SUPREME COURT OF THE UNITED STATES

No. 91–471

CHEMICAL WASTE MANAGEMENT, INC., PETIT- IONER
v. GUY HUNT, GOVERNOR OF
ALABAMA ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

[June 1, 1992]

CHIEF JUSTICE REHNQUIST, dissenting.

I have already had occasion to set out my view that States need not ban all waste disposal as a precondition to protecting themselves from hazardous or noxious materials brought across the State's borders. See *Philadelphia* v. *New Jersey*, 437 U. S. 617, 629 (1978) (REHNQUIST, J., dissenting). In a case also decided today, I express my further view that States may take actions legitimately directed at the preservation of the State's natural resources, even if those actions incidentally work to disadvantage some out-of-state waste generators. See *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dept. of Natural Resources*, *post*, ___ U. S. ___ (1992) (REHNQUIST, C.J., dissenting). I dissent today, largely for the reasons I have set out in those two cases. Several additional comments that pertain specifically to this case, though, are in order.

Taxes are a recognized and effective means for discouraging the consumption of scarce commodities — in this case the safe environment that attends appropriate disposal of hazardous wastes. Cf. 26 U. S. C. A. §§4681, 4682 (Supp. 1992) (tax on ozone-depleting chemicals); 26 U. S. C. §4064 (gas guzzler excise tax). I therefore see nothing unconstitutional in Alabama's use of a tax to discourage the export of this commodity to other States, when the commodity is a public good that Alabama has helped to produce. Cf. *Fort Gratiot, post*, at __ (REHNQUIST, C.J., dissenting) (slip op., at 5). Nor do I see any significance in the fact that Alabama has chosen to adopt a differential

tax rather than an outright ban. Nothing in the Commerce Clause requires Alabama to adopt an “all or nothing” regulatory approach to noxious materials coming from without the State. See *Mintz* v. *Baldwin*, 289 U. S. 346 (1933) (upholding State's *partial* ban on cattle importation).

In short, the Court continues to err by its failure to recognize that waste—in this case admittedly *hazardous* waste—presents risks to the public health and environment that a State may legitimately wish to avoid, and that the State may pursue such an objective by means less Draconian than an outright ban. Under force of this Court's precedent, though, it increasingly appears that the only avenue by which a State may avoid the importation of hazardous wastes is to ban such waste disposal altogether, regardless of the waste's source of origin. I see little logic in creating, and nothing in the Commerce Clause that requires us to create, such perverse regulatory incentives. The Court errs in substantial measure because it refuses to acknowledge that a safe and attractive environment is the commodity really at issue in cases such as this, see *Fort Gratiot, post*, at __ (slip op., at 2) (REHNQUIST, C.J., dissenting). The result is that the Court today gets it exactly backward when it suggests that Alabama is attempting to "isolate itself from a problem common to the several States," *ante*, at 4. To the contrary, it is the 34 States that have no hazardous waste facility whatsoever, not to mention the remaining 15 States with facilities all smaller than Emelle, that have isolated themselves.

There is some solace to be taken in the Court's conclusion, *ante*, at 9, that Alabama may impose a substantial fee on the disposal of all hazardous waste, or a per-mile fee on all vehicles transporting such waste, or a cap on total disposals at the Emelle facility. None of these approaches provide Alabama the ability to tailor its regulations in a way that the State will be solving only that portion of the problem that it has created, see *Fort Gratiot, post*, at __ (slip op., at 4) (REHNQUIST, C.J., dissenting). But they do at least give Alabama some mechanisms for requiring waste-generating States to compensate Alabama for the risks the Court declares Alabama must run.

Of course, the costs of any of the proposals that the

Court today approves will be less than fairly apportioned. For example, should Alabama adopt a flat transportation or disposal tax, Alabama citizens will be forced to pay a disposal tax equal to that faced by dumpers from outside the State. As the Court acknowledges, such taxes are a permissible effort to recoup compensation for the risks imposed on the State. Yet Alabama's general tax revenues presumably already support the State's various inspection and regulatory efforts designed to ensure the Emelle facility's safe operation. Thus, Alabamans will be made to pay twice, once through general taxation and a second time through a specific disposal fee. Permitting differential taxation would, in part, do no more than recognize that, having been made to bear all the risks from such hazardous waste sites, Alabama should not in addition be made to pay *more* than others in supporting activities that will help to minimize the risk.

Other mechanisms also appear open to Alabama to achieve results similar to those that are seemingly foreclosed today. There seems to be nothing, for example, that would prevent Alabama from providing subsidies or other tax breaks to domestic industries that generate hazardous wastes. Or Alabama may, under the market participant doctrine, open its own facility catering only to Alabama customers. See, *e.g.*, *White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U. S. 204, 206–208 (1983); *Reeves, Inc.* v. *Stake*, 447 U. S. 429, 436–437 (1980); *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794, 810 (1976). But certainly we have lost our way when we require States to perform such gymnastics, when such performances will in turn produce little difference in ultimate effects. In sum, the only sure byproduct of today's decision is additional litigation. Assuming that those States that are currently the targets for large volumes of hazardous waste do not simply ban hazardous waste sites altogether, they will

undoubtedly continue to search for a way to limit their risk from sites in operation. And each new arrangement will generate a new legal challenge, one that will work to the principal advantage only of those States that refuse to contribute to a solution.

For the foregoing reasons, I respectfully dissent.