2006).

allegation that the plaintiff is involved in interstate commerce and that the *plaintiff's* interstate commerce is burdened by the ordinance in question is sufficient to satisfy the zone of interests test with respect to ordinances that assertedly impose an excessive burden on interstate commerce.”<sup>201</sup> Although the plaintiffs did not ship any waste from the six members to out-of-state sites, the Fifth Circuit determined that plaintiffs BFI and Waste Management are subsidiaries of national waste companies that “are engaged in interstate commerce, and *their* interstate commerce is allegedly burdened by the ordinances.”<sup>202</sup> The Fifth Circuit determined that the plaintiffs had alleged sufficient facts to meet the “zone of interests” test under the *Pike* standard by alleging that the higher costs imposed by the Mississippi flow control ordinance would burden their ability to conduct interstate commerce by raising the cost of their national and regional contracts.<sup>203</sup> The Fifth Circuit should have allowed the plaintiffs to bring a per se challenge as well because invalidating the ordinances under the per se test would also positively affect the plaintiffs’ regional and national contracts.<sup>204</sup>

### C. Critique of the Fifth Circuit’s Standing Analysis

Following the spirit of *Clarke’s* broad interpretation of which plaintiffs meet the “zone of interests” test for the APA, an intrastate waste firm that meets Article III standing requirements should have standing to challenge a flow control ordinance that regulates it and harms its business. Such a firm is a “reliable” plaintiff that should meet the “zone of interests” test because it shares the same economic interests as interstate firms in striking down the law, it competes with the government-favored waste facilities, and it could enter interstate markets if the

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201. *Nat’l Solid Waste Mgmt. Ass’n*, 389 F.3d at 500.

202. *Id.* at 501. In their Petition for Certiorari, pursuant to Rule 29.6, the petitioners explained their corporate ownership as follows:

Waste Management of Mississippi, Inc., is wholly owned by Waste Management Holdings, Inc., which in turn is wholly owned by Waste Management, Inc. BFI Waste Systems of North America, Inc., is wholly owned by Browning-Ferris Industries LLC. The sole member of BFI Waste Systems of Mississippi, LLC, is Allied Waste North America, Inc.

Cert. Petition, *supra* note 138, at ii.

203. *Nat’l Solid Waste Mgmt. Ass’n*, 389 F.3d at 501.

Plaintiffs argue that, because the flow control ordinances will raise their costs to service these national and regional contracts which include customer locations within the Region, they will be relatively less competitive within the Region and that this impact on these contracts will extend to the portion of the contracts covering customer locations outside of Mississippi. The ordinances thus allegedly burden plaintiffs’ interstate commerce. Plaintiffs therefore are arguably within the appropriate zone of interests and, therefore, have standing to challenge whether the ordinances excessively burden interstate commerce.

*Id.* (footnote omitted).

204. *See supra* notes 7, 10–11, 186–87, 202–03 and accompanying text; *infra* note 242 and accompanying text.

court invalidates the law's discriminatory provisions.<sup>205</sup> Alternatively, the Court in *Boston Stock Exchange* held that a transfer tax on regional stock exchanges that "indirectly infring[ed]" on their interstate trade was sufficient to give them zone of interests standing.<sup>206</sup> Therefore, intrastate firms whose intrastate trade affects interstate trade, or who engage in related interstate trade that is at least indirectly affected by restrictions on interstate trade, should meet the "zone of interests" test for raising both *Pike* or per se challenges.

*1. Other Circuits Have Applied a Less Demanding "Zone of Interests" Test*

a. First Circuit—*Houlton*

The First and Ninth Circuit, and possibly the Eighth Circuit,<sup>207</sup> have appropriately concluded that intrastate waste firms directly regulated by a flow control ordinance are within the zone of interests to challenge the ordinance's constitutionality under the dormant Commerce Clause. In *Houlton*, the First Circuit held that a local waste hauler had zone of interests standing to argue that a flow control ordinance discriminated against interstate commerce. The First Circuit explained: "As a classic plaintiff asserting his own economic interests under the Commerce Clause—a constitutional provision specifically targeted to protect those interests—[plaintiff] avoids any concerns relative . . . to the zone of interests requirement."<sup>208</sup> The court stated that the plaintiff's "claim to standing is not damaged because he failed to allege that he hauled garbage out-of-state or planned to do so. In Commerce Clause jurisprudence, cognizable injury is not restricted to those members of the affected class against whom states or their political subdivisions ultimately discriminate."<sup>209</sup> It concluded: "Thus, an in-state business which meets constitutional and prudential requirements due to the direct or indirect effects of a law purported to violate the dormant Commerce Clause has standing to challenge that law."<sup>210</sup> If a discriminatory law harms both intrastate and

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205. See Cert. Petition, *supra* note 138, at 10 (arguing that plaintiffs BFI and Waste Management were "reliable" plaintiffs as defined by Supreme Court in *Clarke*); *infra* notes 229–48 and accompanying text.

206. See *supra* notes 23, 110, 181 and accompanying text; *infra* notes 273–74 and accompanying text.

207. See *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1376–79 (8th Cir. 1997) (implying that all the plaintiffs, apparently including some intrastate firms, had prudential standing, and stating there was "no question that the *Oehrleins* plaintiffs, that is, various waste haulers and processors, have standing. . . . [W]e see no prudential barriers to standing for the *Oehrleins* plaintiffs"); *Randy's Sanitation, Inc. v. Wright County*, 65 F. Supp. 2d 1017, 1024 (D. Minn. 1999) (stating that "the *Oehrleins* court must have been satisfied that *each* plaintiff had standing to challenge a restriction on out-of-state transportation of waste, regardless of whether it actively engaged in the activity or not" (emphasis added)); Cert. Petition, *supra* note 138, at 10 (arguing that the *Oehrleins* court recognized zone of interests standing for intrastate shippers); see also *Houlton Citizens' Coal. v. Town of Houlton*, 175 F.3d 178, 183 (1st Cir. 1999) (citing *Oehrleins* as recognizing standing for in-state waste haulers).

208. *Houlton*, 175 F.3d at 183.

209. *Id.* (citing *General Motors Corp. v. Tracy*, 519 U.S. 278, 286 (1997)).

210. *Id.* (citing *General Motors Corp.*, 519 U.S. at 286–87).

interstate shippers, the intrastate shipper has the same economic interests as the interstate shipper and thus can serve the interests of the dormant Commerce Clause equally well.

b. Ninth Circuit—*On the Green*

In *On the Green Apartments*, the plaintiff, On the Green Apartments, L.L.C. (“On the Green”), operated a 545-unit residential apartment complex in the City of Tacoma, Washington (“the City”).<sup>211</sup> On the Green sought to haul the garbage generated by its residents to in-state landfills outside Tacoma. By ordinance, however, Tacoma required that all businesses and residents have their waste collected by its Solid Waste Utility.<sup>212</sup> Tacoma also required that all waste, whether collected by the City or self-hauled, must be deposited at the City’s public disposal area.<sup>213</sup> In its dormant Commerce Clause challenge to the ordinance, On the Green alleged that self-hauling and disposing of its waste at in-state landfills would save it money compared to city fees.<sup>214</sup>

The Ninth Circuit held that On the Green met Article III standing because its alleged financial injury would be remedied if the court voided the ordinance.<sup>215</sup> In a similar prior case, however, *Individuals for Responsible Government, Inc. v. Washoe County* (“*Washoe*”), the Circuit had denied standing under the “zone of interests” test to residential and commercial waste generators.<sup>216</sup> In that prior case, the plaintiffs had previously self-hauled to both in-state and out-of-state landfills, but an ordinance required them to have their garbage collected by an exclusive franchisee of the local government. The Circuit found that the plaintiffs lacked standing because:

[T]heir injury—being forced to pay for unwanted garbage services—was “not even marginally related to the purpose[] underlying the dormant Commerce Clause,” that is, “to limit the power of the States to erect barriers against interstate trade.” . . . We relied heavily on the fact that the plaintiffs’ injury would continue even if the waste collector used only landfills outside the state.<sup>217</sup>

Following its *Washoe* precedent, the Ninth Circuit in *On the Green* held that the plaintiff’s challenge to Tacoma’s requirement that it use the City’s exclusive waste hauler failed to meet the “zone of interests” test.<sup>218</sup> By contrast,

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211. *On the Green Apartments L.L.C. v. City of Tacoma*, 241 F.3d 1235, 1237 (9th Cir. 2001).

212. *Id.* The ordinance did allow certain classes of residents and businesses to petition the City for a special permit to self-haul their waste, but Tacoma denied On the Green’s request to self-haul. *Id.* The Ninth Circuit concluded that the plaintiff met the ordinance’s standards for self-hauling rejecting the City’s denial of a permit. *Id.* at 1240–41.

213. *Id.*

214. *Id.* at 1237–38.

215. *Id.*

216. 110 F.3d 699, 703 (9th Cir. 1997).

217. *On the Green*, 241 F.3d at 1239 (quoting *Washoe*, 110 F.3d at 703–04).

218. *Id.* at 1239–40. “Like the *Washoe* plaintiffs, On the Green would be forced to pay for garbage services it did not want ‘even if [Tacoma] were to dump all the garbage it collects from [the city] across the state line. . . . Under those circumstances, the [Ordinance]

the Ninth Circuit in *On the Green* held that the plaintiff's alternative challenge to Tacoma's requirement that self-haulers tip their garbage at the City's dump met the "zone of interests" test because invalidating the requirement of tipping at the City's dump would remedy the alleged financial harm.<sup>219</sup>

Addressing the merits, the Ninth Circuit concluded that On the Green's allegation that it would dump at other in-state landfills was insufficient to implicate the dormant Commerce Clause.<sup>220</sup> Although the Tacoma ordinance apparently prohibited waste from within the City from being sent to either in-state or out-of-state landfills other than the City's dump, the Ninth Circuit concluded, "[W]e cannot assume, however, without more, that this interstate burden exists."<sup>221</sup> Because On the Green alleged only an intrastate burden, the Ninth Circuit held that the Commerce Clause was not implicated.<sup>222</sup>

It is not clear whether the *On the Green* court meant to establish a bright-line rule that intrastate shippers may never win a dormant Commerce Clause case on the merits. The court made clear that it had not addressed whether "a plaintiff must explicitly plead that it would tip its waste out of state in order to make a Commerce Clause challenge."<sup>223</sup> The court held only that if a plaintiff explicitly states that it intends to dispose only in in-state areas that the Clause is not implicated.<sup>224</sup> It is not clear how the Ninth Circuit would address the allegations of BFI and Waste Management that they transported waste from the six members only to in-state sites, but that the higher costs imposed by the six ordinances adversely affected their regional and national contracts.<sup>225</sup>

Contrary to the Fifth Circuit's standing analysis, the Ninth Circuit appropriately concluded that an intrastate shipper can meet the "zone of interests" test even if it may not succeed on the merits. Similar to the *Houlton* decision, the

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would impose no barrier to interstate commerce.'" *Id.* at 1240 (quoting *Washoe*, 110 F.3d at 703-04).

219. *Id.* at 1240 ("On the Green's injury would be remedied if it could take its garbage outside the city. . . . As On the Green's injury is thus related to the purposes underlying the Commerce Clause, it has satisfied the prudential component of standing with respect to its challenge to Tacoma's requirement that self-haulers tip at the city dump.").

220. *Id.* at 1241.

221. *Id.*

222. *Id.* at 1242.

Where, as here, the plaintiff alleges only an intrastate burden, a court cannot manufacture an interstate burden to implicate the Commerce Clause. This is not to say that a plaintiff challenging a similar ordinance must explicitly plead that it would tip its waste out of state in order to make a Commerce Clause challenge. However, where a complaint alleges only an intrastate burden, then the Commerce Clause is not at all implicated. Because On the Green alleges only that absent the Tacoma ordinance it would deposit its waste in another city in Washington, the Commerce Clause is not implicated.

*Id.*

223. *Id.*

224. *Id.*

225. See *supra* notes 7, 10-11, 186-87, 202-03 and accompanying text; *infra* note 242 and accompanying text.

*On the Green* court concluded that the plaintiff had zone of interests standing because it could demonstrate clear economic harm from the ordinance's mandatory requirement of tipping waste at the City landfill, a landfill that discriminated against both intrastate and interstate commerce and competitors. Thus, the plaintiff's allegation that it could tip more cheaply at other in-state landfills was sufficient to meet the "zone of interests" test because the plaintiff suffered tangible economic harm from the law comparable to out-of-state shippers.<sup>226</sup> By contrast, the plaintiff's self-hauling allegations were only marginally related to the interests of the Clause because a ban on self-hauling only indirectly affected whether the waste could be shipped out-of-state; in theory, the City could have banned self-hauling but allowed unrestricted interstate shipping of the waste. Thus, the self-hauling allegation is an example of a "marginal" or tangential interest that is insufficient to justify a suit under the Clause.<sup>227</sup> BFI and Waste Management's allegations that they could dispose waste more cheaply at other Mississippi landfills would clearly meet the "zone of interests" test in the Ninth Circuit.

## 2. *Clarke Suggests a Less Stringent "Zone of Interests" Test*

The *Clarke* Court stated that the "zone of interests" test was designed to ensure that a plaintiff was "reliable," and thus functions to "exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives."<sup>228</sup> The *Clarke* decision broadly interpreted which plaintiffs have sufficient interests to meet the "zone of interests" test for the APA. Following the spirit of the *Clarke* decision, intrastate waste firms that are directly regulated by a flow control ordinance are reliable plaintiffs who should be able to challenge a discriminatory ordinance in its entirety, including its interstate restrictions on commerce. These firms are "reliable" because they share the same interests as interstate firms in invalidating a restrictive flow control ordinance, compete with the approved facilities favored by the challenged ordinance, and could enter interstate markets if the ordinance is invalidated.<sup>229</sup> Both the *Houlton* and *On the Green* decisions imply that, if a flow control ordinance regulates both intrastate and interstate waste, intrastate plaintiffs should have standing to challenge the ordinance's interstate restrictions because they are harmed in essentially the same way as interstate shippers and have a concrete economic interest in challenging its validity.<sup>230</sup>

*Air Courier Conference of America v. American Postal Workers Union* is the one major case in which the Supreme Court has denied standing based on the "zone of interests" test.<sup>231</sup> The Court refused standing for postal employees and their union to challenge a regulation suspending the Postal Service's previous

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226. See *supra* notes 190–91, 208–10, 215, 219 and accompanying text.

227. See *supra* notes 211–12 and accompanying text.

228. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 397 n.12 (1987); see also Cert. Petition, *supra* note 138, at 12–13 (arguing that the plaintiffs BFI and Waste Management were "reliable" plaintiffs as defined by the Supreme Court in *Clarke*).

229. See *Clarke*, 479 U.S. at 397–400; *supra* notes 205–06 and accompanying text.

230. See *supra* notes 195–96, 207–10, 215, 219, 226 and accompanying text.

231. 498 U.S. 517 (1991).

monopoly over certain international operations because the regulation did not directly regulate the plaintiffs and affected them only indirectly.<sup>232</sup> By contrast, intrastate waste firms that are regulated by a flow control ordinance are affected directly.<sup>233</sup> The argument that BFI and Waste Management were reliable plaintiffs that had a concrete interest in challenging the ordinances on their face is strengthened by the Fifth Circuit's conclusion that the plaintiffs met the "zone of interests" test to challenge them under the *Pike* balancing test. The Circuit based its conclusion on the fact that they had adequately alleged that the higher costs imposed by the ordinances at issue would raise their overall cost of servicing regional and national contracts, and thus harm their competitive position in serving waste customers outside Mississippi.<sup>234</sup>

Because they are competitors to the government-sponsored waste facilities that benefit from flow control ordinances, intrastate waste firms should be within the zone of interests to challenge such ordinances.<sup>235</sup> In statutory cases, the Court has emphasized that competitors are usually within the zone of interests. In *Clarke*, the Court stated that "competitors who allege an injury that implicates the policies of the National Bank Act are very reasonable candidates to seek review of the Comptroller's rulings."<sup>236</sup> Subsequently, in *National Credit Union Administration v. First National Bank & Trust Co.*,<sup>237</sup> the Court held that banks were arguably within the "zone of interests" to be protected by a provision of the Federal Credit Union Act limiting federal credit union membership to members of definable groups. The banks had standing because "[a]s competitors of federal credit unions, respondents *certainly* have an interest in limiting the markets that federal credit unions can serve, and the [National Credit Union Administration]'s interpretation has affected that interest by allowing federal credit unions to increase their customer base."<sup>238</sup>

In *Clarke* the Court clearly emphasizes that competitors are usually within the zone of interests to challenge a statute or administrative decision favoring a competitor.<sup>239</sup> In addition, the Court's *Bacchus* and *West Lynn Creamery* decisions suggest that those whose competitive interests are affected by a discriminatory statute are within the zone of interests to challenge it under the dormant Commerce Clause. Neither case, however, explicitly addressed prudential standing as an issue.<sup>240</sup>

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232. Cert. Petition, *supra* note 138, at 13.

233. *Id.*

234. See Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth., 389 F.3d 491, 500–01 (5th Cir. 2004), *cert. denied*, 126 S. Ct. 332 (2005); Cert. Petition, *supra* note 138, at 12–13.

235. See Cert. Petition, *supra* note 138, at 9–10.

236. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 403 (1987).

237. Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 488 (1998), *superseded by statute*, Credit Union Membership Access Act, Pub. L. No. 105-219, § 2, 112 Stat. 913, 914–15 (1998) (amending 12 U.S.C. § 1759(b)), *as recognized in* Am. Bankers Ass'n v. Nat'l Credit Union Admin., 271 F.3d 262 (2001).

238. *Id.* at 493–94 (emphasis added).

239. See *supra* notes 228, 236 and accompanying text.

240. See *supra* notes 162–74 and accompanying text.

In light of the spirit of *Clarke*, *Bacchus*, and *West Lynn Creamery*, the plaintiffs in *NSWMA* alleged sufficient facts demonstrating injury to their competitive position to meet the “zone of interests” test.<sup>241</sup> The plaintiffs were clearly competitors to the Authority and its members, although only directly for intrastate trade.<sup>242</sup> Following the Ninth and First Circuits, the plaintiffs’ allegations of competitive injury from the ordinances’ prohibition against in-state shipping should be enough of an interest to justify a suit challenging the ordinances’ discrimination against both in-state and interstate competition.<sup>243</sup> Further, BFI and Waste Management alleged sufficient facts demonstrating that their broader regional and national contracts and competitive positions are burdened by the higher costs imposed by the Mississippi flow control ordinances to file a *Pike* challenge alleging the ordinances impose excessive burdens on interstate trade.<sup>244</sup> Thus, it makes little sense to prevent them from challenging the ordinances as facially discriminatory as well, even though the plaintiffs do not actually ship waste from locations within the Authority that have flow control ordinances to out-of-state sites.<sup>245</sup>

In both *Bacchus* and *West Lynn Creamery*, the Supreme Court considered the impact of state laws discriminating against out-of-state goods or producers on the competitive position of in-state firms in allowing them to bring Commerce Clause challenges. These suits were not dismissed despite the arguments of both Hawaii and Massachusetts that the wholesale dealers could pass the costs on to their customers and that only out-of-state firms directly affected by the discriminatory taxes or rebates should be able to sue. Neither case, however, explicitly addressed prudential standing as an issue.<sup>246</sup> The six ordinances had a more direct impact on both BFI and Waste Management than the taxes or rebates on the plaintiffs in *Bacchus* and *West Lynn Creamery*.<sup>247</sup> Because their waste business is intertwined with both intrastate and interstate markets, the plaintiffs had sufficient interests to challenge the ordinances under both the per se and *Pike* standards.

### 3. *There Is Not a Clear Distinction Between the Per Se and Pike Tests*

The Fifth Circuit’s distinction in analyzing the “zone of interests” test separately for the per se test and the *Pike* standard is unconvincing because the line between laws that are per se invalid or invalid under the *Pike* test is often too difficult to discern. Therefore, it makes little sense for a court to deny prudential standing under the per se test, but to recognize standing pursuant to a *Pike*

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241. See Cert. Petition, *supra* note 138, at 12–13 (arguing that the plaintiffs BFI and Waste Management were “reliable” plaintiffs as defined by the Supreme Court in *Clarke*); *supra* notes 7, 10–11, 162–74, 186–87, 202–03, 207–10, 215, 219, 228, 236, 239 and accompanying text.

242. See *supra* notes 7, 10–11, 186–87, 202–03 and accompanying text.

243. See *supra* notes 195–96, 207–10, 215, 219, 226 and accompanying text.

244. See *supra* notes 7, 10–11, 186–87, 202–03, 242 and accompanying text.

245. See *supra* notes 10–11, 186–87, 202–03, 242, 244 and accompanying text.

246. See *supra* notes 162–74 and accompanying text.

247. See *supra* notes 7, 10–11, 162–74, 186–87, 202–03, 242, 244–45 and accompanying text.

challenge.<sup>248</sup> In *Brown-Forman Distillers Corp. v. New York Liquor Authority*,<sup>249</sup> the Supreme Court acknowledged that “there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach.”<sup>250</sup> Laws that facially discriminate against interstate commerce are relatively easy to classify as fitting within the *per se* category. Courts have had more difficulty, however, in determining whether facially neutral statutes that have a discriminatory purpose or discriminatory effects fit within the *per se* or *Pike* categories because the Supreme Court has not provided a clear standard for which test applies.<sup>251</sup> In his concurring opinion in *West Lynn Creamery*, Justice Scalia observed: “[O]nce one gets beyond facial discrimination our negative-Commerce-Clause jurisprudence becomes (and long has been) a ‘quagmire.’”<sup>252</sup> He has also argued that the Court should consider abolishing the doctrine because it is not in the text of the Constitution and “in the 114 years since the doctrine of the negative Commerce Clause was formally adopted as holding of this Court . . . our applications of the doctrine have, not to put too fine a point on the matter, made no sense.”<sup>253</sup> In *General Motors Corp. v. Tracy*,<sup>254</sup> the Court acknowledged that “several cases that have purported to apply the undue burden test (including *Pike* itself) arguably turned in whole or in part on the discriminatory character of the challenged state regulations . . . .”<sup>255</sup> Similarly, in *South Dakota Farm Bureau, Inc. v. Hazeltine*,<sup>256</sup> the Eighth Circuit noted that “the Supreme Court has not laid out a specific test for determining discriminatory purpose”; as a result, “[d]iscriminatory purpose . . . is often incorporated into both first-tier analysis and second-tier *Pike* balancing analysis.”<sup>257</sup>

Because the line between the *per se* and *Pike* tests is so unclear, the Fifth Circuit’s use of a separate zone of interests analysis for each test makes little sense. To avoid the complexities that arise from applying both the “zone of interests” test and dormant Commerce Clause doctrine, courts in challenges to

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248. Cert. Petition, *supra* note 138, at 14.

249. 476 U.S. 573 (1986).

250. *Id.* at 579.

251. Kendall, *supra* note 30, at 10460; Zebot, *supra* note 32, at 1065 & n.15; *see* Lawrence, *supra* note 45, at 419 (“The Court has not clearly stated which of these three types of discrimination . . . should be given the most weight in determining the validity of a state statute or, for that matter, how these three types should interrelate.”).

252. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (1994) (Scalia, J., concurring) (citing *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)).

253. *Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 259–65 (Scalia, J., dissenting); *accord Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) (arguing for the replacement of the dormant Commerce Clause with the Import-Export Clause).

254. 519 U.S. 278 (1997).

255. *Id.* at 300 n.12; Kendall, *supra* note 30, at 10460.

256. 340 F.3d 583 (8th Cir. 2003), *cert. denied*, 541 U.S. 1037 (2004).

257. *Id.* at 596 & n.8 (citing Zebot, *supra* note 32, at 1077–84); Kendall, *supra* note 30, at 10460.

discriminatory local laws should allow any plaintiff who meets Article III standing to sue unless their suit raises true policy concerns.<sup>258</sup>

### CONCLUSION

The Fifth Circuit in *NSWMA* used the “zone of interests” test to defeat rather than support the dormant Commerce Clause’s interest in striking down barriers to interstate commerce. In *On the Green*, the Ninth Circuit appropriately treated standing as a threshold question separate from the merits of the case<sup>259</sup> and found that an intrastate shipper could meet the “zone of interests” test even though the court ruled against the same plaintiff on the merits because it was an intrastate shipper.<sup>260</sup> Based on its discussion of *On the Green*, the Fifth Circuit appears to have assumed that a plaintiff is in the zone of interests only if it can win on the merits, but that approach contradicts the Circuit’s own precedent that standing is a threshold question separate from the merits.<sup>261</sup> It also contradicts the *Clarke* decision, which, like the *On the Green* decision, found that the challengers had zone of interests standing even though they lost on the merits.<sup>262</sup> The Court does not usually consider how the invalidation of a statute under the dormant Commerce Clause will affect the plaintiffs in that case, but focuses instead on the overall impact of the law on interstate commerce. Consequently, it makes little sense to impose stricter requirements for standing, including proof that the plaintiff is engaged in interstate commerce, than the Court typically considers in evaluating the substance of a dormant Commerce Clause claim.<sup>263</sup> The Fifth Circuit used the zone of interests standing test to avoid considering whether the six ordinances violated the dormant Commerce Clause’s per se standard. As a result, the Fifth Circuit failed to protect the dormant Commerce Clause’s interest in invalidating flow control ordinances that facially discriminated against interstate commerce.<sup>264</sup>

The Fifth Circuit’s hair-splitting distinction that the plaintiffs failed the “zone of interests” test to bring a facial, per se challenge, but met the test under the *Pike* test because they are affiliated with national waste firms that are allegedly burdened by the ordinances’ higher costs ignores the Supreme Court’s admission that the line between the per se and *Pike* tests is often unclear.<sup>265</sup> If the ordinances burden BFI and Waste Management with higher costs that affect both companies’ regional and national competitiveness, why are they not within the zone of interests for the per se test as well?<sup>266</sup> In *Bacchus* and *West Lynn Creamery*, the Supreme Court allowed in-state wholesalers to bring dormant Commerce Clause challenges because of possible and unsubstantiated impacts on their competitive

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258. See *infra* notes 259–89 and accompanying text.

259. See *supra* notes 215–22 and accompanying text.

260. See *supra* notes 215–22 and accompanying text.

261. See *supra* notes 188–94 and accompanying text.

262. See *supra* note 194 and accompanying text.

263. See *supra* notes 154–74 and accompanying text.

264. See *supra* notes 183–227 and accompanying text.

265. See *supra* notes 43–46, 248–57 and accompanying text.

266. See *supra* notes 7, 10–11, 162–74, 186–87, 202–03, 242, 244–45 and accompanying text.

position even though only out-of-state interests were directly affected.<sup>267</sup> The financial impact of the six ordinances on BFI and Waste Management's regional and national contracts was clearer than the impact on the in-state wholesalers in *Bacchus* and *West Lynn Creamery*. Because of these clear impacts, the Fifth Circuit should have recognized that the plaintiffs met the "zone of interests" test to challenge the ordinances under both the *Pike* and the per se tests.

From a broader perspective, the *NSWMA* decision shows why it makes little sense to impose an additional "zone of interests" test on plaintiffs who meet the three-part constitutional standing test and are raising a constitutional challenge.<sup>268</sup> In 1970, before the Court had fully developed a constitutional standing test, the *Data Processing* Court's inclusion of plaintiffs making constitutional challenges in the "zone of interests" test may have made sense, although Justice Brennan in his *Data Processing* dissent foresaw the difficulties of applying the test.<sup>269</sup> After the Court had fully developed the Article III standing test, Justice White in his *Clarke* majority opinion correctly sought to limit the "zone of interests" test to APA cases and other statutory suits that seek to determine congressional intent.<sup>270</sup> As Professor Siegel and Professors Kelso each suggest, the "zone of interests" test should be limited to federal statutory cases where congressional intent to allow or prohibit certain types of suits is a relevant concern.<sup>271</sup>

Justice Scalia's argument that courts should apply a stricter "zone of interests" test in constitutional cases makes little sense other than as an artificial way to restrict the number of constitutional cases.<sup>272</sup> Additionally, Justice Scalia's implication in *Wyoming* that only direct beneficiaries of interstate trade are within the zone of interests failed to demonstrate why the test should not include indirect beneficiaries and did not offer a workable test for distinguishing between direct and indirect beneficiaries.<sup>273</sup> He failed to reconcile his approach with *Boston Stock Exchange's* holding that the plaintiffs had zone of interests standing because a New York transfer tax "indirectly infring[ed]" their ability to engage in interstate commerce, or with that Court's implication that indirect beneficiaries are within the Clause's zone of interests.<sup>274</sup>

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267. Neither *Bacchus* nor *West Lynn Creamery* explicitly addressed prudential standing, although the doctrine was applicable at the time of each decision. See *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263 (1984); *supra* notes 162–74 and accompanying text.

268. See *supra* notes 83–86, 99–102 and accompanying text.

269. See *supra* notes 83–102 and accompanying text.

270. See *supra* notes 83–86, 103–09 and accompanying text.

271. See *supra* notes 137–45 and accompanying text.

272. See *supra* notes 121–30, 146 and accompanying text.

273. See *supra* notes 23, 110, 181, 206 and accompanying text.

274. 429 U.S. 318, 320 n.3 (1977) (stating that the plaintiffs "are asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business and they allege that the transfer tax indirectly infringes on that right. Thus, they are 'arguably within the zone of interests to be protected . . . by the . . . constitutional guarantee in question'" (quoting *Ass'n of Data Processing Serv. Orgs. v.*

Unlike Justice Scalia, many judges and commentators believe that federal courts ought to vindicate the constitutional rights of those who meet Article III standing and not add unnecessary standing barriers to limit the number of suits.<sup>275</sup> Furthermore, given the difficulty the Court has had in defining when a plaintiff meets the “zone of interests” test in statutory cases, it makes little sense for courts to use the “zone of interests” test in addressing complex constitutional interests that are difficult to define.<sup>276</sup> Justice Scalia himself has argued that its dormant Commerce Clause case law is so confusing that the Court should abolish the doctrine.<sup>277</sup> Justice White’s reasons for limiting the “zone of interests” test to statutory cases, especially APA cases, makes more sense than Justice Scalia’s theory of using the test to prevent plaintiffs who meet Article III standing requirements from vindicating constitutional rights.<sup>278</sup>

Moreover, in dormant Commerce Clause cases, a typical plaintiff’s lawsuit generally benefits interstate trade, even if the plaintiff’s underlying motives for suing are unrelated to interstate commerce. Wyoming’s indirect and parochial interest in taxes provides an example.<sup>279</sup> A recent D.C. Circuit decision stated that a competitor motivated by commercial interests normally meets the “zone of interests” test if its interests are “congruent” with the statute and its suit will “advance, rather than hinder, the operation of the statute” even if its underlying motivations are different from the statute.<sup>280</sup> Thus, the Court should apply liberal standing rules in dormant Commerce Clause cases and allow suits by intrastate businesses harmed by a law that also discriminates against interstate commerce unless its suit would “hinder” interstate trade.<sup>281</sup> Following the spirit of *Clarke*, courts should recognize that intrastate waste carriers harmed by a discriminatory ordinance that discriminates against both intrastate and interstate commerce are usually “reliable” plaintiffs that may raise dormant Commerce Clause challenges.

In general, courts should as a matter of policy allow constitutional suits by plaintiffs who meet Article III standing requirements if their suit serves the interests of the constitutional provision at issue and they are “reliable” plaintiffs capable of pursuing the suit in good faith.<sup>282</sup> Courts should not use the “zone of interests” test simply to limit the number of constitutional suits in federal courts as Justice Scalia has proposed.<sup>283</sup> If it abolishes the “zone of interests” test for constitutional cases, the Court’s Article III standing requirements are sufficiently

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Camp, 397 U.S. 150, 153 (1970)); *see supra* notes 23, 110, 181, 206, 273 and accompanying text.

275. *See supra* notes 94, 131, 149–53 and accompanying text.

276. *See supra* notes 43–46, 248–57 and accompanying text.

277. *See supra* notes 27, 46, 253 and accompanying text.

278. *See supra* notes 103–09 and accompanying text.

279. *See supra* notes 117–19, 122, 150 and accompanying text.

280. *Honeywell Int’l Inc. v. Envtl. Prot. Agency*, 374 F.3d 1363, 1370 (D.C. Cir. 2004) (per curiam), *modified on other grounds*, 393 F.3d 1315 (D.C. Cir. 2005) (per curiam).

281. *See supra* notes 205–47, 258 and accompanying text.

282. *See supra* notes 185–87 and accompanying text.

283. *See supra* notes 127, 146–48 and accompanying text.

restrictive to prevent frivolous constitutional suits, and courts could still apply other prudential limitations to standing.<sup>284</sup>

The issue of prudential standing is especially relevant today with Chief Justice Rehnquist's death and Justice O'Connor's retirement. Chief Justice Roberts and Justice Alito could help support Justice Scalia's goal of expanding the "zone of interests" test to prevent review of many constitutional cases.<sup>285</sup> Ideally, they should instead follow Justice White's argument in *Clarke* that the zone of interests should not be applied to constitutional cases because the test is hard to apply and is unnecessary in light of the Court's now stringent three-part test for Article III standing.<sup>286</sup>

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284.      *See supra* note 151 and accompanying text.

285.      *See supra* notes 19–21, 114 and accompanying text.

286.      *See supra* notes 17, 99, 107 and accompanying text.