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Norfolk Southern Corp. v. Oberly: Coastal Protection Wins in Delaware

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Norfolk Southern Corp. v. Oberly: Coastal Protection Wins in Delaware

I. Introduction

A state Coastal Zone Management Program (CZMP) is a relatively recent phenomenon.[1] Perhaps it is not surprising, then, that *Norfolk Southern Corp. v. Oberly*[2] is the first case in which development restrictions in a federally authorized state coastal plan have faced a full-fledged constitutional attack alleging that the restrictions violate the commerce clause of the U. S. Constitution.[3] *Norfolk Southern* is a significant decision affecting every state coastal plan authorized by the federal Coastal Zone Management Act (CZMA),[4] since both the Delaware District Court and the United States Court of Appeals for the Third Circuit upheld the Delaware Coastal Management Program against the commerce clause challenge.

Both courts rejected Norfolk Southern's claim that the Delaware Coastal Zone Act (DCZA)[5] impermissibly burdened interstate and foreign commerce by imposing a ban on any new bulk transfer operation in the Delaware coastal zone.[6]

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1. State coastal plans are authorized and funded under the federal Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1982 & Supp. III 1985) [hereinafter cited as CZMA]. The 1985-86 amendments to the act are found at 16 U.S.C.A. §§ 1455, 1455a, 1461 (West Supp. 1986).

2. Norfolk Southern Corp. v. Oberly, 632 F. Supp. 1225 (D. Del. 1986), *aff'd on other grounds*, 822 F.2d 388 (3d Cir. 1987).

3. U.S. Const. art. I, § 8, cl. 3. The commerce clause reads: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes."

4. Twenty-eight of the thirty-five U.S. coastal states and territories have voluntarily developed and implemented comprehensive federally approved (and largely federally funded) coastal zone management programs under the CZMA. *See* Legislative History of the Coastal Zone Management Reauthorization Act of 1985, (as part of the Budget Reconciliation Act, Pub. L. No. 99-272, 99th Cong. 2d Sess.) *reprinted in* 1986 U.S. Code Cong. & Admin. News 1070, 1071.

5. Del. Code Ann. tit. 7, §§ 7001-7013 (1974 & Supp. 1986), [herinafter cited as DCZA].

6. *Norfolk Southern*, 632 F. Supp. at 1252; *Norfolk Southern*, 822 F.2d at 407.

The district court's holding had three parts. It concluded, first, that the *Pike* balancing test[7] was applicable in analyzing the dispute. Second, that the existence of factual disputes precluded summary judgment under that test. Third, since the Delaware Act had congressional approval through its authorization under the federal CZMA, it was thus immune to commerce clause attack. Norfolk Southern appealed the decision.[8]

On appeal, the United States Court of Appeals for the Third Circuit affirmed the district court's decision, but used a different analysis. The court of appeals did not find congressional consent for states to impermissibly burden interstate commerce expressed in the CZMA. It held that congressional consent was not necessary, however, because Norfolk Southern had not alleged any burden on interstate or foreign commerce cognizable in dormant commerce clause analysis. The appeals court thus granted summary judgment to defendants/appellees — the state of Delaware and intervening environmental groups.

Part II of this Note presents the factual and legal background of the case. The Note then discusses the two major issues raised by this litigation: 1) the alleged burden on interstate and foreign commerce, and 2) the question of the existence of congressional consent to an otherwise impermissible burdening of commerce. The Note examines the analysis of these issues by the district court in Part III, and the circuit court in Part IV. Part V analyzes the district and circuit courts' disagreement on the existence of congressional consent, as well as the differences in their dormant commerce clause analyses. In Part VI, the Note concludes that the decisions of both courts have provided state coastal plans with increased protection from similar commerce clause challenges. However, the courts' disagreement on the congressional consent issue indicates a need for Congress to resolve this issue by making its consent even more unmistakably clear.

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7. Pike v. Bruce Church Inc., 397 U.S. 137, 142 (1970). The *Pike* test is discussed *infra* note 42 and accompanying text.

8. Norfolk Southern Corp. v. Oberly, 882 F.2d 388 (3d Cir. 1987).

II. Background and Facts

A. *The Facts*

The Norfolk Southern Group[9] is in the business of shipping coal. The companies proposed the construction of a "lightering" facility in sheltered Delaware Bay. In this operation, coal barges would "top-off" partially loaded supercolliers (very large coal carrying ships) before the supercolliers sailed to foreign ports.[10] Appellants asserted that their "top-off" service would make United States coal more competitive in the world marketplace.[11]

Norfolk Southern pursued the idea of a coal transfer service for several years with Delaware state officials. These proceedings culminated in a determination by the state Coastal Zone Industrial Control Board that the proposed project was a "bulk transfer facility" within the meaning of the Delaware Coastal Zone Act,[12] and was therefore, a prohibited activity.[13] The Superior Court upheld the Board's decision and the Delaware Supreme Court affirmed.[14] Following these state admin-

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9. The plaintiffs/appellants are Norfolk Southern Corp., and its affiliates and business partners which include the Southern Railway, Norfolk and Western Railroad, Norfolk Southern Marine Services, Inc., Lambert's Point Barge Co., Inc., Coastal Barge Corp., Coal Logistics Corp., Coastal Carriers Corp. Collectively they are the "Norfolk Southern Group" [hereinafter cited as Norfolk Southern]. *Norfolk Southern*, 632 F. Supp. at 1228 n.2.

10. The top-off would allow supercolliers to be fully loaded to capacities of 100,000 to 160,000 deadweight tons before departing. Plaintiffs asserted that Big Stone Anchorage, which is currently used for oil-lightering operations, is the only naturally protected anchorage with a depth of 55 feet or more between Maine and Mexico. *Id.* at 1229.

11. Plaintiffs Opening Brief at 5, Norfolk Southern Corp. v. Oberly, 632 F. Supp. 1225 (1986) (No. 84-330).

12. *Norfolk Southern*, 632 F. Supp. at 1229. Plaintiffs, Norfolk Southern, had received a status decision by the Delaware Dep't of Nat. Resources and Envtl. Control (DNREC) in February, 1984 that the DCZA did not prohibit their proposal because the project was not a "bulk product transfer facility" as defined by § 7002(f) of the Act. This decision was appealed by the state and later reversed by the State Coastal Zone Industrial Control Bd.

13. *Id.* at 1230. Section 7003 of the DCZA describes uses absolutely prohibited in the coastal zone.

14. Coastal Barge Corp. v. Coastal Zone Industrial Control Bd., 492 A.2d 1242 (Del. 1985).

istrative and legal proceedings, the plaintiffs brought this challenge to the DCZA ban in federal district court arguing that the ban was unconstitutional as applied to their proposed coal top-off operation.[15] They sought declaratory and injunctive relief to prevent Delaware state officials from enforcing the DCZA against their proposed operation.[16]

The defendants, officers of the State of Delaware,[17] were joined by intervening defendants. The intervenors were four environmental organizations and the Kent County Levy Court.[18] The plaintiffs and defendants filed cross-motions for summary judgment.[19]

B. *Delaware Coastal Zone Act and Federal Coastal Zone Management Act*

The law prohibiting Norfolk Southern's proposed service

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15. Plaintiffs asserted DCZA violated the commerce clause. U.S. Const. art. I, § 8, cl. 3.

16. *Norfolk Southern*, 632 F. Supp. at 1228. The entrance of the Dep't of Commerce heightened the significance of the case. The Dep't was granted leave to be present as an *amicus curiae* supporting the plaintiffs' position that the ban on the proposed coal top-off service contravened the national interest in promoting coal exports. *Id.* at 1252. The Dep't of Commerce is responsible for overseeing the environmental protection of the coasts by approving and funding state coastal plans. 16 U.S.C. § 1454 (1982). Its entry in opposition to the approved plan disturbed many environmentalists. *See, e.g., Coastal Protection on Trial in Delaware*, 3 Nat. Resources Def. Council Newsline 1, 4 (1986). Several Senators and Representatives also filed *amicus* briefs for both plaintiffs and defendants. *Norfolk Southern*, 632 F. Supp. at 1252 n.47.

17. Defendants/appellees were Delaware Attorney General Oberly, who is responsible for enforcing the DCZA and Secretary Wilson of the Del. Dep't of Nat. Resources and Envtl. Control, who administers the DCZA. *Norfolk Southern*, 822 F.2d at 392.

18. The intervenors included: The Natural Resources Defense Council (NRDC), a national environmental protection organization; the Delaware Saltwater Sportfishing Association; the National Audubon Society, a national conservation organization whose members use Delaware Bay and adjoining lands for scientific, educational, commercial and recreational purposes; the Sierra Club, a national conservation organization; and the Kent County Levy Court, the governing body of Kent County. Big Stone Anchorage is partially within Kent County. Defendants' and Intervening Defendants' Opening Brief at 8-9, Norfolk Southern Corp. v. Oberly, 632 F. Supp. 1225 (D.Del. 1986) (No. 84-330).

19. *Norfolk Southern*, 632 F. Supp. at 1228.

is the DCZA enacted in 1971.[20] The DCZA is now part of Delaware's Coastal Management Program (DCMP). In the DCZA, Delaware declared that its coastal areas are the most critical to the future of the State in terms of quality of life.[21] The purpose of the Act "is, therefore, . . . to control the location, extent, and type of industrial devlopment in Delaware's coastal areas. In so doing, the State can better protect the natural environment of its bay and coastal areas and safeguard their use primarily for recreation and tourism."[22]

Section 7003 of the Act prohibits entirely any heavy industry in the coastal zone not in operation as of June 28, 1971. The ban includes offshore gas, liquid, or solid bulk product transfer facilities.[23] The Act considers these facilities to be incompatible with the protection of the natural coastal environment. While declaring that the public policy of the state is also to encourage the introduction of new industry into Delaware, the state seeks to strike a balance between further industrialization and the natural beauty, recreational potential, and protection of the state's coastal environment.[24] Delaware's total ban on new offshore bulk product transfer facilities, which its legislature found to be *imperative*,[25] is the central concern of this litigation.

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20. The DCZA was an outgrowth of a Governor's Task Force Report. The Task Force was appointed because of a concern that unmanaged industrial development was causing environmental degradation in Delaware. Defendant's Opening Brief at 9, Norfolk Southern Corp. v. Oberly, 632 F. Supp. 1225 (D. Del. 1986) (No. 84-330).

21. Del. Code Ann. tit. 7, § 7001 (1974). Delaware has reason to be concerned about its coastal zone, since no part of the state is more than eight miles from tidal water. Off. of Coastal Zone Mgmt., Nat'l Oceanic and Atmospheric Admin., U.S. Dep't of Com., Final Environmental Impact Statement of Proposed Coastal Management Program for the State of Delaware 5.A.3 (1980).

22. Del. Code Ann. tit. 7, § 7001 (1974).

23. *Id.* § 7003.

24. *Id.* § 7001. The purpose section of the DCZA concludes:

> It is further determined that offshore bulk product transfer facilities represent a significant danger of pollution to the coastal zone and generate pressure for the construction of industrial plants in the coastal zone, which construction is declared to be against public policy. For these reasons, prohibition against bulk product transfer facilities in the coastal zone is deemed imperative.

Id.

25. *Id.* (emphasis added).

The DCZA is authorized pursuant to the federal Coastal Zone Management Act (CZMA).[26] Congress enacted the CZMA to further the "national interest in the effective management, beneficial use, protection, and development of the coastal zone."[27] In the federal act, Congress declared it to be national policy "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations . . . ."[28]

The findings of the Act stated that increasing and competing demands on coastal resources such as development and preservation were being met inadequately by existing state and local controls.[29] Therefore, in enacting the CZMA, Congress gave to the coastal states the prime responsibility for developing and administering coastal zone management plans which would better serve these competing demands.[30] In addition, federal grants were provided as incentives to the states to help them develop, implement, and administer voluntary management plans.[31]

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26. 16 U.S.C. §§ 1451-1464 (1982 & Supp. III 1985).

27. *Id.* § 1451(a) (Congressional findings of the CZMA).

28. *Id.* § 1452(1).

29. *Id.* § 1451(c), (h). These demands [development pressures] "have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes in ecological systems." *Id.* § 1451(c). In light of these demands, and the urgent need to protect these ecologically fragile resources, the Act stated that the present state and local institutional arrangements for planning and regulating land and water uses were inadequate. *Id.* § 1451(h).

30. *Id.* § 1451(i). Congress found that the "key" to more effective protection of the coast was to "encourage the states to exercise their full authority" over it, and for Congress to work cooperatively with the states in developing land and water use programs for the coastal zone.

31. *Id.* § 1454(a)-(d). Until the 1985 amendments, CZMA provided grants of up to eighty percent of the costs of developing and implementing a state coastal program. *Id.* § 1454(c), (d). Section 1455 authorizes grants for program administration. Once a state plan is approved, federal action in the coastal zone must be "consistent with" the state plan, as defined in § 1456(c), (d). This means that federal agencies must conform their activities to the requirements of the state program.

The Act was reauthorized and amended in 1976, 1980, and 1985, but the orginial framework and policy objectives were untouched. In the 1976 amendments, Congress increased the funding, and required state programs to take into account the siting of energy facilities in assesssing the national interest. Pub. L. No. 94-370 §§ 4, 5(3) (1976) *amending* 16 U.S.C. § 1454, 1455(c)(8). In 1980, the Act was made more specific in its policy objectives. Section 1452 lists these policy objectives. Congress stated

The CZMA delegates to the Secretary of Commerce the responsibility for administering its grant-in-aid program and for approving state coastal management programs.[32] The duties of the Secretary[33] include making findings before approving a state's management program. First, he must find that the program meets the substantive requirements of section 1454(b).[34] Second, the plan must be consistent with Congress' declaration of policy in section 1452,[35] and, third, the program must adequately consider the national interest in, for example, siting energy facilities "necessary to meet requirements which are other than local in nature."[36] After his initial approval of a state's program, the Secretary conducts a continuing evaluation of the program. This includes a review of program implementation, enforcement, and conformity with congressional policy.[37] Lack of progress in a state program or

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that the amendments contained "clarifications" but no new program requirements. *See* H.R. Rep. No. 1012, 96th Cong. 2d Sess. 15, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4362, 4364. CZMA was reauthorized and amended again in 1985-86 by Pub. L. No. 99-272 § 6041, 100 Stat. 124 (1986). The 1985 amendments included the following provisions: federal matching funding for administering state programs was reduced in steps from 4 to 1 in 1986 to a 1 to 1 match after 1988 (§ 1455(a)), procedures were specified for modifying the management programs (§ 1455(g)), financial assistance was reduced, but not below seventy percent of the amount otherwise available to the state for any year, if the Secretary determines that the state has failed to make significant improvement in achieving its coastal management objectives (§ 1458(c)), and a National Estuarine Reserve Research System was established (§ 1461(a)-(g)).

32. 16 U.S.C. § 1454(a), (h) (1982). Approval is pursuant to § 1455. To be approved, the program must set forth "objectives, policies, and standards" for the use of coastal lands and waters. *Id.* § 1453(12). Congress also imposed a number of substantive requirements. The program must, among others, define permissible land and water uses within the designated coastal zone, designate areas of particular concern, extablish guidelines on priorities of uses in particular areas, and create planning processes for energy facilities, access to beaches and for shoreline erosion protection. *Id.* § 1454(b).

33. The Secretary's authority to approve state plans has been delegated to the Assist. Adm'r for Coastal Zone Mgmt. in the Nat'l Oceanic and Atmospheric Admin. 15 C.F.R. § 923.2(b) (1987).

34. *See supra* note 32 for a partial listing of these substantive requirements.

35. 16 U.S.C. § 1455(c) (1982).

36. *Id.* § 1455(c)(8). The Secretary must consider the views of interested federal agencies before approving a program. *Id.* § 1456(b). He may make annual grants for administering the program once it is approved. *Id.* § 1455(a).

37. *Id.* § 1458(a). The policy directives are listed in § 1452(2)(A)-(I).

lack of conformity with national policies results in the withdrawal of federal approval and financial assistance.[38]

Thus, the *Norfolk Southern* case was set within the legal framework of the DCZA and the federal CZMA and their commerce clause implications.

III. The District Court Decision

A. *Commerce Clause Analysis*

The district court began its analysis with a detailed examination of the dormant commerce clause.[39] The court identified three basic approaches used by the Supreme Court in its recent decisions to determine whether a state statute violates the commerce clause.[40] Consequently, the court declared that its first task was to choose the proper standard of review to determine whether, if there had been no federal CZMA legis-

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38. *Id.* § 1458(c), (d). The Secretary must report to Congress biennially on the administration of CZMA. *Id.* § 1462(a). The report must contain, among other elements, a summary of a coordinated national strategy and program for the nation's coastal zone, and a description of the economic, environmental, and social consequences of energy activity affecting the coastal zone. *Id.*

39. Norfolk Southern Corp. v. Oberly, 632 F. Supp. 1225, 1230-43 (D. Del. 1986). The district court's examination can be summarized as follows. The Constitution specifically grants to Congress the power "to regulate Commerce with Foreign Nations, and among the several states and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The Supreme Court has long held that in the absence of congressional exercise of that power, the Commerce Clause by its own force prevents states from erecting barriers to the free flow of interstate commerce. Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 440 (1978) (quoting Cooley v. Wardens, 53 U.S. (12 How.) 299 (1851)). This implied limitation on the power of states to burden commerce even when Congress' power is unexercised is commonly called the "dormant" commerce clause. But the Supreme Court has also recognized that "not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States." Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366, 371 (1976). The commerce clause was designed "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." Hughes v. Oklahoma, 441 U.S. 322, 325 (1979).

40. *Norfolk Southern*, 632 F. Supp. at 1230. These approaches are "a deferential balancing approach for 'evenhanded' regulation; stricter scrutiny for 'discriminatory' regulation and a more highly deferential standard for certain safety regulations." *Id.* *See infra* note 42. The court also noted that "the legal standards governing the review of state regulation under the Commerce Clause remain unsettled." *Norfolk Southern*, 632 F. Supp. at 1231 n.12 (quoting Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting)).

lation,[41] the DCZA's ban on coal lightering in Delaware Bay impermissibly burdened interstate and foreign commerce.[42]

1. *Strict or Deferential Scrutiny*

The district court noted that the Supreme Court has held state statutes to be "economically protectionist" either because of their discriminatory purpose or discriminatory effect.[43] Therefore, it first examined plaintiffs' claim that the DCZA should receive strict scrutiny as a "protectionist" measure with a discriminatory effect.[44] The court found that the

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41. In his conclusion, Chief Judge Schwartz described his initial discussion of the dormant commerce clause issue as "lengthy dicta," since he ultimately granted summary judgment to defendants not on dormant commerce clause grounds, but rather on the basis of congressional consent to the program. He stated that the discussion would give the appellate court the benefit of his views on "the tangled area of Commerce Clause law" in the event of a remand, so that the court could provide guidance if it chose to do so. *Norfolk Southern*, 632 F. Supp. at 1252.

42. The district court regarded the balancing test formulated in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), as the "touchstone " in commerce clause analysis. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (state regulation banning non-returnable milk containers found to be even-handed). The district court noted, however, that the flexible *Pike* approach does not apply to state regulation that is economically protectionist. *Norfolk Southern*, 632 F. Supp. at 1232 (quoting Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) (tax exemption for local wine was discriminatory in purpose and effect, thus violating the commerce clause); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (New Jersey's prohibition on the import of waste generated outside the state was struck down as protectionist.)).

The balancing test, as stated in *Pike*, directs the reviewing court as follows: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. *See also infra* text accompanying notes 58-62.

In cases of economic protectionism, stricter scrutiny, or a virtual *per se* rule of unconstitutionalty is applied by the court. *Norfolk Southern*, 632 F. Supp. at 1232 (quoting South- Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 100 (1984) (The protectionist nature of Alaska's local processing requirement fell within the rule of virtual *per se* invalidity.); *City of Philadelphia*, 437 U.S. at 624 ("Where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.")).

43. *Norfolk Southern*, 632 F. Supp. at 1232 (citing *Bacchus*, 468 U.S. at 270).

44. *Id.* at 1234. The plaintiffs contended that the DCZA's ban on coal transfer facilities discriminates against out-of-state coal shipping interests in favor of in-state recreational interests. *Id.* at 1231. A statute that overtly blocks the flow of interstate commerce at a state's borders falls most easily into the category which the Court

Delaware statute is facially evenhanded, that is, it does not discriminate in its stated purpose, and that it differs significantly from other facially evenhanded statutes which the Supreme Court had subjected to strict scrutiny for their discriminatory effects.[45] It found that the issue in this case was a "statutory distinction regarding uses, not users."[46]

Consequently, the court concluded that even though the ban on bulk product transfer facilities may fall exclusively on out-of-state interests, it did not mean that the state was "discriminating" for purposes of commerce clause analysis.[47] Therefore, strict scrutiny was not warranted on the basis of alleged discriminatory effect alone.[48]

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subjects to strict scrutiny. *City of Philadelphia*, 437 U.S. at 624. Regulation that burdens foreign commerce may also be subject to heightened scrutiny. *South-Central Timber*, 467 U.S. at 96.

45. The district court noted that in those cases the statute protected an in-state market from out-of-state competition in that same market. *See* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977) (apples); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (milk); *see also City of Philadelphia*, 437 U.S. 617 (facially discriminatory regulation of the landfill-space market). The court determined that the DCZA provided no similar competitive advantage. *Norfolk Southern*, 632 F. Supp. at 1235.

46. *Norfolk Southern*, 632 F. Supp. at 1235. The court apparently meant that the Delaware coastal plan has chosen protection of recreational and commercial fishing uses in the Delaware coastal zone over new heavy industrial uses, but that the ban does not discriminate against out-of-state industry in favor of in-state industry. Also, the court found the holding of Exxon Corp. v. Governor of Md., 437 U.S. 117, 127 (1978), which was reaffirmed in Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 474 (1981), that the commerce clause protects the interstate market and not particular firms, to be applicable to the plaintiffs' claims.

47. *Norfolk Southern*, 632 F. Supp. at 1236.

48. The district court discussed an additional factor which counseled against applying strict scrutiny in this case, that is, the enactment of the CZMA and its subsequent amendments. *Id.* at 1236 n.21. The district court found that the CZMA demonstated Congress' special interest in the state-federal relationship here, and that Congress is likely to redefine the responsibilities of the states as needed. Also, the CZMA requires the Commerce Secretary to submit to the President and Congress biennial reports on the state programs and recommendations for additional legislation. 16 U.S.C. § 1462(a), (b) (1982). "[W]ith the federal interest protected by Congress itself, the courts should be less eager to force the states to justify particular regulations." *Norfolk Southern*, 632 F. Supp. at 1236 n.21. This thesis is developed in a number of commentaries. *See*, Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 Wis. L. Rev. 125 (1979); *see also* Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425 (1982).

Fed. R. Civ. P. 56(c) provides that "summary judgment shall be rendered . . . if

Next, the district court looked to see if the DCZA has a discriminatory purpose and applied a similar analysis to that used for discriminatory effect. It noted that discriminatory purpose or intent, however, cannot be established merely by showing that the DCZA happens to burden out-of-state industry disproportionately. Delaware must have specifically intended to benefit Delaware interests.[49] The court found substantial evidence contrary to plaintiffs charges of discriminatory intent.[50] Therefore, although it doubted that plantiffs could establish discriminatory intent, the court concluded, as it had with discriminatory effect,[51] that a question of fact remained, and that discriminatory intent could not be determined on a motion for summary judgment.[52] Finding no indication that the DCZA prevented national uniformity in regulating foreign trade, the court rejected plainfiffs' arguments that strict scrutiny was required because the Delaware ban impermissibly burdened foreign commerce.[53]

. . . there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The district court concluded that even if strict scrutiny were applicable, it should not be applied on summary judgment, because material issues of fact existed as to whether the Delaware CZA discriminates against state interests. *Norfolk Southern*, 632 F Supp. at 1237.

49. *Norfolk Southern*, 632 F. Supp. at 1238. *See, e.g., Hunt*, 432 U.S. at 352 (where there was glaring evidence of discriminatory intent); Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 685 (1981) (Brennan, J., concurring) (The Court found an impermissible protectionist purpose in the Iowa truck-length regulation.). The district court found that the DCZA's statement of purpose, *supra* notes 22 & 24, is not discriminatory. Looking behind the statute's "avowed purpose," it did not find that the statutory exemption from the ban for the Port of Wilmington was discriminatory, as plaintiffs claimed. Section 7002(f) of the DCZA excludes "docking facilities for the Port of Wilmington" from the definition of "bulk transfer facility." The court noted that these facilities could be used by plaintiffs as well as Delaware companies.

50. *Norfolk Southern*, 632 F. Supp. at 1237-38. Norfolk Southern argued, for example, that its proposed operation would benefit out-of-state mining, railroad, and labor interests significantly, but not Delaware interests and residents. The defendants pointed out that two of the six plaintiffs were Delaware corporations, and that the prohibition which extends over both land and water areas, "by definition burdens Delaware interests." *Id.* at 1237.

51. *See supra* notes 46-48.

52. *Norfolk Southern*, 632 F. Supp. at 1238.

53. *Id.* Achieving national uniformity in the regulation of foreign trade is one of the major reasons the power to regulate commerce is placed in the federal government. Japan Line, Ltd. v County of Los Angeles, 441 U.S. 434 (1979). The district

The district court also rejected the defendants' arguments that the DCZA should receive the deferential scrutiny that the courts usually apply to highway safety regulations.[54] The defendants argued that there was "no principled reason" for not extending the deferential approach by analogy to this case.[55] But the court, citing lack of authority from the court of appeals, declined to do so.[56] Nor was the district court persuaded by defendants' additional argument that because the DCZA is a zoning regulation, it should receive deferential

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court declared that the two cases cited by the plaintiffs on this issue, however, were not controlling: *Japan Line*, and South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984). In *Japan Line*, there was a risk of multiple taxation of a foreign company, and in *South-Central Timber*, the plurality decision applied the "virtual *per se* rule of invalidity" to the protectionist Alaska statute without regard to the burden on foreign commerce. *Norfolk Southern*, 632 F.Supp. at 1239. *See also* Maltz, *How Much Regulation is Too Much-An Examination of Commerce Clause Jurisprudence*, 50 Geo. Wash. L. Rev. 47, 49 n.8 (1981) (noting that there is a separate methodology for tax cases).

54. *Norfolk Southern*, 632 F. Supp. at 1240 & n.26. The court noted that highway safety regulations have "traditionally" enjoyed a greater degree of deference than other fields of state regulation. This deference is accorded on the "assumption that the burden of facially evenhanded highway regulations usually falls on in-state as well as out-of-state economic interests, thus providing a political check on unduly burdensome regulations." *Id.* (citing Kassel v. Consolidated Freightways Corp. 450 U.S. 662, 675 (1981)). *See also* Eule, *supra* note 48, at 445. Highways are also primarily a state responsibility, Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 444 n.18 (1978) and the Court is generally reluctant to balance safety against commerce. *See, e.g., id.* at 448-51 (Blackmun, J., concurring) (narrowing [the] decision by focusing on the illusory nature of [the] alleged safety benefits); *see also* Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific R.R. Co., 393 U.S. 129, 140 (1968) ("It is difficult at best to say that financial losses should be balanced against the loss of lives and limbs of workers and people using the highways.").

55. *Norfolk Southern*, 632 F. Supp. at 1240. Defendants had cited *Kassel*, *Raymond Motor*, and Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 523-24 (1959), for the proposition that the Court has applied a deferential standard to areas of traditional local concern which affect safety or the quality of life of a state's citizens. They also noted circuit court decisions which applied this highly deferential standard of review to environmental legislation, and Supreme Court decisions reflecting the hard choice between "non-comparables." *See, e.g., Brotherhood, supra* note 54, at 140. Defendants reasoned that safety and environmental regulations (including coastal zone regulations) share the same characteristics: "they are all designed to promote non-economic, social welfare concerns of peculiarly 'local concern'." Defendants' and Intervening Defendants' Opening Brief at 63-66, Norfolk Southern Corp. v. Oberly, 632 F. Supp. 1225 (D. Del. 1986) (No. 84-330).

56. *Id.* at 1240.

treatment.[57]

2. *Pike Balancing*

After rejecting both strict and deferential scrutiny as the proper standards for this commerce clause challenge, the court chose to apply the *Pike* balancing test. The choice was heavily influenced by the Supreme Court's choice of *Pike* balancing in *Minnesota v. Clover Leaf Creamery Co.*,[58] a 1981 case which upheld a state regulation designed to protect the environment.

Using the balancing test,[59] the court determined that the "Delaware CZA 'regulates evenhandedly to effectuate a legitimate local public interest' with only 'incidental' effects on interstate commerce."[60] The remaining question then became "whether the ban on bulk product [vessel-to-vessel] transfer imposed a burden on commerce clearly excessive in relation to putative local benefits."[61] As the parties clearly disputed both the benefits and the burdens of the coal transferring operation, the court concluded that neither party was entitled to summary judgment as a matter of law under the *Pike* test.[62]

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57. "None of the cases cited by defendants compels a more lenient standard for zoning regulations than for other regulations in areas of legitimate state interest." *Id.* at 1241.

58. 449 U.S. 456 (1981). Since the statute at issue in *Clover Leaf Creamery*, banning plastic non-returnable milk containers, was found to be non-discriminatory, the Court evaluated it by *Pike* balancing; the burden imposed by the statute on interstate commerce was found to be "not clearly excessive" in relation to local benefits. *Id.* at 473.

59. *Supra* note 42.

60. *Norfolk Southern*, 632 F. Supp. at 1241.

61. *Id. See* Pike v. Bruce Church Inc., 397 U.S. 137, 142 (1970) (The extent of the burden depends on whether the local benefits could be promoted as well with lesser impact.).

62. The court found both the benefits and the burdens in sharp dispute. However, it found no real dispute that the coal top-off operation would reduce coal export costs to some extent and so it agreed that the ban does burden commerce. But the court also stated that the *Pike* test requires the court to quantify the burden. The court concluded that quantification could only be done at trial, and therefore summary judgment could not be granted under the *Pike* analysis. *Norfolk Southern*, 632 F. Supp. at 1242. The "putative local benefits" of the regulation were also in dispute. Although defendants maintained that the DCZA is "not simply an anti-pollution measure", the court found that the magnitude of the environmental impact of fugi-

B. *Congressional Consent Analysis*

The district court next addressed the defendants' claim that Congress had consented to the Delaware ban on the proposed transfer operation by its passage of the federal Coastal Zone Management Act.[63] It summarized the constitutional theory behind congressional consent. Proceeding from the premise that Congress' power over commerce is plenary,[64] the Supreme Court has held that "Congress has undoubted power to redefine the distribution of power over interstate commerce. It may . . . permit states to regulate the commerce in a manner which would otherwise not be permissible . . . ."[65] It may, in effect, "consent" to such regulation. In analyzing whether Congress has given its consent, the district court looked first to the text of the federal statute purportedly authorizing state action,[66] then to the relevant legislative history,[67] and, if applicable, to the administrative regulations.[68]

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tive dust emissions and coal spillage from the operation were disputed and uncertain. *Id.* at 1242-43.

63. *Id.* at 1243. For an extended discussion of the constitutional theory of congressional consent see Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 Stan. L. Rev. 387 (1983).

64. *See, e.g.* Gibbons v. Ogden, 22 U.S. 1 (9 Wheat.) 196-97 (1824).

65. Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945) *cited in Norfolk Southern*, 632 F. Supp. at 1230. *See also* Northeast Bancorp Inc. v. Board of Governors, 472 U.S. 159, 174 (1985); Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 427 (1946); Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 652 (1981) (quoting Lewis v. B.T. Investment Managers, Inc., 447 U.S. 27, 44 (1980)); H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 542-543 (1949)). Commerce clause commentators now widely acknowledge the power of Congress to consent to state burdens on commerce. *See, e.g.*, Eule, *supra* note 48, at 443 n.93 ("in light of the acknowledged power to burden trade enjoyed by both Congress . . . and the states when Congress has so authorized . . . ."); Cohen, *supra* note 63 at 387 ("[O]ver a century of Supreme Court decisions establish beyond debate Congress's power to consent to state laws that, absent congressional consent, would be invalid as unreasonable burdens on interstate commerce.").

66. *Norfolk Southern*, 632 F. Supp. at 1244 (citing Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 427 (1946)).

67. *Id.* (citing Northeast Bancorp, Inc. v. Board of Governors, 472 U.S. 159 (1985)).

68. *Id.* at 1244. *See* White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204 (1983) (The mayoral order, requiring fifty percent of construction workers on certain federally funded projects to be Boston residents, was found to be harmonious with the federal regulations.).

The district court noted that the Supreme Court has held that congressional power to consent to otherwise impermissible state regulation must be either exercised expressly,[69] or made unmistakably clear.[70] But the court also noted that "by 'expressly stated' the Supreme Court does not require Congress to explain either in the body of the statute or in the legislative history that it is exercising its Commerce Clause power."[71]

According to the district court, congressional consent encompasses two issues: 1) whether Congress under the CZMA intended to remove state coastal zone statutes from commerce clause attack, and, assuming that CZMA provides such authorization to the states, 2) whether Delaware's ban on the coal-transfer operation was within the scope of that authorization.[72] The court found in the language and legislative history of the CZMA that Congress had not enacted a comprehensive federal law for the vast coastal area of the United States, but had intended, instead, to encourage and assist each coastal state to plan for and manage its own coastal area.[73]

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69. *Norfolk Southern*, 632 F. Supp. at 1244 (citing Western and Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 654 (1981)) (Congress explicitly intended the McCarran-Ferguson Act, 15 U.S.C. § 1011 (1982), to authorize state taxing and regulatory powers over the insurance business.).

70. *Id.* at 1244 (quoting South-Central Timber Dev. Co. v. Wunnicke, 467 U.S. 82, 91 (1984): "There is no talismanic significance to the phrase 'expressly stated' however; it merely states one way of meeting the requirement that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear.").

71. *Id.* at 1244. The district court noted that the McCarran Act, 15 U.S.C. §§ 1011-1015 (1982 & Supp. III 1985), approved in Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946), nowhere mentions the commerce clause. *See also* 12 U.S.C. § 1842(d) (1982) (Douglas Amendment to the Bank Holding Company Act, *construed in* Northeast Bancorp, Inc. v. Board of Governors, 472 U.S. 159 (1985) as removing all commerce clause restraints from state regulation of interstate bank acquisitions).

72. *Norfolk Southern*, 632 F. Supp. at 1244.

73. *Id.* at 1247 (quoting S. Rep. No. 753 92d Cong., 2d Sess. 1 *reprinted in* 1972 U.S. Code, Cong. & Admin. News 4776, 4776). The court found the extensive duties required of the Secretary and the states under the CZMA to "belie plaintiffs' assertions" that the Act is "merely a grant-in-aid statute." *Id.* at 1247 n.42. Section 1451(i) reads in part: "The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone." Plaintiffs argued that this passage showed Congress' intent not to authorize the states to exercise any new powers over commerce. The district court conceded that this reading was "facially plausible," but

The district court determined that the entire thrust of the Act is to have each state resolve for its own coastal area the basic choices (and serious conflicts) among competing uses for finite resources.[74] Therefore, Congress understood that the choices made by the states would affect commercial interests and industrial activities as well as recreational and ecological uses.[75] In section 1452(2), directing states to "giv[e] full consideration to ecological, cultural, historic, and esthetic values as well as to needs for economic development . . . ," the court discerned a clear indication that Congress intended that states may legitimately choose recreational uses over industrial uses in their plans.[76]

The district court concluded that the entire statutory scheme of the CZMA indicates that Congress intended that states resolve choices among competing uses in a way that might otherwise be subject to commerce clause challenge. It pointed to the statute's repeated reference to "choices" to be made by the states after "balancing" developmental and environmental concerns and priorities, and to the statute's directive to define "permissible uses" (and, by inference, impermissible or prohibited uses) in the coastal zone.[77] It concluded that the "statutory framework would become a nullity if the traditional Commerce Clause concern with breaking down barriers to commerce remained paramount."[78]

The court emphasized the "strong safeguard" for the national interest within the CZMA, that is, the requirements for program approval by the Secretary discussed above.[79] Although the "national interest" is not defined by the statute, the court interpreted the term to mean the national interest in specific activities (including commercial activities) which

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found that it was not supported by the legislative history. Rather, in this passage Congress was affirming that authority over the coastal zone should be centered on the states, as opposed to local governments. *Norfolk Southern*, 632 F. Supp. at 1247 n.44.

74. *Norfolk Southern*, 632 F. Supp. at 1247.

75. 16 U.S.C. § 1451(c) (1982).

76. *Norfolk Southern*, 632 F. Supp. at 1248.

77. *Id. See* 16 U.S.C. § 1454 (1982).

78. *Norfolk Southern*, 632 F.Supp. at 1248.

79. *Id. See supra* note 35 and accompanying text.

Congress directed the states to consider in their management plans.[80]

The court used the legislative history found in the House Report to support its reasoning. "To the extent that a State program does not recognize these overall national interests, [including those relating to interstate and foreign commerce] . . . the Secretary may not approve the State program until it is amended to recognize those Federal rights, powers, and interests."[81] Thus, the House Report further confirmed the district court's conclusion that the "national interest" which the Secretary must consider in approving a state program specifically includes commerce.[82]

The district court found the Act's regulations to be further proof that the national interest, including commerce, must be reflected in the substance, not merely the procedure, of the management program.[83] It also reasoned that Congress funds only those plans which are in the national interest, and therefore requires the Secretary of Commerce to approve state plans subject to statutory requirements.[84]

The district court admitted that the congressional consent mechanism here was more complex than the blanket consent given to state insurance laws or to state laws controlling interstate bank acquisitions.[85] But it reasoned that the complexity was not "fatal," as Congress may exercise its plenary

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80. *Id.* at 1247-48. *See supra* notes 31-36 and accompanying text.

81. *Id.* at 1249 (quoting H.R. Rep. No. 1049, 94th Cong., 2d Sess. at 18 (1972)).

82. H.R. Rep. No. 1049, 94th Cong., 2d Sess. at 18 (1972). The House Report on CZMA states that the Act did not relinquish any federal constitutional powers "including those relating to interstate and foreign commerce . . . ." *Id.* Although the plaintiffs saw this statement as proof that Congress was not exercising its Commerce Clause powers, the district court reasoned that taken in context, it shows the very opposite. *Norfolk Southern*, 632 F. Supp. at 1249.

83. *Norfolk Southern*, 632 F. Supp. at 1249.

84. *Id. See* 15 C.F.R. § 923.52(c) (1987). States must 1) describe the national interest in planning for and siting facilities; 2) indicate the sources relied on in (1); 3) indicate how and where the consideration of the national interest is reflected in the substance of the management program, including interstate energy plans or programs. 4) describe the process for continued consideration of the national interest in planning for and siting of facilities during program implementation including administrative procedures and decision points.

85. *Norfolk Southern*, 632 F. Supp. at 1250.

commerce clause power however it wishes. It need not choose between consenting to all coastal zone laws or none.[86]

Finally, the court noted that the Secretary of Commerce first approved the Delaware Coastal Zone Management Plan in August of 1979. At that time it included the specific provision to which plaintiffs object. The Secretary subsequently reviewed and approved the plan, in 1980, 1982 and 1984. Based upon the history, regulations, and the periodic approval, the court concluded that "the requirement of express congressional consent is met."[87]

Examining the Delaware CZA, the district court asserted that the Secretary had commented explicitly on the Delaware ban in the report in which the plan was approved.[88] It found that the repeated approval of the plan by the Secretary meant that the plan bore the "imprimatur" of Congress.[89] The court stated that Congress requires the Secretary to balance the merits of the entire plan. Therefore, the court concluded that the appropriate balance for the court in this case was not national coal-export policy against the allegedly incremental pollution caused by the coal top-off service. Rather, the balance should be coal export policy against the preservation of Delaware's coastal zone as embodied in the DCZM plan. The Sec-

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86. *Id.* (citing Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946) and Northeast Bancorp, Inc. v. Board of Governors, 472 U.S. 159 (1985)).

87. *Id.* The court cited White v. Massachusetts Council of Constr. Employers, 460 U.S. 204, 213 (1983) in which a challenged mayoral order required fifty percent of construction workers on certain federally funded projects in Boston to be Boston residents. The order was not mentioned in the statute, but only in the regulations. The court noted that the Supreme Court found the order to be in harmony with the federal regulations and that the administrative regulation constituted express congressional consent. *Norfolk Southern*, 632 F. Supp. at 1250.

88. *Norfolk Southern*, 632 F. Supp. at 1251.

89. *Id.* The Administrator's report approving the Delaware plan stated that the policies of the plan emphasize protection of valuable natural coastal resources while recognizing a need to accommodate economic growth and balance competing uses. "Thus, while new heavy industrial uses are prohibited from the Coastal Strip, they are allowed in other parts of the State . . . bulk product transfer facilities are restricted to the [already developed] Port of Wilmington, so that any adverse impacts on valuable natural resources will be mitigated while allowing such facilities as are of national interest." Nat'l Oceanic & Atmospheric Admin., U.S. Dep't of Com., Findings of Robert W. Knecht, Ass't Admin. for Coastal Zone Mgmt., Approval of Delaware Coastal Management Program 12 (Aug. 21, 1979).

retary had not disapproved the balancing of competing interests in Delaware's CZMP: "It is not for the federal judiciary to gainsay congressionally authorized commerce policies on the grounds of the national interest. For a court to declare unconstitutional in a piecemeal fashion a state's approved management plan destroys the integrity of Congress' coastal-management policy."[90]

Having found that Congress had authorized the development restrictions within the DCZA through the CZMA and its approval process, the district court held that the DCZA was, therefore, immune to commerce clause challenge. It entered summary judgment in favor of defendants.[91]

IV. The Court of Appeals

A. *Congressional Consent Issue*

The Court of Appeals for the Third Circuit dealt first with the congressional consent issue. It focused primarily on whether Congress' intent to allow a state to impermissibly burden commerce had been "expressly stated"[92] in the federal law or its legislative history, and was, therefore, "unambigious." Otherwise, the court held, no consent could be found.[93] The appeals court did not find congressional intent to be expressly stated in the language of CZMA itself.[94] It found that the Act's statements of findings and purpose were not indicative of congressional intent to authorize an expansion of

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90. *Norfolk Southern*, 632 F. Supp. at 1252.

91. *Id.*

92. Norfolk Southern Corp. v. Oberly, 822 F.2d 388, 393 (3d Cir. 1987) (citing Prudential Ins. Co. v. Benjamin, 328 U.S. 427, 430 (1946)).

93. *Id.* at 393.

94. *Id.* at 394-95. The court reasoned that CZMA is primarily a grant-in-aid statute which encourages the states to exercise their full authority. *Id.* at 393 (citing 16 U.S.C. § 1451(i) (1982)). It concluded that CZMA § 1456(e), the pre-emption section, "strongly suggests" that CZMA was not intended to transfer commerce clause authority from Congress to the states. *Id.* at 394. The language of § 1456(e), according to the circuit court, is very different from the language in the McCarran-Ferguson Act, for example, *supra* note 69, in which Congress stated that its "silence shall not be construed . . . [as a] barrier to the regulation or taxation . . ." [of the insurance industry by the states.] 15 U.S.C. § 1011 (1982).

state powers,[95] and did not transfer any federal power to the states.[96] The court found, instead, that this evidence demonstrated that "Congress intended to encourage the states to use their existing powers more effectively."[97]

In addition, the Third Circuit did not find the requisite clarity of intent in the legislative history of the Act.[98] It interpreted the requirement that congressional consent be "unmistakably clear"[99] to mean that the courts may not engage in "mere speculation as to what Congress probably had in mind."[100]

Although the Third Circuit based its decision on most of the same case law as the district court, unlike the district court it found the holding of *New England Power Co. v. New Hampshire*[101] to be applicable to this case. According to the Third Circuit, *New England Power* held that a "similar nonpreemption provision did not immunize preexisting state laws from commerce clause scrutiny."[102]

The Third Circuit declared that the Supreme Court has found consent only where Congress "affirmatively contemplated *otherwise invalid state legislation.*"[103] It concluded

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95. *Norfolk Southern*, 822 F.2d at 393.

96. *Id.* at 394.

97. *Id.* at 397.

98. *Id.* at 396. The court found the portion of the House Report cited by both parties, *supra* note 73, to be a key passage. This passage stated that CZMA did not relinquish any federal interests. *Id.* at 395. It found that the legislative history passage plainly supported the conclusion that provisions of the state CZMPs under the CZMA are to be consistent with the dormant commerce clause, not that "Congress intended the CZMA to authorize the Secretary to consent to state measures that disregard the limitations of the dormant Commerce Clause." *Id.* at 396.

99. South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 91 (1984).

100. *Norfolk Southern*, 822 F.2d at 393 (citing New England Power Co. v. New Hampshire, 455 U.S. 331, 343 (1982)).

101. 455 U.S. 331, 344 (1982) (The Federal Power Act did not confer congressional consent to state restrictions on the export of power.).

102. 822 F.2d at 394 (quoting *New England Power*, 455 U.S. at 341). The circuit court found that the preemption clause in the CZMA, 16 U.S.C. § 1456(e), was "designed primarily to ensure that CZMA does not preempt pre-exisiting state authority to legislate in these areas." 822 F.2d at 394.

103. *Id.* at 397 (quoting *South-Central Timber*, 467 U.S. at 91-92) (emphasis added by circuit court). The circuit court emphasized that "[t]he Supreme Court has found consent where Congress affirmatively authorized states to control specific aspects of interstate commerce" and cited Northeast Bancorp, Inc. v. Board of Gover-

that in the CZMA, Congress contemplated regulation by the states that would inevitably impose costs on commercial activities. But, the court reasoned, appellees had incorrectly concluded from this premise that "Congress necessarily consented to state legislation [under CZMA] that would otherwise violate the dormant commerce clause."[104] The court stated that the scope of the commerce clause is much narrower than appellees assumed, and that therefore they had incorrectly assumed that all state actions that impose costs on interstate and foreign commerce are constitutionally invalid.[105]

The court noted that the Supreme Court has invalidated three categories of state laws under the dormant commerce clause: 1) those that arbitrarily or purposefully discriminate against interstate commerce in favor of intrastate interests;[106] 2) those that impose incidental burdens on foreign and interstate commerce which are clearly excessive compared to the putative local benefits;[107] and 3) those that "undermine the federal need for uniformity among the states in particular areas, such as foreign trade, and interstate transportation."[108]

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nors, 472 U.S. 159 (1985) (federal law authorized states to decide whether to allow in-state banks to be purchased by out-of-state bank holding companies) and Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648 (1981) (federal law permitted state regulation of the insurance business). *Norfolk Southern*, 822 F.2d at 396.

104. *Norfolk Southern*, 822 F.2d at 397-98.

105. *Id.*

106. *Id.* at 398 (citing Hughes v. Oklahoma, 441 U.S. 322, 336 (1979) (state regulation prohibiting transportation of minnows outside the state held to violate the commerce clause); Maine v. Taylor, 106 S. Ct. 2440, 2453 & n.19 (1986) (discriminatory ban on imported baitfish upheld as serving legitimate local purposes that could not adequately be served by available non-discriminatory alternatives)).

107. *Id.* at 398 (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981)). In *Clover Leaf Creamery*, however, the local law was upheld, not invalidated, as its local benefits were found to outweigh the incidental burden on commerce.

108. *Norfolk Southern*, 822 F.2d at 398 (citing Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979); Bibb v. Navajo Freight Lines, Inc. 359 U.S. 520, 526-27 (1959)). *See also* Wardair Canada, Inc. v. Florida Dep't of Revenue, 106 S. Ct. 2369, 2375 (1986) (the dormant commerce clause operates to ensure that the essential attributes of nationhood will not be jeopardized by states acting as independent economic actors).

The circuit court found no evidence that Congress "affirmatively contemplated" any state action under the CZMA which would fall into any of these categories.[109] The court dismissed the fears of appellees and the district court that Congress' "purpose of encouraging state land use regulation . . . [under the CZMA] would be undermined if such regulation had to be promulgated in accordance with the limitations of the dormant Commerce Clause."[110] Not all regulation that affects commerce or imposes costs on out-of-state interests is unconstitutional absent consent, the court concluded. It found that the CZMA's purpose can be achieved without purposefully discriminating, incidentally discriminating in a manner clearly unjustified by the local benefits, or "impinging on special federal interests in uniformity."[111]

The Third Circuit held that the "approval of the DCMP by the Secretary of Commerce under the CZMA, [therefore], did not confer Congressional consent to any otherwise invalid regulatory provisions of the [D]CZA."[112]

B. *Commerce Clause Analysis*

In its commerce clause analysis, the Third Circuit first considered the values underlying the dormant commerce clause and found that the primary value is to ensure that "our economic unit is the Nation . . . rather than individual states."[113] Its secondary value is to ensure "uniformity among the states in the area of foreign trade."[114] The circuit court then examined the three standards of review and agreed with the district court that *Pike* balancing was appropriate here.[115]

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109. *Norfolk Southern*, 822 F.2d at 398.

110. *Id.* *See supra* text accompanying note 78.

111. *Id.*

112. *Id.*

113. *Id.* at 399 (quoting H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537 (1949)).

114. *Id.* at 399 (quoting Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979)).

115. Like the district court, the circuit court noted that the Supreme Court's "heightened scrutiny" standard is the standard for "simple economic protectionism." *Id.* at 400 (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).

The court stated that the "protectionist" category includes state regulation that discriminates on the face of the statute against out-of-state interests and in favor of in-state interests,[116] as well as regulation which, although neutral on its face, has been found to have been motivated by a discriminatory purpose.[117] The court noted that the Supreme Court has also found economic protectionism to require heightened scrutiny in two cases where the challenged measure was facially non-discriminatory, but was found to have discriminatory effect.[118]

The court declined to use a heightened scrutiny standard here because it found that the DCZA was facially neutral and had no discriminatory effect. The DCZA does not prohibit the export, import, or transhipment of coal and so does not have the effect of blocking the flow of coal at Delaware's borders,[119] and the court reasoned that discrimination against interstate

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116. *Id.* at 400 (quoting *City of Philadelphia*, 437 U.S. at 617, and South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984)).

117. *Norfolk Southern*, 822 F.2d at 400 (citing Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984)).

118. *Norfolk Southern*, 822 F.2d at 400 referring to *Bacchus* and Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977). The court admitted to some difficulty in harmonizing the Supreme Court's analysis of "discriminatory effects" in *Hunt* with the Court's analysis of similar effects in an "incidental burden" case such as Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981). *Norfolk Southern*, 822 F.2d at 400 n. 18. In both cases, the Court had found that

> the statute was evenhanded on its face, but that the effect was to advantage in-state commercial interests relative to out-of-state competition in the same market. However, in *Hunt* the Court labelled the statute discriminatory, while in *Clover Leaf Creamery* the Court found that the law imposed only incidental burdens. Given the similarity of effects, we can only conclude that [the] distinction lies in the evidence concerning the intent of the legislature in each case.

Id. [The Court found this intent to be protectionist in *Hunt*, but not in *Clover Leaf*.]

Consequently, the circuit court concluded that "until we receive further guidance from the Supreme Court, we believe the 'discriminatory effect' cases are best regarded as cases of purposeful discrimination." *Id.* at 400.

119. *Norfolk Southern*, 822 F.2d at 401. The circuit court found that the Supreme Court had used heightened scrutiny only where a state law, challenged for blocking interstate commerce at a state's borders, had "imposed an import or export embargo which precluded interstate commerce in a specified good while leaving unaffected the in-state trade in that good." *Id.* (citing City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

in favor of intrastate movements of goods rather than "blockage" was what triggered heightened scrutiny in such cases.[120] It also concluded that Norfolk Southern had presented no evidence to cast doubt on the declared purpose of section 7003 of the DCZA. Therefore, heightened scrutiny based on discriminatory purpose was inappropriate.[121]

The court rejected the appellees' arguments for deferential scrutiny[122] finding no precedent of the Supreme Court or the Third Circuit which would induce it to apply the deferential standard to non-discriminatory environmental statutes.[123]

In applying the *Pike* balancing test[124] to the DCZA ban, the court noted that the "putative local benefits" in this case are the protection of the coastal environment from pollution and industrial development. These benefits are weighed against the burdens on interstate or foreign commerce; the burdens must be "clearly excessive" to invalidate the statute. The Third Circuit found no reason to review the district court's conclusion that there was a material dispute of fact as to the magnitude of these benefits. As it had concluded that the record revealed "no legally relevant burden on interstate commerce that could be found to be "excessive", the court found that the weighing was unnecessary.[125]

The circuit court referred to another of its recent decisions in which it had noted that when uniformity is not the issue, it is discriminatory measures "which are the focus of the

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120. *Norfolk Southern*, 822 F.2d at 401.

121. *Id.* at 404.

122. *See supra* notes 54-57 and accompanying text.

123. *Norfolk Southern*, 822 F.2d at 405 (quoting *Clover Leaf Creamery*, 449 U.S. at 472, as also applying the balancing test). The circuit court, like the district court, found that the Supreme Court's application of *Pike* balancing in *Clover Leaf Creamery* was dispositive in evaluating environmental laws. In American Trucking Ass'ns, Inc. v. Larson, 683 F.2d 787, 791 (3d Cir. 1982) *cert. denied* 459 U.S. 1036 (1982), the circuit court had applied a deferential standard to highway safety regulations.

124. *See supra* note 42.

125. *Norfolk Southern*, 822 F.2d at 406. The material dispute of fact presumably involved the magnitude and environmental consequence of predicted coal spills and dust emissions and the amount of protection to be afforded the coastal environment by the ban on transfer facilities. *See also* discussion of district court, *Norfolk Southern*, 632 F. Supp. at 1242-43.

Commerce Clause."[126] The court found that the essence of Norfolk Southern's alleged burden was that the DCZA precluded coal transporters from lowering their average costs. This burden was determined to be non-discriminatory. It then stated that once a court has found no discrimination against interstate commerce either facially or in application "the inquiry as to the burden on interstate commerce should end."[127] Since it found no burden that discriminated, the circuit court concluded that the defendant, State of Delaware, was entitled to summary judgment.[128]

V. Analysis

In *Norfolk Southern*, both the district and the circuit courts applied recent Supreme Court commerce clause holdings and principles in well-reasoned, persuasive opinions. They both correctly concluded, the author believes, that the DCZA ban does not violate the commerce clause. That their analyses diverged as they did illustrates how easily even careful, conscientious application of commerce clause principles by different courts can lead to differing analyses, if not different results. The district court followed closely both the discrimination and the incidental burden branches of the analysis, while the Third Circuit, relying on the underlying values of the commerce clause and recent case law, focused more narrowly on the discrimination analysis. In fact, for the Third Circuit, the determination of discrimination against out-of-state interests became the major, if not the sole determination.[129] The circuit court held that to be legally relevant, an "incidental" burden on interstate or foreign commerce must discriminate against interstate commerce relative to intrastate commerce.[130] This approach appears to oversimplify the Su-

126. *Norfolk Southern*, 822 F.2d at 406 (quoting American Trucking Ass'ns, Inc. v. Larson, 683 F.2d 787, 791 (3d Cir. 1982) *cert.denied* 459 U.S. 1036 (1982)).

127. *Norfolk Southern*, 822 F.2d at 407 (quoting *American Trucking*, 683 F.2d at 799)).

128. *Id.*

129. *Id.* at 406.

130. *Id.* at 406-07. In discussing the alleged burden on foreign commerce of the DCZA, the circuit court acknowledged that the "courts often use the term 'burden' in

preme Court's earlier incidental burden analysis.[131] However, the Third Circuit has perhaps correctly concluded that the Court's recent decisions have generally held that preventing discrimination against out-of-state interests and in favor of in-state interests in interstate commerce[132] is the principal function of the commerce clause[133] and, therefore, the key consideration.

The Supreme Court has used various analyses over the years to determine how much the states may be permitted to regulate interstate commerce, [134] and its standards still appear

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a much more general sense to mean affecting the flow of commerce," but it noted that "not every burden on commerce in this general sense is relevant to foreign Commerce Clause analysis." *Id.* at 404. It found that increased costs of the goods shipped were not a relevant burden requiring rigorous scrutiny under the analysis, though the degree to which a state law impinged on the need for federal uniformity is a relevant burden. *Id.* at 404-05.

Continuing its analysis, the circuit court also noted that "[w]here the 'burden' on out-of-state interests is no different from that placed on competing in-state interests, however, it is a burden on *commerce* rather than a burden on *interstate* commerce.") *Id.* at 406 (emphasis in the original).

131. *Compare* Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 473-74 (1981), *supra* note 58, *and* Exxon Corp. v. Governor of Md., 437 U.S. 117, 126-27 (1978) (The Court first found that the state statute prohibiting oil producers and refiners from operating retail service stations did not "discriminate" against interstate commerce; it then found that the statute did not "impermissibly burden" interstate commerce.). *See* Tushnet, *supra* note 48 at 131 (a finding of non-discrimination does not terminate dormant commerce clause scrutiny); Maltz *supra* note 53 at 58. *See also* the balancing approach of *Pike*, *supra* note 42.

132. *See* Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 448 (1960) ("State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand."). The Third Circuit found *Norfolk Southern* to be "virtually on all fours with *Huron*." *Norfolk Southern*, 822 F.2d at 407. *See also Clover Leaf Creamery*, 449 U.S. at 471 ("If a state law purporting to promote environmental purposes is in reality 'simple economic protectionism' we have applied a virtually *per se* rule of invalidity.").

133. *Norfolk Southern*, 822 F.2d at 406. *See* American Trucking Ass'ns, Inc. v. Larson, 683 F.2d 787 (3d Cir. 1982) *cert. denied* 459 U.S. 1036 (1982), discussing Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (The Court found the case to be one of the few where local safety measures that were nondiscriminatory placed an unconstitutional burden on interstate commerce.). The Third Circuit noted that *Bibb* implies that ordinarily it is discriminatory measures which are the focus of the commerce clause. *American Trucking*, 683 F.2d at 791.

134. Trying to understand and harmonize these tests and analyses, may lead to the frustration expressed in the following mock "Restatement of Constitutional Law."

Section 6. Regulation of Interstate Commerce

to be evolving. One commentator believes that the Court, of late, has achieved a greater measure of "doctrinal consistency" in the dormant commerce clause area of constitutional law.[135] In his view, the new consistency stems from the Court's increased reliance on *Pike* balancing with its emphasis on whether the state statute on its face or in its effect is "evenhanded" or "discriminatory."[136] Others believe that the continued weighing and balancing of national versus legitimate (local) state interests, the heart of the court's "burden" analysis, necessarily leads to inconsistent results, and often to inappropriate invalidation of state regulation.[137]

In the Coastal Zone Management Act, Congress has enacted a detailed statutory scheme to encourage the states to implement national policies under which development will be compatible with the preservation and enhancement of the na-

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Comments: d. Although the power of the Federal Government over interstate commerce is plenary, the states may regulate commerce some, but not too much. If a state attempts to regulate commerce too much, such regulation will be unconstitutional.

Caveat: This Restatement is not intended to express any opinion on how much regulation is too much.

1 Harv. L. Revue 5, 11-12 (1932) *quoted in* W. Lockhart, Y. Kamisar & J. Choper, Constitutional Law Cases and Materials 349 (4th ed. 1975). The authors note that 1 Harv. L. Revue may be found in the bound volumes possessed by the Bd. of Editors of 45 Harv. L. Rev.

135. *See, e.g.*, Hellerstein, *Hughes v. Oklahoma: The Court, the Commerce Clause and State Control of Natural Resources*, 1979 Sup. Ct. Rev. 51, 71 (1979).

136. *Id.*

137. The circuit court placed itself among those who hold this latter view. "In our view, the dormant Commerce Clause does not authorize a federal court to engage in the kind of broad-based "national interest balancing" requested by Norfolk Southern. Balancing the societal value of decreasing unemployment in the Eastern coal mines and shrinking the size of the trade deficit against the societal value of protecting the coastal zone is within the province of Congress." *Norfolk Southern*, 822 F.2d at 407.

"[T]he ad hoc balancing test currently in vogue necessarily requires judges to draw on personal, subjective value judgements regarding the relative importance of various state goals." Maltz *supra* note 53 at 85. Eule, *supra* note 48 at 442, discusses the objections that judicial review of evenhanded state commercial legislation through "the current weighing process is inconsistent with our constitutional system of representative democracy." This criticism is based on the belief that "[i]f democracy means anything, it is that the choice between competing substantive political values must be made by representatives of the people rather than by unelected judges." Eule, *supra* note 48 at 442 n. 89.

tion's coastal resources. It is a statutory mechanism in which national interests including interstate commerce must be considered and accommodated by each state's coastal plan as a condition of federal approval.

Thus, in formulating its plan each state must conduct a weighing and balancing of national versus "local" interests which is analogous to that employed by the Court in its commerce clause analysis. It seems clear, therefore, that after federal approval of a plan, further weighing and balancing of these interests by the courts should rarely be necessary.

Assuming that the Third Circuit's interpretation accords with the Supreme Court's present commerce clause analysis, and a finding of no discriminatory burden basically ends the inquiry,[138] this decision is good news for supporters of state coastal zone planning. Just as the Third Circuit correctly held that the Delaware coastal plan was not discriminatory, it seems clear that coastal plans, generally, need not be discriminatory. In making coastal policy choices and in balancing economic and natural resource protection concerns, state plans must burden both in-state and out-of-state interests in order to be effective.[139] Consequently, they should then withstand challenge under the dormant commerce clause, as the *Norfolk Southern* decision has shown.

Under the Third Circuit's dormant commerce clause analysis, the need for congressional consent to an otherwise impermissible burden on commerce is obviously reduced. However, congressional consent to such a burden would immunize

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138. The Norfolk Southern Group decided not to file a petition for certiorari with the Supreme Court to review the Third Circuit's decision. Natural Resources Defense Council News Release, Sept. 28, 1987, *Norfolk Southern Abandons Efforts to have Delaware Coastal Zone Act Struck Down.* Available from NRDC, 122 E. 42nd St., New York, N.Y. 10168.

139. Since coastal plans regulate the land and water areas of the state, in-state interests must, by definition, also be affected or "burdened" by the regulation. It is improbable that a state plan which is blatantly discriminatory against out-of-state interests would receive federal approval, unless there were no less discriminatory alternative. *See* Maine v. Taylor, 106 S. Ct. 2440 (1986) (where the Court found a state ban on the importation of live bait fish did not violate the commerce clause because it served a legitimate local purpose that could not be served as well by available nondiscriminatory means).

coastal plans from attack once they were approved by the Secretary of Commerce, and would afford them protection even if a plan were found to impose a discriminatory or clearly excessive burden on interstate commerce. The district court persuasively demonstrated that such consent is implicit in the total CZMA scheme: funding, regulations, and federal approval process.[140] However, the Supreme Court has predicated the determination of congressional consent on a finding that Congress has made its intent to permit such regulation "unmistakably clear." Various courts have construed this requirement differently. The Court has declared that congressional intent need not be "expressly stated" in the explicit language of the statute, the regulations, or the legislative history.[141] Without such explicitness, however, some courts, as illustrated by the Third Circuit's *Norfolk Southern* decision, will find Congress' intent to be less than "unmistakably clear."[142]

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140. The intervening defendants-appellees persuasively argued that the total CZMA scheme clearly showed that Congress expected the states to further the national interest by controlling development with significant impacts *regardless* of whether such control might interefere in a significant way with interstate or foreign commerce. Intervening Defendants-Appellees' Brief at 21, Norfolk Southern Corp. v. Oberly, 822 F.2d 388 (3d Cir. 1987) (No. 86-5322) (emphasis added). They also argued that in CZMA, Congress "nowhere expressly limited the states to regulating land and water uses with purely intrastate impacts." *Id.* Further, these defendants had argued that White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204 (1983) was similar to this case in that the agency regulations in *White* issued only a general mandate or invitation to employ low income persons residing in the area, similar to the "invitation" in the text of CZMA and its implementing regulations. The intervening defendants noted that *White* was a unanimous decision in which the Court stated that

> Congress, unlike a state legislature authorizing similar expenditures, is not limited by any negative implications of the Commerce Clause in the exercise of its spending power. Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce.

Id. at 213. The circuit court, however, found it was unclear whether *White* had liberalized consent analysis. *Norfolk Southern*, 822 F.2d at 397.

141. *See supra* note 70.

142. This narrow definition of "unmistakably clear" indicates an approach to statutory construction shared by a majority of the Supreme Court in a number of recent cases. *See, e.g.*, Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) *cert. denied* 465 U.S. 1038 (1984) and Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) *rehearing denied* 473 U.S. 926 (1985). In *Pennhurst*, the five member majority required an "unequivocal expression of Congressional intent." *Pennhurst*,

Therefore, Congress should amend the CZMA to make its consent unmistakably clear in order to immunize approved plans from subsequent attack by those regulated under the plan.[143]

Congress should also consider amending the CZMA to eliminate the problem presented by the conflicting roles of the Secretary of Commerce. The Secretary is the nation's chief commerce official and advocate as well as the federal official who approves the coastal plans. His participation in this suit on the side of the plaintiffs, challenging the constitutionality of a plan he had originally and repeatedly approved, highlighted this conflict. Fortunately, neither the district nor the circuit court accepted his arguments that the policy of increasing coal exports should take precedence over an approved plan in which Delaware had already balanced these interests.

In spite of the correct result and persuasive analyses of the *Norfolk Southern* courts, both decisions reflect the Supreme Court's continued reluctance to extend to state environmental protection regulation the same deference in commerce clause analysis that it accords to health and safety legislation.[144] It is now widely recognized that most pollution

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465 U.S. at 99. The dissent in *Atascadero* criticized this requirement as putting in place "special rules of statutory drafting . . . not justified (nor justifiable) as efforts to determine the genuine intent of Congress." *Atascadero*, 473 U.S. at 254. The dissent found that "no reason has been advanced why ordinary canons of statutory construction would be inadequate to ascertain the intent of Congress." *Id.* In *Atascadero*, another 5-4 decision, the majority held that Congress may abrogate a state's immunity from suit in federal court ony by "making its intention unmistakably clear in the language of the statute." 473 U.S. at 242. The majority criticized the respondents for relying on pre and post enactment legislative history and inferences from general statutory language. *Id.*

143. The CZMA is in urgent need of congressional clarity of purpose to achieve its important national policies. The problems of pollution and the destruction of fragile coastal ecology through improper development are increasingly critical, as fifty-three percent of the U.S. population currently lives within fifty miles of the shore, and some estimates project that by the year 2000, eighty percent of the population may live there. S. Rep. No. 753, 92d Cong., 2d Sess. 2, *reprinted in* 1972 U.S. Code Cong. & Admin. News 4776, 4777.

144. The Supreme Court has repeatedly upheld health protective measures, such as local quarantine regulations prohibiting the importation of diseased animals and other items, even though the regulations were directed against out-of-state commerce.

control and environmental protection regulations relate ultimately to public health. Often the connection is clear and direct.[145] With some natural resource regulation, however, the nexus is more indirect, — as when regulation prohibits the destruction or degradation of coastal resources, such as estuaries, beaches, and marshes, which are fishery and wildlife habitat. In the latter case, regulation prevents pollution, whether municipal (mainly sewage), agricultural, or industrial, from destroying the aesthetic and recreational character of these natural resources. It simultaneously protects the fish, shellfish, and wildlife which are dependent upon the resources. In recent years, we have learned the painful lesson that even when animal life is not destroyed by pollution, it may become so contaminated with chemicals or bacteria as to be unsafe for consumption by animals higher in the food chain, including humans. In this way, pollution creates immediate public health hazards, as well as long-term adverse health effects by eliminating vital sources of food. Consequently, even when the connection between state regulation and public health concerns is this "indirect," the state's (and the nation's) interest in preserving these resources surely merits deference from the courts equal to that given, for example, to highway safety regulation.

Recently, in *Hughes v. Oklahoma*,[146] the Supreme Court noted the similarity between a state's interest in the conservation of its natural resources and its interest in the health and

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See Asbell v. Kansas, 209 U.S. 251 (1908); Reid v. Colorado, 187 U.S. 137 (1902); Bowman v. Chicago & N.W. R.R. Co., 125 U.S. 465, 489 (1888) *cited in* City of Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978). In his dissent in *City of Philadelphia*, Justice Rehnquist analogized to the quarantine laws New Jersey's challenged regulation prohibiting the importation of out-of-state waste to its landfills. He maintained that New Jersey should be free "under our past precedents to prohibit the importation of solid waste because of the health and safety problems it poses to its citizens." *Id.* at 632. See also Maltz, *supra* note 53, at 172, for a discussion of the "quarantine exception" to the commerce clause.

145. *See, e.g.*, the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1982 & Supp. III 1985) (regulating mixtures and chemicals which directly affect human health or the environment). *See also* the Resource Conservation and Reclamation Act, 42 U.S.C. §§ 6901-6969 (1982 & Supp. III 1985) (regulating solid and hazardous waste disposal which may affect human health or the environment).

146. 441 U.S. 322 (1979).

safety of its residents.[147] The author believes that this recognition is overdue.[148] The Court is lagging behind Congress and the public in the weight it accords the increasingly critical area of environmental protection. It is time to extend to environmental protection matters, the deference and weight they deserve in judicial review.

VI. Conclusion

Norfolk Southern Corp. v. Oberly, is a significant victory for the protection of the country's valuable coastal resources. In this decision, the United States Court of Appeals for the Third Circuit unanimously affirmed the Delaware District Court's upholding of the Delaware Coastal Zone Act. The effect of the decision is to protect one of the country's major estuaries from pollution and increased industrial development pressure. In holding that the total ban on coal transferring facilities imposed by the Delaware Coastal Zone Act does not violate the commerce clause, the circuit court has provided an important precedent for other state coastal plans which may face similar challenges.

The precedent would be strengthened, however, if both courts had found that the federal Coastal Zone Management Act expressed congressional consent for approved plans to impermissibly burden interstate commerce. Since the Third Circuit rejected this rationale, Congress should make its consent

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147. Although the Court struck down a facially discriminatory statute in *Hughes*, it acknowledged that a state's interest "in maintaining the ecological balance of its waters . . . may well qualify as a legitimate local purpose. . . . [such interests are] "similar to the States' interests in protecting the health and safety of their citizens." *Hughes*, 441 U.S. at 337. Hellerstein, *supra* note 135, at 61-62, states that the "crux of the disagreement" between the majority and the dissenters in *Hughes* was the weight each gave to the state's interest in conservation, as well as their differing views on what constitutes discrimination against interstate commerce.

148. A few recent decisions have shown some increased recognition. *See, e.g.*, Maine v. Taylor, 106 S. Ct. 2440 (1986) *supra* note 139. In this 7-1 decision the Court found the state to have a legitimate interest in "guarding against imperfectly understood environmental risks." *Id.* at 2453. It agreed with the Maine District Court that the commerce clause does not require the state "to sit idly by and wait until potentially irreversible environmental damager has occurred . . . before it acts to avoid such consequences." *Id.* at 2453.

even more "unmistakably clear" in the Coastal Zone Management Act in order to give additional protection to its important coastal policies.

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