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# MUNICIPAL SOLID WASTE FLOW CONTROL IN THE POST-CARBONE WORLD

Eric S. Petersen\*

David N. Abramowitz\*\*

## I. Introduction

To deal most effectively and efficiently with the public health and safety problems associated with solid waste and its collection, management and disposal, governments in the United States often have sponsored both governmental and privatized solid waste management facilities.<sup>1</sup> These facilities are financed through a variety of methods, running the gamut from put-or-pay contracts between a private owner and a local government,<sup>2</sup> to general obligation debt used to finance the construction of a facility, to project-specific revenue obligations of a governmental unit.<sup>3</sup> Many of these financing options rely upon the delivery of solid waste, whether in the form of garbage, recyclables, compostables, construction and demolition debris, or other types of unwanted material, to the facility to gener-

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1. See generally Eric Petersen, *WHOSE WASTE IS IT ANYWAY? ASSURING FLOW CONTROL FOR MUNICIPAL WASTE PROCESSING FACILITIES* (1993) [hereinafter, *WHOSE WASTE IS IT ANYWAY?*] (discussing the origins of local government flow control measures and flow control in general).

2. In short, put-or-pay contracts obligate the government to deliver a specified amount of waste each year. In the event that the government fails to meet this obligation, it is still required to pay the tipping fee for the shortage. See *infra* notes 45-51 and accompanying text.

3. Warren T. Gregory, et al., *Economics and Financing of Resource Recovery Projects*, in *THE SOLID WASTE HANDBOOK, A PRACTICAL GUIDE* 121 (W. Robinson ed. 1986).

ate revenues to pay off outstanding debt or to fulfill the government's delivery obligations under a put-or-pay contract.<sup>4</sup>

Recently, governments have relied upon a variety of types of flow control to ensure that waste is delivered to the desired facility.<sup>5</sup> Flow control is the ability to control where waste originating in a certain area is transported, processed or disposed. Until recently, flow control was most often achieved through legislative means, in other words, through the adoption and enforcement of ordinances requiring all collectors and haulers of solid waste operating in the jurisdiction to dispose of such waste at a designated site.<sup>6</sup>

After years of challenging such legislative flow control ordinances with generally unsuccessful results, the haulers scored an important victory in May of 1994, when the United States Supreme Court, in *C & A Carbone, Inc. v. Town of Clarkstown*,<sup>7</sup> struck down a flow control ordinance as violative of the Commerce Clause<sup>8</sup> of the United States Constitution. The loss of the ability to engage in legislative flow control has endangered the economic stability of solid waste facilities constructed to protect the public health and safety whose financing was supported by flow control laws, and could also lead to increased environmental risks and liabilities for local governments and their taxpayers. Faced with the inability to determine legislatively where waste will be disposed, governments have turned to Congress for authorization to engage in legislative flow control. With private waste management companies aggressively lobbying for severely limited grants of authority, however, governments will be forced to consider alternative means of achieving solid waste flow control in order to achieve their public purpose goals in solid waste management.

This Article addresses the solid waste management options available to the governmental sector to ensure the delivery of solid

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4. See, e.g., *Central Iowa Refuse System v. Des Moines Metro. Solid Waste Agency*, 715 F.2d 419, 422 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985); *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187, 1188-89 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982).

5. See generally Martin E. Gold, *Solid Waste Management and the Constitution's Commerce Clause*, 25 URB. LAW. 21 (1993) (suggesting judicial restraint in applying the Constitution to solid waste management problems and calling for Congressional authorization of flow control).

6. See generally State & Local Government Solid Waste Management § 7.08 (1992 & Supp. 1993) (discussing the uses of flow control ordinances in connection with the development of solid waste facilities).

7. 114 S. Ct. 1677 (1994).

8. U.S. CONST. art. I, § 8, cl. 3.

waste on a long-term basis to specific facilities sponsored by the government in light of the *Carbone* decision. Part II discusses in detail the role played by flow control in solid waste management and solid waste project financings. Part III presents a synopsis of the historical legal challenges to the governmental flow control power, focusing especially on the constitutional issues involved, and tracing the Commerce Clause challenges prior to *Carbone*. In Part IV, the *Carbone* decision is analyzed and the actual and theoretical impact of the decision is assessed. Part V presents four alternative methods by which governments can likely achieve the effect of legal flow control without running afoul of *Carbone*, and Part VI examines recent Congressional efforts to authorize legislative legal flow control in certain limited circumstances.

## II. Solid Waste Management and Flow Control-Based Financings

### A. State and Local Management of Solid Waste

The safe and proper disposal of garbage in order to prevent, among other things, groundwater contamination, disease, obnoxious odors and dangerous gases, and the presence of vermin inherent in solid waste is first and foremost a matter of public health and safety. The presence of waste can quickly become a nuisance or much worse because waste spreads "disease, pestilence, and death."<sup>9</sup> In 1976, the United States Congress enacted the Resource Conservation and Recovery Act<sup>10</sup> (RCRA) in response to the growing concern with waste management throughout the nation.<sup>11</sup> In connection with nonhazardous solid waste,<sup>12</sup> RCRA formally expressed and authorized what had been known for decades: that the responsibility for managing such waste should be left to state, regional and local authorities.<sup>13</sup> The adoption of RCRA was in part meant to encourage comprehensive state planning in the solid waste management field.<sup>14</sup> The regulations promulgated by the Environmental Protection Agency (EPA) pursuant to RCRA

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9. *Philadelphia v. New Jersey*, 437 U.S. 617, 631 (1978).

10. Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified in various sections of 42 U.S.C. §§ 6901-6992k (1988)).

11. See 42 U.S.C. § 6901(a)(4) (1983).

12. RCRA addresses both hazardous and nonhazardous waste, but much of its detail is in reference to hazardous waste. See generally 42 U.S.C. §§ 6921-6934 (1983) Municipal solid waste, the focus of most flow control laws, is one type of nonhazardous waste.

13. 42 U.S.C. § 6901(a)(4) (1983).

14. 42 U.S.C. § 6946 (1983).

"contain methods for achieving the objectives of environmentally sound management and disposal of solid and hazardous wastes, resource conservation and resource recovery, and maximum utilization of valuable resources."<sup>15</sup> Recycling, a method of resource conservation recovery, is an example of the type of state solid waste management plan provision being encouraged by the federal government.<sup>16</sup>

The EPA recognized that when developing programs and projects under the auspices of a state's solid waste management plan, a steady and secure supply of waste is of vital importance to local governmental units. The regulations note that the amount of waste accumulated in an area of the state engaging in solid waste management planning "will influence the technology choices for recovery and disposal, determine economies of scale, and affect marketability of resources recovered."<sup>17</sup> Thus, the EPA recommends that when devising solutions to solid waste management problems, including the development of solid waste management facilities, the amount of waste should be taken into account, as it is necessary to have a sufficient volume of waste to support the "goals and objectives of the State plan, including materials or energy recovery as appropriate."<sup>18</sup>

In response to the mandates and recommendations contained in RCRA and the regulations promulgated thereunder, and to secure a steady waste supply, state waste management plans include provisions authorizing local governmental units to designate a specific facility or site as the only place at which solid waste generated within the jurisdiction may be processed or disposed. Commonly known as "flow control" ordinances, these provisions are explicitly authorized in more than twenty states<sup>19</sup> and typically provide that

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15. 40 C.F.R. § 256.01(a) (1993).

16. 40 C.F.R. §§ 256.30-.31 (1993).

17. 40 C.F.R. § 255.10(c) (1993).

18. *Id.*

19. Colorado (COLO. REV. STAT. § 30-20-107); Connecticut (CONN. GEN. STAT. § 22A-220A); Delaware (DEL. CODE ANN. tit. 7, § 6406 (31)); Florida (FLA. STAT. ch. 403.713); Hawaii (HAW. REV. STAT. § 340A-3(a)); Illinois (ILL. REV. STAT. ch. 34, para 5-1047); Indiana (IND. CODE § 36-9-31-3 & 4); Iowa (Iowa Code § 28G.4); Louisiana (LA. REV. STAT. § 38:2307(9)); Maine (ME. REV. STAT. ANN. tit. 38, § 1304-B(2)); Minnesota (MINN. STAT. § 115A.80); Mississippi (MISS. CODE ANN. § 17-17-319); Missouri (MO. REV. STAT. § 260.202); New Jersey (N.J. STAT. ANN. §§ 13:1E-22, 48:13A-5); New York (1991 N.Y. LAWS ch. 569, at 1687-89); North Carolina (N.C. GEN. STAT 130A-294); North Dakota (N.D. CENT. CODE, § 23-29-06(6) & (8)); Ohio (OHIO REV. CODE ANN. § 343.01(H)(2)); Oregon (OR. REV. STAT. § 268.317(3) & (4)); Pennsylvania (PA. STAT. ANN. tit. 53, § 4000.303(c)); Rhode Island (R.I. GEN. LAWS § 23-19-10(49)); Tennessee (TENN. CODE ANN. § 68-211-814); Vermont (VT.

all waste generated within the particular jurisdiction must be delivered to a site designated by the government for processing or disposal. Local governments<sup>20</sup> adopt these laws pursuant to state constitutional authority<sup>21</sup> or enabling statutes.<sup>22</sup> Flow control directives essentially amount to “export bans,” normally imposed to support a local waste management facility. “Import bans,” which could be considered a form of flow control but are not typically discussed in those terms,<sup>23</sup> are restrictions imposed by the state preventing the disposal of out-of-state waste at in-state facilities, usually privately owned landfills.<sup>24</sup>

## B. The Need for Flow Control in Solid Waste Management

Legislative flow control, in the form of export bans, has been a vital economic element in supporting dozens of major waste-to-energy and landfill-based waste disposal programs involving billions of dollars in capital investment.<sup>25</sup> This relationship between flow control and the security for such programs stems from the methods by which local governments discharge their historical and legal duties to provide for the proper collection and disposal of solid waste.<sup>26</sup>

### 1. Waste Collection and Disposal Relationships

Waste collection arrangements traditionally have been local in nature, and their degree of privatization varies widely among communities. Residential waste collection is usually performed by mu-

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STAT. ANN. tit. 24, § 2203a, 2203b); Virginia (VA. CODE ANN. § 15.1-28.01); Washington (WASH. REV. CODE §§ 35.21.120, 36.58.040); West Virginia (W. VA. CODE 240-2-1b); Wisconsin (WIS. STAT. § 159.13(3), (11)).

20. Generally in this Article, “local government” refers to counties, cities, towns, and villages.

21. See, e.g., CAL. CONST. art. XI §§ 5(a), 7 (1976 & Supp. 1994); N.Y. CONST. art. IX, § 2(c)(10) (McKinney 1987).

22. See *supra* n.19.

23. For purposes of this Article, references to “flow control” refer only to export bans.

24. See, e.g., *Fort Gratiot Sanitary Landfill v. Michigan Dept. of Natural Resources*, 223 S. Ct. 2019, 2022 (1992).

25. See OFFICE OF TECHNOLOGY ASSESSMENT, CONGRESS OF THE UNITED STATES, *FACING AMERICA’S TRASH: WHAT’S NEXT FOR MUNICIPAL SOLID WASTE* (1989); N.C. Vasuki, *Solid Waste Authorities: Getting Movement on Needed Projects*, SOLID WASTE & POWER, Aug. 1991, at 20.

26. See generally *Matula v. Superior Court*, 146 Cal. App. 2d 93 (1957) (finding that the regulation of solid waste is a duty of the California city, not merely a right); *City of Rochester v. Gutberlett*, 105 N.E. 548 (N.Y. 1914) (upholding the right of the New York municipality to determine how to best provide for the collection of garbage).

municipal collection forces,<sup>27</sup> or private haulers operating under municipal contract<sup>28</sup> or municipal franchise.<sup>29</sup> Commercial waste, the most profitable type of waste collected,<sup>30</sup> is normally hauled by private companies on a freely competitive basis.<sup>31</sup> As discussed below, it is the ability of local governments to control these haulers and where they transport the collected waste that often determines the feasibility of the solid waste processing and disposal programs.

Disposal of waste historically occurred at landfills, either municipally or privately owned.<sup>32</sup> Greatly tightened state regulation in the 1970s and 1980s, however, drove up landfill pricing and prompted a large number of landfill closures, particularly in the Northeast and Florida.<sup>33</sup> These events indirectly led to a large scale need for flow control. Expecting the trend to continue, seeking to protect taxpayers, and attempting to carry out traditional municipal waste disposal responsibilities, a great number of cities and counties sponsored the development of waste-to-energy facilities.<sup>34</sup> These transactions were models of privatization. Private

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27. Municipalities which provide solid waste collection services typically do so using municipal employees and municipal vehicles, as is the case for residential waste in the City of New York. For further discussion, see *infra* part V.A. When collection services are provided by municipal forces, flow control has been relatively uncontroversial so far. It is typically the attempt to control private haulers seeking to dispose of waste at the lowest cost available that has resulted in the challenging of flow control laws.

28. In such a situation, the hauler is typically paid directly by the government for collection services rendered under the terms of the contract.

29. In franchised solid waste collection programs, the government grants to the hauler a franchise to collect waste and, typically, the hauler is paid directly by the ratepayers, or customers, on a regulated basis.

30. Commercial waste collection is usually the most profitable waste for two reasons. Generally, businesses are able to pay higher collection rates than residential customers and they typically generate more waste to be collected as well. Additionally, commercial waste usually contains a larger amount of recyclable materials, materials which haulers often separate out and sell for their profit. Even if haulers do not engage in self-separation of recyclables, they may have deals with processing facilities that desire to receive waste rich in recyclables. Such deals may include a reduction in the tipping fee paid by the hauler in order to encourage the hauler to deliver its waste to the facility. This can result in a reduction of costs for the hauler, which it may not have to pass through to its customers.

31. In such a situation, commercial customers are able to negotiate freely with haulers for mutually agreeable rates and service.

32. Buxbaum & Baumol, *Service Arrangements for Conventional Disposal*, in *EVALUATING THE ORGANIZATION OF SERVICE DELIVERY: SOLID WASTE COLLECTION AND DISPOSAL* 428 (E.S. Savas and Barbara J. Stevens eds., 1977).

33. See *WHOSE WASTE IS IT ANYWAY?*, *supra* note 1, at 4.

34. See generally Kelly Outten, Note, *Waste to Energy: Environmental and Local Government Concerns*, 19 U. RICH. L. REV. 373 (1985) (discussing the development of waste to energy facilities in the United States).

firms like Ogden, Wheelabrator, Foster Wheeler, American Ref-Fuel and Westinghouse designed, permitted, built and operated the plants. Municipalities sited the facilities and arranged for waste supply (through legislated flow control) and disposal of the residual ash from the mass-burn plants.<sup>35</sup> Initially, the private companies acted as the owners of the facilities and borrowed funds to finance construction. Certain changes made in the Tax Reform Act of 1986, however, made private ownership and financing less attractive,<sup>36</sup> and led to increased public ownership and financing of waste projects, and an increased reliance on regulatory flow control directives.<sup>37</sup>

## 2. Environmental Concerns

The trend towards public ownership, or at least public sponsorship, of waste facilities also developed from environmental concerns. Municipal responsibility for providing waste collection and disposal has always been linked to public health and safety. The enactment of the Comprehensive Environmental Response, Compensation and Liability Act<sup>38</sup> (CERCLA), however, has heightened the importance of environmental considerations by affecting municipal finances in connection with environmental concerns.

CERCLA was enacted to "provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites."<sup>39</sup> It generally imposes strict liability on owners and operators of facilities at which hazardous substances have been disposed.<sup>40</sup> One court has described CERCLA's approach as follows:

CERCLA employs a bifurcated mechanism to promote the cleanup of hazardous waste sites, hazardous spills, and releases

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35. *Id.* at 381-83 (addressing the use of flow control).

36. The Tax Reform Act of 1986, 26 U.S.C. § 144(e)(1)(A), Pub. L. No. 99-514, 100 Stat. 2621 (1986), resulted in a reduced amount of qualified private activity bond funding which may be issued as tax-exempt securities. 26 U.S.C. §§ 141(e)(1)(A), 142(a)(6). Additionally, the changes essentially abolished the investment tax credit available to companies on equipment in such facilities and reduced the depreciation benefits on the property and equipment of which private owners could take advantage. The two tax elements had provided a substantial cash flow for private owners under the prior tax laws. For a review of such pre-'86 tax considerations, see Gregory, et al., *supra* note 3.

37. See State & Local Govt. Solid Waste Mgmt. § 7.04 (1992 & Supp. 1993).

38. 42 U.S.C. §§ 9601-9800 (1988 & Supp. 1994).

39. Pub. L. No. 96-510, 94 Stat. 2767 (1980).

40. See 42 U.S.C. § 9607(a) (1983 & Supp. 1994).



of hazardous substances into the environment. Through the creation of Superfund, the federal government is empowered to respond to hazardous waste disposal. 42 U.S.C. §§ 9604-05, 9611-12. The statute also authorizes private parties to institute civil actions to recover the costs involved in the cleanup of hazardous wastes from those responsible for their creation. 42 U.S.C. § 9607(a)(1-4).<sup>41</sup>

Under CERCLA, such private parties may recover "response costs" for cleanup from a responsible person under § 9607(a).<sup>42</sup> A responsible person includes an owner or operator of such facilities, an arranger of the transportation for disposal or treatment of hazardous substances owned or possessed by such person and a transporter of such substances who selects the site. Such responsible persons are liable for:

- (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
- (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
- (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
- (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.<sup>43</sup>

These costs can result in substantial financial liability for owners, operators, arrangers and transporters. At first glance, it might appear foolish for municipalities to become owners or operators of waste disposal sites, thereby subjecting themselves to potential CERCLA liability. In those situations, however, the municipalities can control the waste screening processes and attempt to detect hazardous substances before processing or disposal. Alternatively, if the waste was delivered to a site not owned by that municipality, the government would have no control over the screening process that had been implemented and could not assure itself that the site had not been inadvertently accepting hazardous substances, thereby exposing all of its past and future customers to potential CERCLA liability. It has been held that municipalities that hire private haulers to collect and dispose of waste can be subject to

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41. 3550 Stevens Creek Assoc. v. Barclays Bank, 915 F.2d 1355, 1357 (9th Cir. 1990).

42. 42 U.S.C. § 9613(f)(1) (1983 & Supp. 1994).

43. 42 U.S.C. § 9607(a) (1983 & Supp. 1994).

“arranger” liability, regardless of whether it can be shown that the municipality’s waste actually contained hazardous substances and regardless of whether the municipality had determined the disposal site.<sup>44</sup>

The threat of such extensive liability in the absence of fault has provided a great impetus for governments to develop their own facilities to guard against assuming such risks. Flow control also provides governments that do not sponsor their own facilities with the ability to pick and choose which locations are least likely to become Superfund sites, thus protecting the public and avoiding substantial financial liability. It should not be forgotten that unlike private companies, the government’s first duty is not to deliver a profit, but rather to serve the public.

### C. Financing Solid Waste Management Facilities

#### 1. Tipping Fees as Revenues

The cost of these extensive waste facilities, typically tens of millions of dollars, can be financed in a variety of ways.<sup>45</sup> Most financing mechanisms rely on a secure supply of solid waste, and thus, depend on flow control to assure their feasibility. This is accomplished through the use of the “tipping fee.” A tipping fee<sup>46</sup> is the per ton charge that haulers delivering waste to a facility must pay in order to deposit their waste at the site. The amount of the tipping fee is based on the costs associated with the facility or solid waste management system and the expected tonnage of waste to be delivered in an operating year. Typically, the costs contributing to the setting of the tipping fee include, among other things, debt service on any outstanding debt used to finance the facility or the system, operation and maintenance costs of the facility, and, in the case of a governmental owner, costs of other solid waste management services provided by the government for which it cannot fea-

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44. See *Transportation Leasing Co. v. California*, 861 F. Supp. 931 (C.D. Cal. 1992) (“CERCLA does not permit defendants to avoid liability by simply hiring an outside contractor to perform collection services instead of the city fulfilling that duty itself.”) See also *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192 (2d Cir. 1992) (municipalities which manage disposal activities held to be “arrangers” under CERCLA).

45. See generally *Gregory, et al., supra* note 3, at 121-27 (addressing resource recovery financing structures from a financial planner’s perspective).

46. Sometimes referred to as a gate fee or disposal charge, the term “tipping fee” is derived from the fact that trucks delivering waste must “tip” the back-end of the truck to drop off the waste.

sibly charge the users directly and which are not self supporting.<sup>47</sup> Totalling these and other costs and dividing by the expected tonnage for the operating year thus yields the tipping fee. Any shortfall in tonnage would therefore result in an inability of the facility owner to pay a portion of the costs listed above, perhaps putting its debt at risk of default. Thus, in most cases, there is a waste supply risk connected with the financing of a waste management facility.<sup>48</sup>

## 2. *The Risk of Waste Supply*

If the facility is financed by a private owner in either a project financing<sup>49</sup> or a corporate credit financing,<sup>50</sup> the private owner and the investors assume the risk of an inadequate waste supply and typically pass it through to the government via "put-or-pay" contracts entered into with the municipality. Put-or-pay contracts stem from the operating concept that "trash and cash are fungible,"<sup>51</sup> and obligate the government to deliver or cause to be delivered to the facility at issue a specified tonnage of waste each year of the contract. If the government fails to meet its delivery obligations, it is still required under the contract to pay the tipping fee to the facility for the shortfall in waste. Thus, regardless of whether the government delivers its waste to the facility, revenues are received by the owners of the facility. In a system financing by a governmental unit,<sup>52</sup> the investors take the risk of waste supply because typically only tipping fee revenues are available to generate funds sufficient to meet the waste management system's costs, including the payment of debt service.<sup>53</sup> In contrast, general obliga-

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47. For example, recycling education programs or special household hazardous waste drop-off days do not generate revenues and their costs must be covered by tipping fees for services for which the government can charge a fee.

48. See generally *WHO'S WASTE IS IT ANYWAY?*, *supra* note 1, at 5 (describing the waste supply risk in various financing structures).

49. In a private project financing, the private company typically finances the facility with the security of a contract with a specific governmental unit which pledges to supply waste to the facility and pay for its processing or disposal.

50. In a corporate credit financing, the private company finances the facility with its own credit as security. Such privately owned and operated facilities are commonly referred to as merchant facilities in which owner, to secure its debt, signs contracts with several different entities, essentially selling capacity in the facility to these entities.

51. *WHOSE WASTE IS IT ANYWAY?*, *supra* 1, at 5.

52. In a system financing, the governmental unit typically issues long-term debt to finance a facility, secured by the revenues of the solid waste system.

53. Another source of funds that may be available with respect to waste-to-energy facilities is the revenues from the sale of energy produced at such facilities. The

tion financings<sup>54</sup> of governmentally-owned waste facilities protect investors from the risk of waste supply because facility revenues do not solely support the bonds. Instead, the government secures the bonds and therefore assumes the risk of waste supply. Thus, over the long term, the risk of hauler non-delivery in waste facility financings resides in the investors, private owners or the level of government sponsoring the bonds, unless the local government connected with the project is able to use taxpayer dollars or raise a solid waste management fee to offset some of the associated costs.

### 3. *Flow Control as Credit Support*

With waste delivery shortfalls correlated to debt service shortfalls, meaning that hauler evasions<sup>55</sup> are a credit risk, investors and credit rating agencies insisted upon, and received, assurances of waste supply.<sup>56</sup> This was accomplished through the adoption of enabling laws on the state level and implementing ordinances establishing export bans on the local level. In other words, flow control ordinances became a primary means by which local governments could support their facilities and secure a steady revenue stream.

As waste management technologies and mandates began to evolve, flow control was used to provide credit risk security for other types of waste management facility financings as well.<sup>57</sup> With increased concerns over the desirability of waste-to-energy plants,

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amount of energy produced, however, is dependent in part on the amount of waste combusted. Thus, the waste supply risk is present here as well.

54. General obligation debt refers to the fact that while revenues from a specific source of income are not pledged to pay the debt service, the government's general fund credit secures the bonds. That is, the government is obligated to pay debt service from its general fund and, if necessary, must raise taxes to generate funds sufficient to make its debt service payments.

55. Hauler evasions constitute instances in which a hauler was expected, through laws, contracts or other means, to deliver its collected waste to a designated site, but failed to do so.

56. For a look at the early concerns of credit rating agencies and their evaluation criteria in resource recovery financings, see STANDARD & POOR'S CREDITWEEK, Oct. 15, 1984, at 44-54.

57. See, e.g., *Economic and Institutional Barriers to Private Investment in Resource Conservation and Recovery*, SYMPOSIUM ON RESOURCE CONSERVATION AND RECOVERY: SUBCOMM. ON TRANSPORTATION AND COMMERCE OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94th Cong., 2d Sess. (1976) (addressing economic feasibility of waste disposal facilities and guaranteed waste flows; see also H.R. REP. NO. 1491, 94th Cong., 2d Sess., 9 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6246 (listing topics discussed at above symposium).

there has been a sharp decline in new orders for such facilities.<sup>58</sup> In recent years, materials recovery facilities (MRFs),<sup>59</sup> mixed waste processing facilities<sup>60</sup> and composting facilities<sup>61</sup> have begun to proliferate across the nation. This is a direct result of increased federal encouragement of the use of alternatives to landfilling and incineration<sup>62</sup> along with the adoption of legislation in many states requiring recycling and the diversion of waste from rapidly decreasing landfill space.<sup>63</sup> California, one of the more progressive states in this regard, provides in its Integrated Waste Management Act<sup>64</sup> for the imposition of fines on municipalities that do not meet the stated diversion goals.<sup>65</sup> Flow control enables local governments to develop the waste facilities needed to assure compliance with such mandates and statutes. Although materials recovery,

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58. See, e.g., *Around the States: California*, 22 SOLID WASTE REPORT 5 (Jan. 28, 1991) (Alameda County voters approve ban on garbage incineration); Franklin, *Recycling is Focus of State Plan*, BOSTON GLOBE, June 14, 1990, Metro Region, at 1 (noting that state solid waste plan makes incineration a choice of last resort); *Wisconsin Passes Major Recycling Bill*, INTEGRATED WASTE MANAGEMENT, May 16, 1990, at 1 (Wisconsin bans incineration of recyclable materials).

59. Most materials recovery facilities (MRFs) typically handle clean, curbside separated residential recyclables, preparing them for marketing to purchasers of recyclable materials.

60. Mixed waste processing facilities process mixed loads of municipal solid waste and separate out recyclable materials for marketing.

61. Composting facilities process the compostable portion of mixed municipal solid waste or certain selected types of municipal solid waste.

62. The EPA sought to establish national goals for solid waste management practices. OFFICE OF SOLID WASTE, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *THE SOLID WASTE DILEMMA: AN AGENDA FOR ACTION 1-4* (1989) (hereinafter *AGENDA FOR ACTION*). The report strongly recommends an integrated waste management approach of, in order of desirability, source reduction, recycling, combustion and landfilling, to address local solid waste problems. *Id.* at 16-17. Source reduction involves asking manufacturers to reduce the amount and toxicity of their packaging and influencing consumers to change their buying habits with regard to packaging. *Id.* at 18. Recycling is meant to divert from landfills and incinerators materials in the waste stream which can be reused in some form, thereby reducing both waste volume and the need for new materials. *Id.* Combustion reduces the amount of waste to be landfilled, burning the waste so that only the residual ash needs to be buried. As noted earlier, many combustion facilities generate energy from the waste. *Id.* at 19. Generally, the EPA encouraged non-landfill disposal facilities "as the preferred means of solid waste management whenever technically and economically feasible." 40 C.F.R. § 256.31(e) (1991).

63. See, e.g., MINN. STAT. § 115A.02; N.J.S.A. § 13:1E-99.32-99.43; R.I. Gen. Laws § 23-19-3(11).

64. CAL. PUB. RES. CODE § 40000-41000 (1984 & Supp. 1995).

65. CAL. PUB. RES. CODE § 41813. California requires municipalities to divert 25% of their municipal solid waste by January 1, 1995, and 50% by January 1, 2000. CAL. PUB. RES. CODE § 41780. Methods of diversion accepted by the State include source reduction, recycling and composting. *Id.*

mixed waste processing and composting facilities are less capital intensive than waste-to-energy facilities, they nevertheless need a secure waste stream in order to generate steady revenues sufficient to justify investment. Flow control also helps governments in the development of new and expanded landfills, as well as expensive improvements to old landfills as required by state and federal policies.<sup>66</sup> Thus, an assured waste supply assists all types of waste management facilities in securing financing and meeting governmental long-term health, safety and environmental goals.

#### **D. The True Reason for Waste Facilities and Flow Control**

The need to plan and provide for waste management on a long-term basis is often forgotten in the flow control debate. The very reason a government builds or sponsors these facilities, and thus needs flow control laws, should be considered. Landfill disposal arrangements are typically short-term, year-to-year relationships, which are subject to the vagaries of the market. In today's market, the ability to plan long-term for assured and proper disposal of waste requires long-term commitments, debt and security. These factors, however, should not blur the motivations underlying all those efforts: protecting the public health and safety through effective, reasoned and dependable means. These rationales were given much greater weight in the past and, to a degree, were accepted by the courts when haulers began to challenge flow control laws in an effort to bring waste to their own facilities or other sites with lower tipping fees.

### **III. Carters and the Courts: Hauler Challenges to Flow Control**

Private haulers have challenged<sup>67</sup> legislative flow control in court for ninety years, losing consistently until the 1990s. Arguments

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66. See 40 C.F.R. pt. 258 (1993); N.J.A.C. 7:26-2 (1994); 25 PA. CODE ch. 273 (1994).

67. Haulers have repeatedly challenged flow control for the simple reason that often the governmentally designated disposal site charges the haulers a higher tipping fee than at other sites. This may be on account of the fact that the governmentally sponsored facility's tipping fees are set at a level, as discussed earlier, sufficient to meet the full costs of the solid waste management system, including debt service, operation and maintenance costs and the costs of certain other services provided, such as recycling education and special household hazardous waste disposal days. In addition to the obvious objection that the government needs the revenues, governments also object to such hauler evasions because the site to which the hauler wishes to transport its waste is often a landfill. Typically, private landfills have lower tipping fees than public processing facilities. One reason for not wanting to send waste to a landfill is that in many states, state policy requires governments to achieve a certain

against legislative flow control based on antitrust, property taking and interstate commerce discrimination were rejected routinely by the courts at all levels.

### A. Due Process in the Supreme Court

In an ironic twist, considering its later decision in *Carbone*, the United States Supreme Court began the long run of unsuccessful challenges to flow control. In 1905, the Supreme Court upheld the flow control ordinance at issue in *California Reduction Co. v. Sanitary Reduction Works*.<sup>68</sup> In that case, San Francisco had granted a fifty-year exclusive franchise to a single company to dispose, by "crematories or by a process of reduction,"<sup>69</sup> of garbage collected in the jurisdiction and to charge a per load fee to do so.<sup>70</sup> The ordinance demonstrates the strong public health and safety element associated with flow control provisions. The crematories to be built pursuant to the disposal franchise were required to combust the waste completely and prevent odors and smells from escaping from the waste, the combustion process or the "residuum." Waste subject to the flow control franchise included "house refuse, dirt, ashes, cinders, sludge, crockery, tins, bones and other like matter, dead animals . . . putrid vegetable matter, fish, flesh" and condemned food.<sup>71</sup> The flow control aspect of the ordinance stated that all persons in the City were required to deliver their waste to the crematory once it was constructed, and violations were punishable by fines and imprisonment. Additionally, the franchisee was authorized to collect a tipping fee from the haulers of up to twenty cents per load delivered.<sup>72</sup>

In its decision upholding the ordinance in the face of a due process "takings" challenge asserted by a hauler acting in violation of the ordinance, the Supreme Court viewed the issue to be a public health and safety matter, and focused on the City's authority and obligation to protect the public health by all reasonable means.<sup>73</sup>

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diversion rate, or percentage of waste that is not landfilled, but is instead recycled, composted or transformed into energy at a waste-to-energy facility. If haulers instead landfill this waste, the government runs the risk of not meeting its diversion goals and of incurring fines from the state.

68. 199 U.S. 306 (1905).

69. *Id.* at 307.

70. *Id.* at 308.

71. *Id.*

72. 199 U.S. at 308.

73. *Id.* at 318-20.

In finding that the City's choices must be given due deference in matters of the public health and safety, the Court stated that:

States possess, because they have never surrendered, the power—and therefore municipal bodies, under legislative sanction, may exercise the power—to prescribe such regulations as may be reasonable, necessary and appropriate, for the protection of the public health and comfort. . . . If a regulation, enacted by competent public authority avowedly for the protection of the public health, has a real, substantial relation to that object, the courts will not strike it down on grounds merely of public policy or expediency.<sup>74</sup>

The Court also noted that a hauler should not object to a municipal flow control provision:

Still less has the licensed scavenger a right to complain; for his right to convey garbage and refuse through the public streets, in covered wagons, was derived from the public, and he was subject to such regulations as the constituted authorities, in their exercise of the police power, might adopt.<sup>75</sup>

The Court determined that the flow control ordinance and all it contemplated constituted a regulation to protect the public health and safety. The Court reasoned that the municipal authorities may have thought that the safety of the community could not be assured unless all the waste that constituted the nuisance and caused the danger was carried to a crematory where it could be promptly destroyed by fire, thereby minimizing the danger to the public health.<sup>76</sup> Thus, the Court, finding that it could not say that the flow control ordinance violated the due process clause or resulted in an unconstitutional taking of private property for public use, upheld the ordinance.<sup>77</sup>

The Court's statements in *California Reduction* regarding the wide berth given to governments in matters of public health and safety have served as guiding principles for local governments in fulfilling their traditional duties and statutory mandates. As a result, municipal preeminence in most matters of waste management was unquestioned.<sup>78</sup>

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74. *Id.* at 318.

75. *Id.* at 322.

76. *Id.* at 323.

77. 199 U.S. at 323.

78. See, e.g., *Wiggins v. Town of Somers*, 149 N.E. 2d 869, 873 (N.Y. 1958). *City of Rochester v. Gutberlett*, 105 N.E. 548, 550 (N.Y. 1914); *Ex parte Zhizuzza*, 147 Cal. 328, 332 (1905).



For instance, *California Reduction* was immediately applied by the Supreme Court in *Gardner v. Michigan*,<sup>79</sup> where the Court upheld a flow control ordinance established by the City of Detroit, finding that "property rights of individuals in the noxious materials . . . must be subordinated to the general good."<sup>80</sup> The Court noted that if the owner of the garbage suffers any loss by its destruction, "the inconvenience or loss is presumed to be compensated in the common benefit secured by regulation."<sup>81</sup> Following the reasoning developed in *California Reduction*, the Court found that the ordinances in question could not "be held wanting in the due process of law required by the Constitution."<sup>82</sup>

## B. Antitrust Challenges to Flow Control

In addition to raising due process claims, haulers have also traditionally relied on antitrust claims to contest flow control laws, especially in the early and mid-1980s. In general, haulers have argued that by requiring private hauler waste<sup>83</sup> to be transported to a governmentally-designated site, local governments were acting as monopolists in restraint of trade and violating federal antitrust laws.

The federal courts, however, repeatedly upheld municipal flow control laws against antitrust challenges pursuant to the "state action" exemption. Under the Sherman Antitrust Act,<sup>84</sup> states are exempt from antitrust liability.<sup>85</sup> This exemption has been ex-

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79. 199 U.S. 325 (1905).

80. *Id.* at 332-333.

81. *Id.* at 331 (citations omitted).

82. *Id.* at 333.

83. Note that haulers in flow control cases impliedly consider waste they collect and haul to be owned by them, at least in relation to determining where such waste will be transported. Some governments using private haulers have attempted to combat such claims by providing in contracts, franchises or ordinances that collected waste remains the property of the local government. *See Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Auth.*, 814 F. Supp. 1566 (M.D. Ala. 1993) (where the district court rejected such an attempt at achieving flow control). Although these claims by haulers are debatable, such a contention is of strongest force in situations in which the hauler pays waste generators to collect their waste. For example, in California, haulers, seeking a profit through the marketing of recoverable materials, sometimes pay residential and commercial customers for their recyclables. The California Supreme Court held, prior to the *Carbone* decision, that in such situations, a municipality's exclusive franchise to another hauler does not cover such recyclables, as they have not been "discarded" and continue to have value. *See Waste Management of the Desert, Inc. v. Palm Springs Recycling Center, Inc.*, 7 Cal. 4th 478 (1994) (commonly known as the "Rancho Mirage case").

84. 15 U.S.C. § 1-41 (1988 & Supp. 1993).

85. The state action exemption was articulated by the Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943), and is based on the concept of dual sovereignty.

tended through case law to municipalities,<sup>86</sup> which qualify if their actions are taken pursuant to a clearly articulated state policy that is affirmatively expressed. A state policy expression will be found to be affirmatively expressed "if suppression of competition is the foreseeable result of what the statute authorizes."<sup>87</sup> This standard was employed by federal circuit courts in the mid-1980s to uphold flow control provisions in Ohio<sup>88</sup> and Iowa,<sup>89</sup> despite their adverse impact on free trade. Following these cases, state solid waste statutes have typically included provisions articulating the state's intention to displace competition in the field and thus pass the antitrust test.<sup>90</sup>

### C. Commerce Clause Challenges Before *Carbone*

As other arguments have proven unsuccessful, in the past twenty years, haulers have increasingly turned to the Commerce Clause of the Constitution as a means by which to challenge flow control laws. In 1978, it was established by the Supreme Court in *Philadelphia v. New Jersey*<sup>91</sup> that solid waste constituted an article of commerce and thus, its transport is subject to Commerce Clause analysis. Although *Philadelphia* was an import ban case,<sup>92</sup> the Court's determination therein has been continually reaffirmed, most recently in *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*<sup>93</sup> and *Carbone*.<sup>94</sup>

Typically, haulers contend that state-authorized solid waste export restrictions imposed by local governments interfere with the free flow of interstate commerce by limiting where haulers can transport solid waste. The Commerce Clause provides that "Congress shall have the power . . . to regulate Commerce . . . among the several States."<sup>95</sup> That provision has historically been read "not

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86. See, e.g., *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *City of Lafayette v. Louisiana Power and Light*, 435 U.S. 389 (1978).

87. *City of Columbia*, 499 U.S. at 373.

88. *Hybud Equipment Corp. v. City of Akron*, 742 F.2d 949 (6th Cir. 1984), cert. denied, 471 U.S. 1004 (1985).

89. *Central Iowa Refuse Systems v. Des Moines Metro. Solid Waste Agency*, 715 F.2d 419 (8th Cir. 1983).

90. See, e.g., 1991 N.Y. LAWS ch. 569, § 1 (authorizing Rockland County and all municipalities therein to impose "appropriate and reasonable limitations on competition" with respect to solid waste services).

91. 437 U.S. 617 (1978).

92. See *supra* notes 23 and 24.

93. 112 S. Ct. 2021 (1992).

94. 114 S. Ct. 1677 (1994).

95. U.S. CONST. art. I, § 8, cl. 3.

only as an authorization for congressional action, but also, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation."<sup>96</sup> Commonly known as the dormant Commerce Clause, this "negative" aspect prohibits states, in the absence of Congressional authorization, from "advancing their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state."<sup>97</sup> Nonetheless, the Court has observed that:

[t]he Commerce Clause does not . . . invalidate all state restrictions on commerce. It has long been recognized that, "in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it."<sup>98</sup>

To determine whether a governmental regulation violates the Commerce Clause, the Supreme Court has developed a multi-part test that must be applied to a Commerce Clause challenge. How this test is applied and interpreted often determines whether a regulation passes muster under the Commerce Clause. Essentially, the test is as follows:

- (1) Is the regulation at issue an evenhanded regulation with only an incidental effect on interstate commerce, or is it discriminatory against interstate commerce?
- (2) If the regulation is evenhanded and effectuates a legitimate local purpose, it should be upheld unless it is shown that the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.
- (3) If the regulation at issue is discriminatory, the government must show, under a strict scrutiny test, that the law (a) serves a legitimate local purpose, and (b) the purpose could not be served by less discriminatory alternative means, or else the regulation will be struck down.<sup>99</sup>

#### D. Early Governmental Successes

The second part of the test was developed by the Supreme Court in *Pike v. Bruce Church, Inc.*<sup>100</sup> The *Pike* test was generally ap-

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96. *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979).

97. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949).

98. *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 669 (1981) (quoting *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 767 (1945)).

99. See *infra* part III.e.

100. 397 U.S. 137, 142 (1970).

plied in cases upholding export bans in the 1980s. Federal courts in New Jersey, Ohio and Delaware in the mid-to-late 1980s each found flow control schemes to have only an incidental effect on interstate commerce. In New Jersey,<sup>101</sup> the contested regulation in *J. Filiberto Sanitation, Inc. v. New Jersey Department of Environmental Protection*<sup>102</sup> required all waste in Hunterdon County, regardless of point of origination, to be delivered to the County's transfer station, from which the County arranged for disposal.<sup>103</sup> The Third Circuit ruled that the regulation operated on an evenhanded basis because both in-state and out-of-state haulers were covered.<sup>104</sup> Therefore, the regulation, which was crafted to assist in alleviating the garbage problem, placed the burden on New Jersey residents,<sup>105</sup> who may not have the advantage of lower tipping fees at other sites.<sup>106</sup>

The Ohio case, *Hybud Equipment Corporation v. City of Akron*,<sup>107</sup> similarly resulted in the denial of a Commerce Clause challenge to a flow control ordinance. The U.S. Court of Appeals for the Sixth Circuit ruled that "the economic costs of the [flow control] measure fall hardest on people who generate and collect garbage in the City of Akron."<sup>108</sup> Any increased costs due to the regulation were passed through to the hauler's customers, i.e., the residents of the municipality whose duly elected officials instituted the ordinance in the first place.<sup>109</sup>

In Delaware, the district court, in *Harvey & Harvey v. Delaware Solid Waste Authority*,<sup>110</sup> upheld a state statute requiring delivery of solid waste to in-state facilities as part of a legislative program supporting the Delaware Solid Waste Management Authority's integrated system of waste processing facilities and landfills. The court found that the law regulated on an evenhanded basis, with only an incidental effect on interstate commerce, because all waste in Delaware, regardless of origin, was required to be delivered to the Authority's facilities.

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101. New Jersey has a comprehensive statewide solid waste regulatory program.

102. 857 F.2d 913 (3rd Cir. 1988).

103. *Id.* at 916.

104. *Id.* at 921.

105. *Id.* at 922.

106. *Id.* at 921.

107. 654 F.2d 1187 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931, *re-manded*, 701 F.2d 178 (6th Cir. 1982), *appeal aff'd*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985).

108. *Id.* at 1194-95.

109. *Id.*

110. 600 F. Supp. 1369 (D. Del. 1985).

### E. Recent Hauler Victories

In the early 1990s, however, the courts' view of export bans began to change as the trend shifted towards applying the third part of the Commerce Clause test,<sup>111</sup> the strict scrutiny analysis. A district court in Rhode Island, in *DeVito Trucking v. Rhode Island Solid Waste Management Corp.*,<sup>112</sup> granted a preliminary injunction against the enforcement of a state regulation requiring all solid waste to be disposed of at state-licensed facilities. The court found that the regulation completely eliminated interstate commerce, in effect conferring an economic benefit on the state authority at the expense of those engaged in interstate commerce.<sup>113</sup> One contributing factor was that private haulers were charged higher tipping fees than municipal haulers, essentially acting as subsidizers of the government.<sup>114</sup> The court concluded that the state's purpose of public health and safety protection could be achieved in a less discriminatory manner through waste inspections, and its purpose to provide for a financially viable disposal system could be achieved by local taxation.<sup>115</sup>

A 1992 Minnesota case, *Waste Systems Corp. v. County of Martin*,<sup>116</sup> upheld an Iowa landfill owner's challenge to a Minnesota county's flow control law. Because two-thirds of the county's waste had been privately hauled to the Iowa landfill before the adoption of the law, the court found clear and substantial discrimination against interstate commerce.<sup>117</sup> Although the financial viability of the county's waste facility was found to be a legitimate local purpose, the court ruled that less discriminatory means of achieving it were available, including taxation to lower the tipping fee to attract private haulers economically.<sup>118</sup>

In North Carolina, a federal district court, in *Container Corporation of Carolina v. Mecklenberg County*,<sup>119</sup> issued a preliminary injunction against the enforcement of a county export ban law. The law, which was challenged by a local hauling company that transported waste to a landfill it owned in South Carolina, was enacted in part to support a county-wide integrated recycling, incineration

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111. See *supra* note 99 and accompanying text.

112. 770 F. Supp. 775 (D.R.I. 1991), *aff'd*, 947 F.2d 1004 (1st Cir. 1991).

113. *Id.* at 783.

114. *Id.* at 781.

115. *Id.* at 785.

116. 985 F.2d 1381 (8th Cir. 1993).

117. *Id.* at 1383, 1387.

118. *Id.* at 1388.

119. No. 92cv-154-MU (W.D.N.C. June 19, 1992).

and landfill disposal system.<sup>120</sup> Surprisingly, the court concluded that there is no difference between export bans and import bans and that, as enforced, the law was discriminatory in effect because it banned the exportation of in-county waste across state borders.<sup>121</sup> Conditioning hauler licenses on compliance with the flow control regulation was determined to be an unlawful attempt to cause a waiver of the right to engage in interstate commerce.<sup>122</sup> The court noted that less discriminatory means to support the county's facility were available, including taxation, and stated that the county had failed to show that the flow control ordinance was the only effective means available.<sup>123</sup>

In 1993, an Alabama federal district court, in *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*,<sup>124</sup> upheld a challenge to export bans imposed by three Alabama cities. Each city had adopted an ordinance pursuant to user contracts signed with a regional solid waste authority requiring all waste generated within the city to be disposed of at the facility that would be built by the Authority.<sup>125</sup> One ordinance also vested in the city title to all waste generated within the city.<sup>126</sup> Another ordinance permitted haulers to transport the waste out-of-state, but only upon compliance with strict reporting requirements not applicable to waste disposed of at the Authority's facility.<sup>127</sup> The court ruled that the ordinances clearly discriminated against interstate commerce. Moreover, the market-participant doctrine,<sup>128</sup> put forth as a defense, was found to be inapplicable, as the cities were not pur-

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120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 21-22.

124. 814 F. Supp. 1566 (M.D. Ala. 1993).

125. *Id.* at 1570.

126. *Id.*

127. *Id.*

128. The market participant doctrine, as developed by the Supreme Court, provides that when a governmental entity enters a marketplace as a participant, it is treated as a proprietor for purposes of Commerce Clause analysis. In other words, when analyzing the constitutionality of the government's actions, the Commerce Clause will not be implicated unless the government is acting as a market regulator.

This doctrine has been spelled out by the Supreme Court in four major cases. See *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983) (approving requirement that construction company use 50 percent city residents on public construction projects paid for by the city); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (upholding state's right to limit sales of cement from a state-owned cement factory to in-state buyers); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (upholding state subsidy program to encourage the recycling of abandoned cars, with tougher restrictions on out-of-state firms). *But see* South-Central Timber Develop-

chasers or sellers of the waste, nor were they bona-fide interest holders as required by the doctrine.<sup>129</sup> The court ruled that the cities had failed to demonstrate that their method was the least restrictive alternative and rejected most of the traditional arguments in favor of upholding flow control provisions.<sup>130</sup> Several alternatives to ensure the economic viability of the facility were suggested by the court, including charging competitive rates at the facility and financing the facility through bank loans, ad valorem taxes, private investors or utility bill assessments.<sup>131</sup>

## F. The New York Approach

The trend towards intolerance of flow control laws created a conflict between the circuits. Interestingly, the New York courts had largely rejected the line of analysis being developed in the fed-

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ment, *Inc. v. Wunnicke*, 467 U.S. 82 (1984) (invalidating state requirement that all timber bought from state be processed in-state prior to shipment out-of-state).

The market participant doctrine has essentially made review of government action a two-part process. The initial step, is to determine if the government's actions are taken as a market regulator or as a market participant. If the latter is the case, then the Commerce Clause is not implicated and a Commerce Clause analysis need not be performed. As the Court stated in *White*, "[t]he impact of the local business preference on out-of-state residents figures into the analysis only after it is decided that the City is regulating the market rather than participating in it." *White*, 460 U.S. at 210.

An example of how this would apply in the solid waste disposal arena is if a municipality owned its own facility. Supreme Court Chief Justice Rehnquist, dissenting in *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, implied that in such a situation the market participant doctrine would apply and, if the government attempted to restrict access to its facility, such actions would not be subject to judicial review. *Id.* at 2018. After striking down an attempt to limit the amount of hazardous waste disposed of in Alabama via a surcharge on out-of-state waste, the Court suggested several alternatives for how the government's goal of banning out-of-state hazardous waste could be achieved. One alternative suggested by Rehnquist in his dissent was as follows: "Or Alabama may, under the market participant doctrine, open its own facility catering only to Alabama customers." *Id.* (citations omitted).

To the extent that a government wishes to prevent waste from being processed outside its jurisdiction, however, the courts will probably find the market participant doctrine inapplicable, as in *Waste Recycling*. Such an attempt at flow control of waste recyclables is more of a regulatory action, than a proprietary one. This is because, although the government is considered a participant in the disposal field by virtue of its ownership of the facility, it is seen as such only regarding actions with respect to the facility itself. An attempt to restrict the flow of waste under the guise of the government's ownership of the facility is considered to be an impermissible downstream restriction of interstate commerce. The market participant doctrine is not considered to extend to such regulatory actions, otherwise a local government could regulate a broad market merely by opening a business in one particular aspect thereof. *See, e.g., South-Central Timber Development, Inc., supra.*

129. 814 F. Supp. at 1572.

130. *Id.* at 1581.

131. *Id.*

eral system<sup>132</sup> and, in deciding *Town of Clarkstown v. C & A Carbone, Inc.*,<sup>133</sup> the New York Appellate Division found the Town's flow control law constitutional. After the New York Court of Appeals denied a motion to hear the case on appeal, Carbone filed a writ of certiorari with the U.S. Supreme Court, which was granted in May, 1993. As a result, *C & A Carbone, Inc. v. Town of Clarkstown* and its potential outcomes became the focus of much of the waste world. It was clear that the Supreme Court's decision in this case could determine the future of many existing and planned solid waste management programs, as well as the future of many businesses engaged in solid waste practices.

#### IV. The Supreme Court Weighs In: The *Carbone* Decision

In its May 16, 1994, decision, the U.S. Supreme Court struck down Clarkstown Local Law No. 9,<sup>134</sup> a law requiring all nonhazardous solid waste within the Town, whether generated within Clarkstown or generated outside the Town and brought within its limits, to be deposited at a Town-designated transfer station.<sup>135</sup> Clarkstown was contractually obligated to deliver and pay for the processing of 120,000 tons of solid waste per year at that facility.<sup>136</sup> The transfer station was owned and operated by a private company, but the Town could purchase the facility for \$1 at the end of a five-year term.<sup>137</sup>

The Clarkstown ordinance was challenged by, among others, C & A Carbone, Inc., a company engaged in the processing of solid waste. Carbone operated a recycling center in Clarkstown. Under the provisions of the ordinance, after Carbone removed the recoverable recyclables from the solid waste it received at the recycling center, it was required to send the residual waste to the designated transfer station and pay the tipping fee at that facility.<sup>138</sup> Carbone, which received some waste from out of state, was instead trans-

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132. See, e.g., *Town of North Hempstead v. Inc. Village of Westbury*, 588 N.Y.S.2d 293 (2d Dep't. 1992); *Vinnie Montes Waste Sys. Inc. v. Town of Oyster Bay*, 567 N.Y.S.2d 335 (N.Y. Sup. Ct. 1991); *Omni Group Farms, Inc. v. County of Cayuga*, 766 F. Supp. 69 (N.D.N.Y. 1991); *County of Washington v. Casella Waste Management*, 1990 U.S. Dist. LEXIS 16941 (N.D.N.Y. 1990).

133. 587 N.Y.S.2d 681 (2d Dep't. 1992), cert. granted, 113 S. Ct. 2911 (1993).

134. 114 S. Ct. 1677 (1994).

135. *Id.* at 1680.

136. *Id.*

137. *Id.*

138. *Id.* at 1681.



porting its residual waste to cheaper disposal sites located out of state.

### A. The Majority Opinion

The relatively brief majority opinion in the 6-3 decision was written by Justice Kennedy and signed by four other Justices. The Court essentially treated the issue as a standard Commerce Clause case and began its analysis by noting that, despite the Town's arguments to the contrary, the flow control ordinance does indeed regulate interstate commerce.<sup>139</sup>

The Court stated that, although on its face Local Law No. 9 may not appear to regulate interstate commerce because it treats all waste equally regardless of where it originates, the economic effects of the law reach outside New York State in two ways. First, by requiring Carbone to send the nonrecyclable portion of out-of-state waste to the designated transfer station, and thus causing Carbone to pass the tipping fee at the transfer station through to the waste generators,<sup>140</sup> the ordinance drives up the cost for out-of-state waste generators to dispose of their solid waste. Second, because the ordinance prevents everyone except the designated transfer station from processing the in-town waste and the residual waste from Carbone's facility, out-of-state businesses are denied access to a local market.<sup>141</sup> Thus, the Court concluded that this brings the ordinance within the scope of the Commerce Clause.

In determining the validity of Local Law No. 9, the Court applied the standard Commerce Clause test.<sup>142</sup> The Court ruled that the law discriminates against interstate commerce and thus, found no need to apply the *Pike* test.<sup>143</sup> Since the law favors an in-town processor of solid waste over out-of-state processors, the Court held the ordinance to be a discriminatory market regulation similar in effect to other local processing laws struck down in earlier Commerce Clause cases.<sup>144</sup>

In perhaps a novel concept, the Court considered the article of commerce at issue not to be the solid waste itself, but rather the service of processing and disposing of it. The law effectively bars the import of out-of-state processing services and in fact, according

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139. 114 S. Ct. at 1681.

140. *Id.*

141. *Id.*

142. *See supra* notes 91-99.

143. *Id.* at 1682. *See also supra* note 100.

144. 114 S. Ct. at 1682.

to the Court, "squelches" all competition in the waste processing field, whether in-state or out-of-state.<sup>145</sup> This denial of access to the local market is discrimination against interstate commerce, and the Court stated that, "absent the clearest showing that the unobstructed flow of interstate commerce itself is unable to solve the local problem" for which the law was adopted, the law must be declared invalid.<sup>146</sup>

The Court found several nondiscriminatory alternatives to address the alleged justification for the ordinance, namely health and environmental problems, as well as uniform safety regulations.<sup>147</sup> Also, the Court disposed of the Town's argument that the long-term survival of the transfer station necessitated special financing by proposing alternatives to the law, including subsidizing the facility through general taxes or municipal bonds. The Court observed that, "having elected to use the open market to earn revenues for its project, the [T]own may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State."<sup>148</sup> Thus, the Court held that Local Law No. 9 impermissibly regulates interstate commerce.

## B. The Concurring Opinion

Justice O'Connor filed a concurring opinion, disagreeing with the majority finding that the ordinance discriminates against interstate commerce. Justice O'Connor noted that the laws involved in the Commerce Clause cases cited by the majority all discriminated on the basis of geographic origin.<sup>149</sup> In other words, they "gave a competitive advantage to local business *as a group* vis-a-vis their out-of-state or non-local competitors *as a group*."<sup>150</sup> Local Law No. 9, however, does not give more favorable treatment to local interests as a group as compared to non-local economic interests. Justice O'Connor observed that, "[r]ather, the garbage sorting monopoly is achieved at the expense of all competitors, be they local or nonlocal."<sup>151</sup> Justice O'Connor noted that this distinction is best demonstrated by the fact that the challenging party, Carbone, is located within the Town.<sup>152</sup> Thus, in-Town and out-of-Town

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145. *Id.* at 1683.

146. *Id.*

147. *Id.*

148. *Id.* at 1684.

149. 114 S. Ct. at 1688.

150. *Id.*

151. *Id.* at 1689.

152. *Id.*

processors are treated equally under the ordinance and Justice O'Connor considered the law to "discriminate" evenhandedly. She therefore concluded that, because in-Town competitors are just as equally burdened by the ordinance, Local Law No. 9 does not discriminate against interstate commerce.

Justice O'Connor then applied the *Pike* test<sup>153</sup> to determine whether the law imposes an excessive burden on interstate commerce as compared to the local benefits conferred. She acknowledged the importance of the local interest in proper disposal of waste but noted that this interest could also be accomplished by a law merely requiring proper processing somewhere.<sup>154</sup> She also noted that the Town's purpose of ensuring the financial viability of the transfer station could be achieved by means with a less drastic impact on the flow of goods—by imposing taxes, issuing municipal bonds or by lowering the tipping fee to a competitive level.<sup>155</sup>

In concluding that the burden of the ordinance is excessive, Justice O'Connor noted that, given the number of jurisdictions in which flow control ordinances could be adopted, there is a high potential for conflict.<sup>156</sup> In other words, a processor like Carbone, once it sorts out the recyclables, may be faced with complying with two flow control laws (one from Clarkstown and one from the jurisdiction where the waste originated) that require the disposal of the residual waste at two different sites. Justice O'Connor concluded that situations such as this are likely to lead to the elimination of the movement of waste between jurisdictions.<sup>157</sup>

Justice O'Connor also addressed the argument that RCRA authorizes the implementation of flow control and thus supersedes the dormant Commerce Clause. Although Justice O'Connor stated that certain provisions in RCRA do appear to indicate that Congress expected local governments to implement some form of flow control, she concluded that such provisions do not "rise to the level of the 'explicit' authorization required by our dormant Commerce Clause decisions."<sup>158</sup>

Justice O'Connor concluded her opinion with an important notation. She said, "It is within Congress' power to authorize local imposition of flow control. Should Congress revisit this area, and

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153. *See supra* note 100.

154. 114 S. Ct. at 1690.

155. *Id.*

156. *Id.*

157. *Id.* at 1691.

158. *Id.* at 1692.

enact legislation providing a clear indication that it intends States and localities to implement flow control, we will, of course, defer to that legislative judgment."<sup>159</sup> Thus, municipalities that wish to implement legal flow control can turn, and as will be seen later in this Article, have turned, to Congress for authorization to do so.

### C. The Dissenting Opinion

In a lengthy dissenting opinion joined by Chief Justice Rehnquist and Justice Blackmun, Justice Souter made several important points. He noted that in applying the dormant Commerce Clause test to Local Law No. 9, the majority ignored the key difference between such local processing cases and this one: "the exclusion worked by Clarkstown's Local Law 9 bestows no benefit on a class of local private actors, but instead directly aids the government in satisfying a traditional governmental responsibility."<sup>160</sup>

Because the law differentiates merely between "the one entity responsible for ensuring the job gets done and all other enterprises, regardless of their location," Justice Souter found that the law "falls outside that class of tariff or protectionist measures that the Commerce Clause has traditionally been thought to bar States from enacting against each other . . . ."<sup>161</sup> Justice Souter thus stated that the majority is "greatly extending the Clause's dormant reach."<sup>162</sup> He noted several arguments against such extension, including the lack of any indication that an out-of-state processor had been harmed by the law or that the interstate movement of trash was affected "one whit." Justice Souter also noted that the effect of the law was to spread the financing costs among the local generators of trash, not the out-of-state economic interests, which was an "equitable result."<sup>163</sup>

Justice Souter acknowledged the similarity between Local Law No. 9 and the Court's earlier processing cases but noted that the differences are significant enough to prevent the case from being decided the same way. Because the law favors only a single processor who is essentially an agent of the municipal government, any discrimination caused by the ordinance "fails to produce the sort of entrepreneurial favoritism we have previously defined and con-

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159. 114 S. Ct. at 1691.

160. *Id.*

161. *Id.*

162. *Id.*

163. 114 S. Ct. at 1693.

demned as protectionist.”<sup>164</sup> Justice Souter noted that Clarkstown investors who wished to provide processing services faced the same exclusion as out-of-town processors. As such, “Local Law 9’s exclusion of outside capital was part of a broader exclusion of private capital,” and does not discriminate against out-of-state investors. Therefore, any protectionist effect was substantially mitigated.<sup>165</sup>

Justice Souter also emphasized the fact that the transfer station was essentially a municipal facility because it was built and operated under a contract with the Town and it would soon become municipally owned. The facility performed a function traditionally and statutorily in the domain of local governments. As he stated, “favoring state-sponsored facilities differs from discriminating among private economic actors, and is much less likely to be protectionist.”<sup>166</sup> Justice Souter then concluded that these differences from earlier dormant Commerce Clause cases justify applying the *Pike* test because “a more particularized enquiry is necessary before a court can say whether such a law does in fact smack too strongly of economic protectionism.”<sup>167</sup>

In determining whether the burden on interstate commerce was excessive in comparison to the local benefits, Justice Souter observed that the monopolistic nature of the ordinance was “not itself suspicious for purposes of the Commerce Clause.” This is because challenges to monopolies arise under antitrust statutes, not the Constitution. He noted that, “[t]he only right to compete that [the Commerce Clause] protects is the right to compete on terms independent of one’s location.”<sup>168</sup>

As noted earlier, Justice Souter concluded that there is no “geographically based selection among firms, and it is clear from the face of the ordinance that nothing hinges on the source of trash that enters Clarkstown or upon the destination of the processed waste that leaves the transfer station.”<sup>169</sup> Also, although there is an incidental local economic benefit in the form of local jobs, it is mitigated by the fact that Clarkstown finances these benefits “from the resources of the very citizens who passed it into law.” Thus, every resident bears a portion of the burden imposed by the law,

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164. *Id.* at 1695.

165. *Id.*

166. *Id.* at 1698.

167. 114 S. Ct. at 1698.

168. *Id.* at 1699.

169. *Id.*

“an uncharacteristic feature of statutes claimed to violate the Commerce Clause.”<sup>170</sup>

Justice Souter examined the rationale behind the ordinance and the favored facility and pointed to Clarkstown’s need to provide trash processing at an affordable price now and in the future, regardless of whether the private market sees fit to meet that need. Additionally, “there is no question that a ‘put or pay’ contract . . . will be a significant inducement” to private companies to build a facility for the benefit of municipalities.<sup>171</sup> He also noted that there are limits to a municipality’s ability to raise taxes and issue bonds to finance the facility.<sup>172</sup> Flow control has an advantage over taxes and bonds in that it equitably spreads the cost of the facility among all residents who generate trash, the true users of the facility.

Justice Souter concluded that, because the municipality’s interests were substantial, the alternative means for advancing them were less desirable. Moreover, since no harm had been shown to anyone other than residents of the Town who paid higher fees for disposal services, the ordinance should not be struck down as violative of the Commerce Clause.<sup>173</sup>

#### D. The Effect of the *Carbone* Decision

##### 1. Direct Impact on Solid Waste Facilities

The language used by the majority was exceptionally, and perhaps unexpectedly, broad, indicating an intent to forestall further contest over the issue. In an ironic twist for privatization enthusiasts, private haulers have succeeded in placing in jeopardy the interests of painstakingly privatized waste disposal systems, because if municipalities cannot control where their waste is disposed, they will be unable to support the often-privatized facilities with which they have put-or-pay contracts or construction and operation agreements.

The bond rating agencies thus far have been cautious in downgrading waste disposal facility debt in response to *Carbone*.<sup>174</sup> Longstanding rating criteria have included legislated flow control

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170. *Id.*

171. 114 S. Ct. at 1701.

172. *Id.*

173. *Id.* at 1702.

174. See *Slants & Trends*, 25 SOLID WASTE REPORT 365 (Nov. 17, 1994); *Slants & Trends*, 25 SOLID WASTE REPORT 127 (Apr. 21, 1994) (each discussing views of rating agencies that while some ratings may be weakened, rating agencies expect many facilities to find the means to stay afloat).

as one of several relevant rating factors.<sup>175</sup> Also of importance are the cost and availability of the alternative, competing disposal facilities, which are available on a practical basis to private haulers seeking to escape legal flow control. The ability of the municipality to price its disposal service to attract haulers economically varies considerably in different locations, which makes it difficult to formulate generalizations about disposal system creditworthiness after *Carbone*.

Nevertheless, two facilities in Ohio have already shut down, in part because of concerns about waste supply in the absence of legislative flow control. City-owned waste incinerators in Columbus and Akron, which were financed through the issuance of long-term municipal bonds, were closed in November, 1994, with officials citing the lack of flow control as a major reason.<sup>176</sup>

In the immediate future, the *Carbone* case can be expected to have a dampening effect on the development of new municipal waste disposal facilities. For example, local governments are unlikely to sponsor the compost and recycling facilities mandated by law and policy, or undertake landfill system expansions, until they are confident about the levels of waste that they can lawfully cause to be delivered to the new facility. One unfortunate result may be the shrinkage, delay or cancellation of a considerable number of valuable currently planned public-private disposal ventures.

## 2. *Broad Judicial Interpretations*

The effect of the Court's broad language in *Carbone* is already being seen in courts nationwide.<sup>177</sup> Several decisions have been issued in various jurisdictions that demonstrate the wide swath cut

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175. See STANDARD & POOR'S CREDITWEEK, Oct. 15, 1984, at 44-54.

176. Karen Pierog, *Two Ohio Waste Incinerators Close, Partly Due to May High Court Ruling*, BOND BUYER, Nov. 9, 1994, at 1, 9.

177. See *Southcentral Pennsylvania Waste Haulers Association v. Bedford-Fulton-Huntingdon Solid Waste Authority*, No. 1:CV-93-1318 (M.D. Penn. June 24, 1994) (the district court found that the flow control component of the state solid waste management plan was discriminatory, but ruled that there are issues of fact that must be decided to determine whether there were any other means available to advance the legitimate local interest, because the defendants had detailed their unsuccessful efforts to find a less discriminatory means of obtaining long-term waste disposal capacity as well as the factors involved which they claimed forced them to choose to utilize a flow control scheme); *Waste Disposal, Inc. v. Town of Barnstable*, No. 91-13231-DPW (D. Mass. May 31, 1994) (the district court engaged in an extensive examination of the solid waste management plan at issue and the facts supporting its development but ultimately used *Carbone* to put aside most of the offered justifications, including the Town's desire to maintain a self-sustaining solid waste management system to meet state and federal goals).

by *Carbone*. Courts are generally construing the decision broadly, perhaps even more broadly than the Court anticipated; some decisions clearly amount to overly enthusiastic applications of *Carbone*. For example, in *Mid-American Waste Systems, Inc. v. Fisher*,<sup>178</sup> the Ohio district court used *Carbone* to justify the granting of a temporary restraining order against the enforcement of two resolutions of the Solid Waste Authority of Central Ohio (SWACO).<sup>179</sup> One resolution acted as a flow control regulation, and the other imposed a per ton solid waste generation fee on all solid waste generated within SWACO's district. SWACO planned to use the generation fee to reduce the tipping fee at its facilities to \$0.00, thereby economically encouraging local haulers to bring waste to the facilities; such a practice is commonly known as "economic flow control."<sup>180</sup>

The *Mid-American* court focused on the *Carbone* argument that the purpose of the Clarkstown ordinance in that case was to finance the private transfer station, and analogized from there, effectively ignoring the Supreme Court's suggestion that the Clarkstown facility could alternatively have been supported through general taxes or municipal bonds. The *Mid-American* court noted the suggestion, but did not analyze whether the generation fee concept was different. Instead, the District Court essentially stretched the concept of discrimination "in practical effect" too far. The court focused on the "economic effect" of the waste generation fee resolution in the broadest sense possible, finding that to enforce the generation fee resolution would eliminate competition by other facilities wishing to receive in-district waste. Thus, the court found that the resolution discriminated against interstate commerce.<sup>181</sup>

This sort of extension of Commerce Clause doctrine reaches too far down the stream of commerce. To claim that the resolution discriminates against, and not just incidentally affects, interstate commerce solely because one possible result is the elimination of competition is extreme. If this line of reasoning is followed, a resolution applying general taxes or the proceeds of the sale of municipal bonds to lower the tipping fee at a facility might also be considered to discriminate against interstate commerce, conflicting with the alternatives suggested by the *Carbone* Court.

The breadth of the *Carbone* decision is also shown in *Tri-County Industries, Inc. v. Pennsylvania Department of Environmental Re-*

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178. No. C-2-94-493 (S.D. Ohio May 31, 1994).

179. *Id.*

180. *See infra* notes 227-236.

181. No. C-2-94-493 (S.D. Ohio May 31, 1994).



*sources*,<sup>182</sup> where the court, confronted with a challenge by a hauler seeking to transport waste to an unauthorized site, invalidated a flow control ordinance in a Pennsylvania county solid waste management plan. The court found that the ordinance in question discriminated in practical effect against interstate commerce.<sup>183</sup> The law provided that waste in the county could be disposed only at a designated facility,<sup>184</sup> but at the time, the only facility designated was located within Pennsylvania. The court thus shifted the burden to the defendants to demonstrate that no nondiscriminatory alternatives were available to achieve the admittedly legitimate local purpose of proper solid waste management and compliance with state law.<sup>185</sup> Defendants maintained that the risk of escalating disposal costs in part motivated the county to designate a single disposal site and that the site was selected through an open, fair and competitive interstate process.<sup>186</sup> Nonetheless, the court held that the process used to choose a disposal site is irrelevant; rather, the use of single site was the issue.<sup>187</sup>

The court noted that even if the county had designated two sites, one in-state and one out-of-state, there may still have been a legitimate Commerce Clause claim under a *Pike* analysis.<sup>188</sup> The court, however, did not address how such a designation would put a burden on interstate commerce, let alone a burden in excess of the local benefits. This omission might be read to imply that any processing and disposal program that is not completely open to competition could be considered a violation of the Commerce Clause. Such reasoning could cause a drastic change in solid waste planning by local governments.<sup>189</sup>

### 3. *Reinvigorating Antitrust Challenges*

Broad interpretations of *Carbone* may also be used to reinvigorate antitrust challenges to flow control practices.<sup>190</sup> In a decision with poor implications for governments attempting to develop their own solid waste management systems, the federal district

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182. No. 93-592 (W.D. Penn. Oct. 12, 1994).

183. *Id.*

184. *Id.*

185. *Id.*

186. No. 93-592 (W.D. Penn. Oct. 12, 1994).

187. *Id.*

188. *Id.*

189. *See supra* note 177.

190. *See supra* part IV.

court in *Pine Ridge Recycling, Inc. v. Butts County*,<sup>191</sup> did not dismiss plaintiff's antitrust claim that the County had attempted to monopolize the solid waste disposal market in its region in restraint of trade. The County maintained that it fit within the state action exemption because it was acting under state authorization.<sup>192</sup> Rather than follow the long history of solid waste antitrust decisions, the court instead found the state action exemption not to apply, because interpreting the state authorization as sought by the County would result in a view in direct conflict with the Commerce Clause.<sup>193</sup>

This cross-pollination of legal concepts is dangerous. The court cited no authority for using one legal concept to give rise to another. Moreover, the court did not offer an explanation as to why actions that may be in violation of the Commerce Clause may not be excused with respect to any antitrust claims raised. The true danger of the *Pine Ridge Recycling* court's approach is that it could abolish the longstanding state action exemption through the use of the Commerce Clause in many areas affecting municipal governance. As noted earlier, local governments have for years developed solid waste management plans and programs in reliance on authority granted by state statute or constitutional provision. A reemergence of antitrust claims could potentially cause a great upheaval in solid waste management areas, perhaps detrimentally interfering with the public health and safety, and certainly affecting municipal finances through exposure to potential antitrust damages.<sup>194</sup>

#### 4. Recent Developments

Although *Carbone* has predominantly resulted in flow control provisions being invalidated, this is not exclusively the case. On December 20, 1994, the Commonwealth Court of Pennsylvania upheld a preliminary injunction preventing haulers from violating a County flow control ordinance. The case, *Delaware County v. Ray-*

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191. 855 F. Supp 1264 (M.D. Ga. 1994).

192. *Id.* at 1271.

193. *Id.*

194. The reason a proliferation of antitrust claims is of concern to municipalities is the relief associated with such claims—treble damages. See 15 U.S.C.A. (West 1973 & Supp. 1994). Typically, the Commerce Clause does not provide an avenue for parties to bring suit for damages. Most Commerce Clause suits seek relief in equity rather than at law. Thus, to say a municipality, through its flow control law, acts in restraint of trade in violation of the Commerce Clause is one thing; to say it acts in restraint of trade in violation of antitrust laws is quite another.

*mond T. Opdenaker & Sons, Inc.*,<sup>195</sup> involved a challenge to the County's flow control ordinance that required all waste generated in the County to be delivered to facilities designated by the County. Although out-of-state facilities were eligible for designation, none had been designated at the time. The haulers sought to deliver the waste to sites located in different Pennsylvania counties.

In refusing to strike down the ordinance, the court noted the County's arguments distinguishing this case from *Carbone*. First, the ordinance pertained only to waste generated in the County, not to waste generated elsewhere. Second, the haulers were not disposing of waste at out-of-state facilities. Third, the County, in designating a site, did not negotiate with one favored company, but used a bidding process open to interstate business. Fourth, the ordinance allowed the designation of out of state facilities. Finally, the purpose of the ordinance was not purely economic, as it was passed in response to a state act requiring waste disposal plans. The basis of the court's decision rested on the fact that the haulers had failed to establish that they or anyone else were engaged in interstate commerce or that interstate commerce was affected in any way. The court mentioned that the waste was neither picked up nor disposed of in other states, factors which were present in *Carbone*.

A case being watched very closely at the time of this writing is *Atlantic Coast Demolition & Recycling v. Atlantic County Board of Freeholders*,<sup>196</sup> on appeal to the U.S. Court of Appeals for the Third Circuit. Oral arguments were heard in September, 1994, and a decision is expected shortly. This is the first post-*Carbone* flow control case to reach the circuit court level on its merits. Moreover, the fact that it is in the Third Circuit, which upheld a New Jersey flow control regulation in 1988, makes it all the more interesting. The challenge brought in the case deals with New Jersey's comprehensive solid waste management scheme, in which the state has effectively treated disposal service providers as utilities and retained control over solid waste management.<sup>197</sup> Solid waste management districts in New Jersey submit and continually amend and update solid waste management plans to the state for approval.

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195. No. 34 C.D. (Pa. 1994).

196. No. 94-5173.

197. See generally N.J.S.A. § 13:1E-1-207 (1991 & Supp. 1994) (The Solid Waste Management Act); N.J.S.A. § 48:13A-1-13 (Solid Waste Utility Control Act); N.J.S.A. § 13:1D-1 (1991 & Supp. 1993) (treating entities involved in waste disposal to be public utilities).

New Jersey regulations permit such plans to include flow control provisions,<sup>198</sup> and such provisions are integral to district plans, more so than in other jurisdictions. In this case, the district controlled the flow of construction and demolition debris, preventing a Philadelphia business from receiving the waste in part because of the plan's recycling requirement.

The district court could not find a likelihood of success on the merits, but its decision was issued prior to *Carbone*. After *Carbone*, however, in a different case, that same court effectively refused to apply *Carbone*, not wanting to invite the chaos that could result from a decision that would disturb the foundation of a complex, longstanding solid waste management system and potentially affect the municipal debt supporting the system.<sup>199</sup> The court stated it would look for guidance from the Third Circuit, referring to *Atlantic Coast*, regarding whether the differences between the New Jersey system and the Clarkstown system are sufficient to result in a different finding.<sup>200</sup> If the Third Circuit does uphold the New Jersey scheme, it would not be surprising to see the case appealed to the Supreme Court. When faced with the different consequences involved in *Atlantic Coast*, the Court might find it more difficult to invalidate flow control provisions that are so integral to a state's ability to provide for the public health and safety.

#### V. Evading *Carbone*: Four Available Alternatives for Local Governments

The legal status of legislative flow control is in a state of flux, and it appears that flow control ordinances are generally unenforceable at this time. As a result, local governments that have traditionally relied on legislative flow control, or at least the threat of such flow control, to support municipally owned or sponsored waste management facilities have been forced to turn to alternative means for causing waste to be delivered to their facilities. Because the *Carbone* decision on its face does not address non-legislative forms of flow control, there remain four viable alternative methods that should withstand Commerce Clause challenges by which local governments can ensure that waste is delivered to the desired facilities. They are: municipal hauling, contract flow control, franchise flow control and economic flow control. The only real question is

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198. N.J.A.C. § 7:26-6.5.

199. Borough of Haddon Heights v. Shinn, No. 94-CV-2753, at 13-16 (D.N.J. June 6, 1994).

200. *Id.* at 18.

whether municipal governments have the political will to implement these methods to achieve public goals that are not now being supported by private hauling interests.

### A. Flow Control by Municipal Haulage

Of the four, the method least likely to be judicially assailed is municipal waste collection. If a municipality collects municipal solid waste through the use of municipal vehicles and municipal employees, it is indisputable that the municipality can then control where that waste is disposed, just as private haulers have contended on their own behalf. Thus, to achieve flow control, all a local government need do is take over collection of all waste.

It is unlikely that a challenge to a municipality's right to engage in such services would be successful. Municipal waste collection monopolization has been consistently upheld in the courts against a variety of challenges.<sup>201</sup> The only argument that could potentially succeed, however, is a *Carbone*-based contention that, should the municipality attempt to exclude all competition from private haulers, it would be impermissibly regulating interstate commerce. A broad reading of *Carbone*, perhaps following the logic in *Mid-American* or *Pine Ridge*,<sup>202</sup> could be used to argue that municipal monopolization of waste collection results in out-of-state businesses being denied access to the local waste market. This sort of reading, however, disregards traditional waste management practices. Historically, local governments have been considered ultimately responsible for protecting the public's health and safety.<sup>203</sup> In many jurisdictions, this has been codified in municipal home rule and other police power provisions.<sup>204</sup> Accordingly, municipalities in the past have provided solid waste collection services to their constituents, either by virtue of police power authorizations or statutes specifically addressing solid waste management. To ignore this historic responsibility would result in chaos for all governmental services.

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201. See, e.g., *City of Rochester v. Gutberlett*, 211 N.Y. 309 (1914); *Ex parte Zhizhuzza*, 147 Cal. 328 (1905). See generally 83 A.L.R. 2d 799, § 5 (discussing a municipality's ability to exclude private waste removal services).

202. See *supra* note 191.

203. See 83 A.L.R. 2d 799, § 5.

204. See, e.g., CAL. CONST. art. XI, §§ 5(a),(7) (1976 & Supp. 1994) (the "municipal affairs" doctrine and general police power authority over sanitation); N.Y. CONST. art. IX, § 2(c)(10) (McKinney 1987) and N.Y. Mun. Home Rule Law art. 2, § 10(1)(ii) (a)(12) (McKinney 1987) (enabling local governments to provide for the public safety, health and well-being).

Through municipal collection, a local government can most easily ensure that waste will be delivered where the government prefers. Engaging in municipal collection, however, involves a great commitment of resources and an increase in potential liabilities on account of the active role of the municipality. With this in mind, the majority of local governments have chosen not to engage in municipal collection, particularly collection of commercial waste. Nevertheless, should other forms of flow control fail, local governments can always support their facilities by "biting the bullet" and transporting the waste themselves.

### **B. Contract Flow Control**

Given the attendant costs and burdens of municipal collection, some local governments have chosen to engage in a different method of controlling the disposal of waste—contract flow control. Contract flow control is achieved when a local government effectively monopolizes solid waste collection and then contracts out to one or more haulers to provide collection services on behalf of the municipality. The contract typically includes a negotiated provision, voluntarily agreed to by the hauler, in which the municipality designates a disposal site or reserves to itself the ability to do so in the future. The *Carbone* decision did not address this form of flow control, and it appears that contractually designating a disposal site differs significantly from the ordinance struck down in the case.

One key difference is the voluntary nature of the contractual flow control provision. The contract is a mutually voluntary agreement entered into by the local government and the hauler. Presumably, the hauler is able to negotiate the flow control provision and is under no obligation to enter into the contract. Because the hauler receives the benefit of its bargain, this situation differs from the unilaterally imposed rules and regulations of legislative flow control.

Additionally, if the premise of a local government being entitled to take over waste collection for itself is accepted under the reasoning in *Carbone*, then contractual flow control must be accepted as well. In that vein, a municipality is doing nothing more than monopolizing and privatizing the municipal function of solid waste collection and, in so doing, it is setting forth the terms and conditions under which the private company may assume this governmental power. Monopolization and privatization decisions, implemented through voluntary agreements, should not be subject to Commerce Clause review.

In fact, this sort of analysis is suggestive of the type made by the Supreme Court in a 1983 case, which continued the development of the market participant doctrine.<sup>205</sup> In *White v. Massachusetts Council of Construction Employers, Inc.*,<sup>206</sup> the City of Boston required, as a condition of receiving a city construction contract, that the contractor's workforce include at least 50 percent bona fide Boston residents.<sup>207</sup> The Court found that because the City used city funds to employ the contractor, it was acting as a market participant. As a result, the Court ruled that the facially discriminatory contract requirement should not be analyzed under the Commerce Clause and thus was not problematic.

Although not exactly congruent, the *White* fact pattern is analogous to a contract flow control scheme. If a local government is expending its funds to hire a private contractor to perform a municipal function, Commerce Clause challenges are not likely to be accepted by courts. With contract flow control, a local government pays, under a contract, an independent contractor to perform the service of collecting waste on behalf of the municipality. As a condition to the contract, the contractor is required to comply with the local government's choice of a disposal site. This condition, although perhaps discriminatory, is imposed by the municipality as a market participant and thus should not be subject to Commerce Clause analysis.

As mentioned above, *Carbone*, which invalidated a flow control provision imposed by regulatory means, did not address this method of effecting flow control, a method that is achieved without the use of the regulatory powers of the local government. The extension of *Carbone* to this form of privatization of solid waste collection services appears questionable at best.

### C. Franchise Flow Control

A third form of flow control that remains viable following *Carbone* is franchise flow control, a variation of contract flow control that may be considered a more secure method of ensuring the delivery of waste to a designated site. A franchise flow control

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205. For a more detailed discussion of the market participation doctrine, see *supra* note 128. Unlike in *Waste Recycling, Inc.*, discussed *supra* note 124, a municipality contracting for collection services is indeed engaged in business in the market, rather than merely regulating a market to its advantage. If a private business contracted with a hauler and included a flow control provision, it is likely that no question would be raised. None should be raised when a municipality does so either.

206. 460 U.S. 204 (1983).

207. *Id.* at 206.

scheme incorporates the voluntary nature and market participant status associated with contract flow control, while adding important regulatory aspects in exchange for the acquisition of a "property right" by the hauler. Franchising appears to be the least intrusive and most balanced means by which to attempt to achieve flow control, and has the added benefit of enabling the government to avoid the administrative hassles of paying the haulers, as typically occurs under a collection contract. Direct payment is not necessary because, in a franchise scheme, the hauler bills its customers, known as ratepayers, directly for its collection services.

Generally, a governmental franchise is a special privilege, granted by the government to individuals or corporations, that had not existed and does not belong to the individual or corporation as a matter of right;<sup>208</sup> the governmental franchise is vested only by a grant of sovereign power by the government.<sup>209</sup> Typically, franchises concern such services and functions that the government itself is obligated to furnish to its citizens. Franchises also involve the right to use the public streets and ways to deliver these services to the general public.<sup>210</sup> For example, utility companies are often granted franchises to provide utility service on behalf of the government. Part of that franchise grant is a right to use the public streets and ways in order to, for example, lay sewer pipes or electrical wires. Similarly, a grant of a solid waste collection franchise is a grant by a government to authorize one or more private companies to provide solid waste collection services on behalf of the government. Along with the authorization conferred, the government also grants the haulers the right to use the public streets and ways to collect and transport the solid waste.

The ability of local governments to grant franchises for solid waste collection is typically derived from state statutes,<sup>211</sup> but the extent and conditions of such franchises are also the result of a municipality's ability to take over solid waste collection and monopolize such services in itself. As with contract flow control, the government's inherent power to act for the protection of the public health and safety and to suspend private competition creates the means by which a local government can impose flow control. A franchise's status as a grant from the government is a result of the fact that the government holds all powers and authority in the field

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208. See 36 AM. JUR. 2D. 719, 723 (1968).

209. *Id.* at 722.

210. *Id.* at 723, 725.

211. See, e.g., CAL. PUB. RES. CODE § 40059(a) (1986 & Supp. 1994).



for which the franchise is granted.<sup>212</sup> Thus, the franchisee receives only those powers given by the government. As noted earlier, if a municipality provided collection services itself on an exclusive basis, it clearly would be able to direct the waste to designated places.<sup>213</sup> By reserving this power to itself when it grants a waste collection franchise, the government, as the monopolizing entity, retains the authority to impose flow control.<sup>214</sup>

By its nature, of a franchise is different from a mere license<sup>215</sup> to do business or a contract for services. A franchise is generally considered property and, as a result, the grantee has vested rights under the franchise, which are protected by state and federal constitutions.<sup>216</sup> A franchise, however, also constitutes a contract between the government and the grantee, and becomes binding as such once the grantee accepts the terms and conditions of the grant from the government.<sup>217</sup> Typically, the terms and conditions of the franchise are spelled out in a franchise agreement,<sup>218</sup> a contract voluntarily entered into by both the government and the grantee.

This concept of the franchise as a contract leads back to the earlier discussion of contract flow control,<sup>219</sup> but when considered in connection with the idea of franchise-as-property-right, it gives franchise flow control another dimension. The privileges received by the hauler as a grantee and their protected status under state and federal constitutions bestow on haulers greater legal rights than under a typical contract. As a result, in negotiating the terms

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212. 36 AM. JUR. 2D. at 722-723.

213. See *supra* notes 68-70.

214. *Id.* at 726 (noting that sovereigns granting franchises can, so far as the franchise affects the public, prescribe the conditions and terms on which it is held).

215. See generally 36 AM. JUR. 2D., at 724 (noting, in part, that a license is a temporary, personal privilege, "while a franchise is neither personal nor temporary, and, it is not [ordinarily] revocable at the mere will of the grantor.").

216. *Id.* at 726-27. As discussed therein, a franchise is a property right protected by the Constitution from arbitrary revocation, impairment or destruction. See *Hamilton Mfg. Co. v. Massachusetts*, 73 U.S. (6 Wall) 632 (1867). The owner has the same protection as the owner of any other property. See *Conway v. Taylor*, 66 U.S. (1 Black) 603 (1861).

217. See 36 AM. JUR. 2D., at 728-30. As discussed therein, a franchise is the subject of a contract and generally the obligation of the grantee to comply with the terms and conditions of the grant constitutes sufficient consideration.

218. The use of a franchise agreement, although common, is not always necessary. "The well-established rule as to franchises is that where a municipal corporation, acting within its powers, enacts an ordinance conferring rights and privileges on a person or corporation, and the grantee accepts the ordinance and expends money in availing itself of the rights and privileges so conferred, a contract is thereby created. . . ." 36 AM. JUR. 2D., at 728-29.

219. See *supra* part V.B.

of the franchise agreement, the local government provides substantial consideration to the hauler and, in return, can more easily insist on the terms and conditions necessary to accomplish the flow control goals of the government.

In a solid waste collection franchising scheme, the government can choose to create an exclusive, nonexclusive or partially exclusive franchise. Exclusive franchises contain an additional element of consideration given by the government—the exclusivity of the grant. Exclusive franchisees are assured that they are the only haulers authorized to operate in the designated area. Although there is no competition, the franchisees are typically more closely regulated, especially with regard to the rates charged. Nonexclusive franchisees are obviously subject to competition, but usually all nonexclusive franchisees are subject to similar regulation by the government. The competitive element of nonexclusive franchises is an appealing aspect because they are less likely to be attacked as restricting competition. Nevertheless, the similarity with a mere licensing program, where the local government permits several haulers to operate in the same area, may make the flow control provisions contained in nonexclusive franchises more likely to be challenged as a form of regulatory flow control. Partially exclusive franchises allow competitive hauling among a limited number of authorized franchisees. In California, a state that relies heavily on franchising solid waste collection services,<sup>220</sup> municipalities generally utilize an exclusive franchising program; many localities, however, are considering partially exclusive or nonexclusive franchises as the least disruptive means of gaining greater control over the waste collection and disposal activities of private haulers.

Another interesting aspect of franchising solid waste collection services is the issue of who charges the ratepayers. Typically, as mentioned earlier, the franchisee collects from the customers based on a rate schedule contained in the franchise, but this is not the only or most advisable method of rate collection. For example, in Anaheim, California, the franchise agreement was structured such that the city collects from the ratepayers and then, under the terms of the franchise agreement, pays the haulers. The main disadvantage of allowing the haulers to charge its customers directly is that

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220. See, e.g., Orange County Code § 4-3-56 (solid waste in the unincorporated areas of the county shall be collected by franchised haulers on an exclusive basis); Los Angeles Municipal Code § 66.08.1 (contemplating the issuance of franchises for rubbish collection); see also Webster, *Beverly Hills, California: Evaluating and Assigning Franchises*, WASTE AGE, Jan. 1995, at 49.

it means haulers handle the funds. The onus would therefore be on the government if concerns arise over a hauler's rate-charging practices or its performance under the franchise. In contrast, if the government collects the fees from ratepayers, it gives the government a great deal of power with respect to flow control challenges. As the municipality would have the money, it could use it as a means of assuring that the haulers follow the terms of the franchise, including any flow control provisions. This method of collection, however, is administratively difficult to employ in jurisdictions where nonexclusive franchisees operate, on account of the variety of rates charged.

As noted above, *Carbone* was silent with respect to non-legislative flow control methods. Nevertheless, the regulatory nature of a franchising program, and the broad language used in the majority opinion, have caused some concern regarding the constitutionality of a solid waste collection franchising scheme. The main purpose of any solid waste collection franchising program is to provide generally for the safe and efficient collection and disposal of solid waste. There may, however, be questions about whether this is still possible given certain language in *Carbone*, specifically, the Court's citation of *Buck v. Kuykendall*.<sup>221</sup> *Buck* is a 1925 U.S. Supreme Court decision that struck down a Washington statute prohibiting common carriers from using state highways over certain routes without a certificate of public convenience. The *Buck* Court stated that the primary purpose of the law "is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner."<sup>222</sup>

This quote was cited at the end of the *Carbone* opinion and may generate concern respecting the validity of franchises in an interstate transportation/flow control context.<sup>223</sup> What must be kept in mind, however, is that the public health and safety concerns with respect to the collection and transportation of solid waste are arguably much greater than those for common carriers. Even if franchises are viewed merely as regulatory measures to protect the public health and safety, it cannot be said that such measures are adopted merely to prohibit competition. Rather, as a U.S. District

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221. 114 S. Ct. at 1684 (citing 267 U.S. 307 (1925)).

222. 267 U.S. at 315-16.

223. 114 S. Ct. at 1684 (citation omitted).

Court recently stated, there are clear environmental benefits to restricting the movement of solid waste, "as anyone who has driven behind a waste truck knows."<sup>224</sup> In addition to limiting the use of the roads for aesthetic reasons, an argument similar to that used in the common carrier case,<sup>225</sup> franchises also enable the municipalities to protect the public health and safety from the more serious problems by nature associated with the collection and transport of solid waste, such as garbage leaking out of trucks and hauling vehicles causing delays in traffic. The "regulations" used in franchise flow control are merely the means by which the government acts; they are not being used actively to regulate the market, as with legislative flow control.

In addition to issues raised by the language of *Carbone*, there may be some question concerning the voluntary nature of franchise agreements and, more specifically, the flow control provisions contained therein. It might be argued that such agreements could be considered contracts of adhesion, in other words, that the flow control provisions are forced on haulers that are unable to refuse the terms. As discussed earlier, however, the monopolistic powers of local governments in the solid waste management realm provide a means by which such terms may be justified. Although the franchisor may "insist" on a flow control provision as part of a waste collection contract or franchise, an agreement containing such a provision is not "involuntary" in nature because what a government is doing through the grant of a franchise, and the determination of the terms thereof, is exercising a latent power to take over the collection of solid waste and select the disposal site. With franchise flow control, the government is not "washing its hands" of its duty to provide for collection; rather, it has actually taken over collection pursuant to its authority and has chosen to contract out, as with any other governmental service. It is not abdicating its responsibility or powers in this field; rather, it is just performing the function and providing the service in what it has determined is the most beneficial manner for the public. With legislative flow control, this sort of governmental assumption of responsibility in connection with the authority to monopolize is simply not present.

Franchising thus gives a balanced approach to flow control, which may be more acceptable to both governments and haulers. Governments are able to retain some control over the haulers without having to pay the haulers directly. Haulers are less likely

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224. *Atlantic Coast*, No. 94-5173, at 43.

225. See *supra* note 222.

to object to franchising than municipal collection or putting collection contracts out to bid because they have more of an opportunity to negotiate the terms of their grant and have greater security in their rights. In addition to these benefits, franchises can be used to assist in achieving economic flow control, the fourth alternative available to local governments seeking to control the flow of solid waste.

#### D. Economic Flow Control

A fourth form of flow control, and one which should be very likely to withstand Commerce Clause analysis, is economic flow control. Economic flow control is achieved when haulers deliver solid waste to a facility because the costs of disposal at the facility, including transportation costs and tipping fees, are less than or comparable to those at alternative disposal sites.

At governmentally-owned solid waste management facilities, especially those financed through the issuance of debt instruments, the tipping fee is usually greater than at competing privately-owned facilities because of the additional waste-related programs that are funded through the landfill tipping fee. Also, landfills are a generally cheaper means of disposal than technology-laden, capital-intensive incinerators or materials recovery facilities (MRFs). Thus, in order to attract waste, the government will need to lower its tipping fee, while continuing to derive revenues sufficient to pay operating costs, debt service and other expenses associated with the facility. The difference between the costs of the facility and the tipping fees charged can be financed in a variety of ways. For example, as suggested by Justice Kennedy in the *Carbone* majority opinion, the government can issue general obligation debt instruments or raise taxes to supply the difference.<sup>226</sup> These types of decisions, however, are often politically unpalatable for local governments. Instead, governments can turn to more attractive alternatives, including the use of generator fees and franchise fees to fund the facilities.

The generator fee concept involves the charging of a solid waste fee by a governmental unit to its generator constituency, i.e., the residences and businesses that produce solid waste. This is typically accomplished through the local tax bill. Often, the entity charging the fee simply attaches its fee to a taxing entity's tax bill

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<sup>226</sup> 114 S. Ct. 1684 (citing *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988)).

as a separate line item. For example, a county may charge a fee for solid waste services it provides, yet the fee can be collected through tax bills sent out by town government. Or, a public authority may be authorized to impose fees, and it can charge those fees through the governmental tax bill.<sup>227</sup> The advantage of the separate line item approach is that the increase in payments made by citizens can be traced by each citizen directly to the solid waste enterprise, making it less objectionable to the taxing entities. This also avoids the difficult decision to raise taxes. The money derived from these fees is then applied to finance some of the costs of operations at the solid waste facility, and thus enable the owner to lower the tipping fee. The lower tipping fee should make it economically efficient for haulers in the area to dispose of their waste at the facility. Furthermore, the additional payment by citizens may be offset because, in theory, the lower tipping fee charged to haulers should be passed through to the customers of the haulers.<sup>228</sup> Thus, although the customers pay a new solid waste fee, they receive what should be a commensurate benefit in reduced payments to haulers. Nothing requires the haulers to deliver waste to a less expensive publicly owned disposal site, however, and if a hauler owns a competing landfill or other facility, the hauler is free to utilize its own facility even though it may be more costly.

The basis for charging the solid waste fee depends on the jurisdiction. In many cases, local governments and public authorities are authorized to charge fees only for the use of waste management facilities or for services rendered by such facilities.<sup>229</sup> These are known as user fees and often are restricted to amounts reasonably related to the costs incurred at the facility. By nature, user fees are usually only chargeable to actual users of the facility. Thus, if a particular person's waste is not going to a facility, it may be difficult to impose a user fee for that facility on that person. To avoid this problem, governments can try to impose a "capacity fee." Capacity fees are based on the premise that the governmental owner of a facility is making the facility available to all persons in the jurisdiction, effectively reserving capacity for them. Some

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227. See, e.g., N.Y. PUB. AUTH. LAW § 2045-e(14) (McKinney Supp. 1995) (authorizing the listing of a lien on the local government's tax bills for overdue fees charged by the Onondaga County Resource Recovery Agency).

228. This scenario applies mainly in situations in which haulers directly bill their customers. If the jurisdiction operates under a collection contract in which the government pays the haulers and bills the citizens, reductions can be made in taxes or other charges to compensate for the new solid waste fee.

229. See, e.g., N.Y. PUB. AUTH. LAW § 2045-e(14) (McKinney Supp. 1994).

jurisdictions specifically authorize such capacity fees.<sup>230</sup> In most jurisdictions, however, it would have to be argued, in order to justify the capacity fee, that the availability of waste management services at a facility plus the benefit to the entire community for having such services available to others constitute a "use" of the facility. In that sense, a "user" is someone who receives a benefit from a solid waste facility or system.<sup>231</sup>

Another means to achieve this sort of economic flow control is, as mentioned earlier, through the franchising system. The municipality granting the franchise may be able to charge a franchise fee to the grantee, to be used to finance costs at the facility. Typically, this fee, which can be a flat fee or based on gross profits or possibly tonnage collected, is paid in consideration for the rights and privileges granted in the franchise.<sup>232</sup> Because the franchise terms are often negotiated, the validity of the fee is difficult to question,<sup>233</sup> but governments often try to relate the fee to the "burden" placed on the municipality by the exercise of the franchise.<sup>234</sup> The franchise fee imposed by the government will no doubt be passed through to the customers, but the lower tipping fees paid by the haulers can be required in franchises to be passed through as well. This should result in a form of rough justice for the ratepaying customers.

Economic flow control should be a constitutionally viable method under *Carbone*, because it does not involve any regulation of haulers. Nevertheless, despite the language in *Carbone* regarding the use of taxes or general obligation debt to finance facilities, a post-*Carbone* case in Ohio found that a generator fee imposed to achieve economic flow control could be considered to violate the Commerce Clause. This decision, *Mid-American Waste Systems, Inc. v. Fisher*,<sup>235</sup> although ill-founded, should serve as a warning to

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230. See, e.g., N.Y. PUB. AUTH. LAW § 2053-g (McKinney Supp. 1994) (authorizing the Rockland County Solid Waste Management Authority to fix and collect fees and charges for the use of its facilities and services rendered, including the availability thereof).

231. This is similar to the concept in many jurisdictions of water and sewer charges to those who do not actually use the water or sewer systems, but are required to "hook up," and is premised on the idea that there is a benefit to all by having such systems. See, e.g., N.J.S.A. § 40:56-52 (West Supp. 1994); *Id.* at §§ 40A:2EA-10 to -14 (West Supp. 1994); N.Y. TOWN LAW §§ 198(1)(g)-(k), 201, 202 & 202-a (McKinney 1968).

232. See 36 AM. JUR. 2D., at 747.

233. *Id.* at 747-49.

234. For example, franchise fees can be justified as compensating the government for administrative costs, for the use of the public streets and for aesthetic burdens.

235. No. C-2-94-493 (S.D. Ohio May 31, 1994) (discussed *supra* note 178).

local governments about how the language in *Carbone* can be stretched by those who wish to prevent any form of flow control.

## VI. Garbage In, Garbage Out: Congress Gets Involved

### A. Background

In response to *Carbone*, municipal interests have lobbied Congress to take action to authorize flow control once again.<sup>236</sup> With huge amounts of public waste management facility debt currently outstanding,<sup>237</sup> local governments have been very concerned about the risk of default on these revenue-backed issues. Additionally, municipalities who have not relied on legislative flow control, but may have relied on the threat of such, are now faced with haulers who have the freedom to take the waste wherever they prefer. The haulers' decisions are naturally made with an eye on their profits. Local governments, however, are concerned about their potential liabilities in the future, protecting the public health and safety, and meeting waste diversion goals established by state governments. If it is cheaper for a hauler to take recyclables to a landfill, it may now be difficult to convince the hauler to take them to a MRF. As discussed in Part II, the lack of flow control may also hinder municipalities' ability to plan for the long term with respect to solid waste management. These and other arguments have been presented to the members of Congress on behalf of local governments.

At the same time, the private waste industry has mobilized its forces to prevent the restoration of full flow control authority. Interests within the industry are divided,<sup>238</sup> however, and a variety of bills with different views were considered by Congress throughout the summer of 1994. Finally, in mid-August 1994, an initial compromise bill was recommended by the House Energy and Commerce Committee and passed by the House on September 29, 1994.<sup>239</sup> This bill, H.R. 4683, a proposed amendment to Subtitle D of the Solid Waste Disposal Act,<sup>240</sup> was sponsored by Representative Frank Pallone, Jr. (D-NJ). The Pallone bill did not come to a

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236. *See Agreement Abounds: Existing Flow Control Laws Merit Grandfathering*, THE BOND BUYER, July 14, 1994, at 5.

237. During the Congressional debates over flow control it was estimated that \$18 billion in municipal debt supporting waste management facilities was outstanding. 140 CONG. REC. H10,307 (daily ed. Sept. 29, 1994) (statement of Rep. Minge).

238. *See* 140 CONG. REC. H10,312 (daily ed. Sept. 29, 1994) (statement of Rep. Richardson).

239. H.R. 4683, 103d Cong., 2d Sess., 140 CONG. REC. H10,320, H10,320 (1994).

240. 42 U.S.C. § 6941.



vote in the Senate; instead, it served as the basis for S. 2345,<sup>241</sup> the bill which was the subject of a Senate vote. The Senate had attempted to link the flow control measures of the Pallone bill with a waste import restriction bill, different versions of which had passed both branches of Congress.<sup>242</sup> The new bill, S. 2345, also contained several compromises by municipal interests that were not included in the Pallone bill, including an effective prohibition on future flow control except with respect to certain grandfathered facilities. Nevertheless, in an effort to obtain some form of authorization for flow control to protect outstanding debt, the House passed this bill on the final Friday of the session.<sup>243</sup> But with time running out, and unanimous consent required, S. 2345 was defeated in the Senate when one Rhode Island senator objected to a portion of the bill concerning the waste import restrictions.<sup>244</sup> Given the amount of progress made towards a workable compromise and the in-depth consideration that occurred during the final months of the session, a waste bill, either as combined legislation or simply as a flow control measure, will likely be considered again by the full Congress during 1995.<sup>245</sup>

### B. The Pallone Approach

The Pallone bill<sup>246</sup> addresses flow control authority over three types of waste—residential waste, nonresidential waste and recyclable materials. Generally, the bill permits residential flow control in the future, provided the political subdivision has established a source separation program,<sup>247</sup> but prohibits future flow control of nonresidential waste except as “grandfathered” in the bill.<sup>248</sup> Nonresidential waste flow control is grandfathered only in those communities that, prior to May 15, 1994, have designated a facility for

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241. S. 2345, 103d Cong., 2d Sess., 140 CONG. REC. S10,220 (1994).

242. *Id.*

243. S. 2345, 103d Cong., 2d Sess., 140 CONG. REC. H11,401, H11,407 (1994).

244. *Flow Control Coalition to Push Bill During Lame Duck Session*, 25 SOLID WASTE REPORT 367-68 (Nov. 17, 1994).

245. On the first day of the new session, three flow control bills were introduced in the House of Representatives, including one by Rep. Pallone. See H.R. 24, 104th Cong., 1st Sess. (1995); H.R. 225, 104th Cong., 1st Sess. (1995); H.R. 342, 104th Cong., 1st Sess. (1995).

246. Because S. 2345 resulted from last minute negotiations and contains numerous compromises which may not be continued in the next version considered by Congress, this Article will use the Pallone bill, H.R. 4683, as a basis for its discussion of the Congressional approach to authorize legislative flow control. The Authors believe municipal interests would not be served by agreeing to go forward with S. 2345.

247. H.R. 4683, 103d Cong., 2d Sess. §§ (a)(1) & (b)(2)(1994).

248. *Id.* at § (f)(1)(C).

nonresidential waste or had “committed” to such designation.<sup>249</sup> The word “committed” is defined to require governmental action to implement the designation decision, for example, legally binding contracts, solicitation of proposals, purchase of land, or other actions to develop the facility to be designated.<sup>250</sup> As for recyclable materials, except for already existing contracts, no recyclable material can be controlled unless individuals or entities voluntarily relinquish such material to the local government.<sup>251</sup>

### 1. Residential Waste

H.R. 4683 permits the future flow control of residential waste so long as certain conditions are met. To exercise flow control authority over residential waste, a political subdivision will have to establish a source separation program for recyclable materials and will have to hold at least one public hearing in which it finds that it is necessary to exercise flow control authority over the waste to meet its current or anticipated solid waste management needs.<sup>252</sup> Additionally, the political subdivision will have to provide a written explanation of its findings on that matter.<sup>253</sup> As a further requirement, a competitive designation process, as discussed below, must be utilized.<sup>254</sup> This process must result in the designation of a disposal site based on the standards set forth in the bill, including engaging in an open competitive process.<sup>255</sup>

### 2. Nonresidential Waste

To engage in flow control of nonresidential waste, the political subdivision will have to fit within one of the Grandfathering provisions set forth in the bill. The “hard grandfathering” provision grandfathers laws, ordinances, regulations, solid waste management plans and legally binding provisions adopted before May 15, 1994, which apply to the transportation, management or disposal of municipal solid waste to a proposed or existing facility designated prior to May 15, 1994.<sup>256</sup> In other words, if the political subdivision legislated flow control to a designated facility before May 15, 1994, it will continue to be able to flow control that type of waste to that

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249. *Id.* at §§ (a)(2)(A) & (B).

250. H.R. 4683 at § (i)(8).

251. *Id.* at § (a)(3).

252. *Id.* at § (b)(2).

253. *Id.* at § (B)(ii).

254. H.R. 4683 at § (c).

255. *Id.*

256. *Id.* at § (f)(1)(C).

facility. Any change in the facility designated appears to require undertaking a competitive designation process.

The bill also contains in section (a)(2)(B) a "soft grandfathering" provision for non-residential waste, permitting a local government to exercise flow control authority if, prior to May 15, 1994, it has adopted a law, ordinance, regulation, solid waste management plan or legally binding provision that "identified the use of 1 or more waste management methods that will be necessary for the transportation, management or disposal of municipal solid waste generated within its boundaries, and *committed to the designation* of 1 or more waste management facilities for that method or methods."<sup>257</sup> "Committed to the designation . . ." is defined in the bill to mean that, prior to May 15, 1994, the local government was "legally bound" to designate a facility, or performed one or more of the following actions for the purpose of such a designation:

- (A) Solicitation of proposals for designation of a facility;
- (B) Purchase of land for the facility to be designated;
- (C) Execution of a legally binding contract or franchise agreement for waste collection services expressly for the delivery of waste to a waste management facility to be designated; or
- (D) Other action since January 1, 1993, that evidences recent significant financial commitment for the continuing development of a facility to be designated.<sup>258</sup>

These standards for committing to designate a facility are somewhat arbitrary and certainly vague. They also represent vastly different stages of the solid waste management facility procurement process. The weakness of the bill is evident here for other reasons as well. For example, solicitation of proposals for designation of a facility is a limiting example, one that may not adequately describe important and costly steps taken by many governments. Local governments seeking to become self-sufficient with respect to solid waste management services will not issue requests for proposals (RFPs) for the designation of a facility. Rather, the RFPs will be for proposals to construct and operate a facility on behalf of the government. This is but one example of how the bill may fail to account for differences in procurement processes around the country.

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257. *Id.* at § (a)(2)(B) (emphasis added).

258. H.R. 4683 at § (i)(8).

Also, under the Pallone provisions, the grandfather exemption for nonresidential waste “sunssets” after five years,<sup>259</sup> meaning that unless a local government has designated a facility within a five-year period, the grandfather coverage would expire. All other public and private contracts existing prior to May 15, 1994, will be grandfathered for the remainder of their terms, but the bill is silent regarding the future of waste systems that have relied on such contracts.<sup>260</sup>

An important limitation of the bill that should not be overlooked is that the grandfathering provision is limited in scope because the local government can flow control only the same type of waste it had flow controlled prior to May 15, 1994.<sup>261</sup> For example, if the community was grandfathered for only compostable materials prior to May 15, 1994, it could not flow control other materials in the future. To the extent that the local government is grandfathered for flow controlling nonresidential municipal solid waste, however, the bill permits the local government to flow control “such solid waste from any existing management facility to any other existing future waste management facility.”<sup>262</sup>

### 3. *Competitive Designation Process*

One significant difficulty for municipalities contained in the Pallone bill is the competitive designation process,<sup>263</sup> which applies to all attempts to exercise the flow control authority in the bill, except for laws that are “hard grandfathered,” i.e., laws actually designating a facility prior to May 15, 1994. The goals of the competitive designation process must include capacity assurance and the protection of the public health and safety.<sup>264</sup> The process must be an open competitive process with specified criteria for selection of the facilities to be designated.<sup>265</sup> One problem with the bill is that it appears that even “hard grandfathered” local governments will have to go through the competitive designation process if they seek to designate a different facility. The real concern is that, although it is not clear, it seems that such a process must be implemented even if the local government wishes to designate its own, already-constructed, publicly-financed facility. To require a municipality to

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259. *Id.* at § (b)(4).

260. *Id.* at §§ (f)(1)(A) & (B).

261. *Id.* at § (b)(3).

262. H.R. 4683 at § (a), ¶ 3.

263. *Id.* at § (c).

264. *Id.*

265. *Id.*

go through a competitive designation process, after having expended valuable time and resources and having engaged in an extensive planning process, would seem inequitable and unjust at best.

#### 4. *Criticisms of the Pallone Bill*

As mentioned earlier, one of the chief concerns governments should have with the Pallone bill is that many of the provisions do not harmonize with some existing solid waste management programs and procurement processes. This can be traced to several factors. First, and most obviously, the bill was sponsored by a representative from New Jersey, a state with a unique method of solid waste management. As discussed earlier,<sup>266</sup> in New Jersey, the state retains control over solid waste management practices. The state delineates solid waste management districts (usually the counties) and requires them to file and amend periodically solid waste management plans, which must be approved by the state and become as binding as a statute.<sup>267</sup> Flow control is achieved through these solid waste management plans, in which the state grants a disposal franchise to a facility, the only means by which a New Jersey entity is permitted to receive waste.<sup>268</sup>

When read against the solid waste system in New Jersey, the provisions of the Pallone bill make much more sense. Specifically, the use of the term "solid waste management plan" is clearly a result of the New Jersey influence, because in New Jersey such plans are the chosen means of implementing flow control. Other jurisdictions also have "solid waste management plans," but the term is used differently. In other states, the term does not mean a binding provision that controls solid waste management with the effect of a statute, but rather it refers to a general study of solid waste management options and the policy document created as a result. Such plans do not have the weight of a law which controls both governments and private companies engaged in various aspects of solid waste management in the jurisdiction, as is the case in New Jersey.

An additional concern is the compromising nature of the bill. Because the 103d Congress focused on issues other than waste flow control in its final few months, those members of Congress actually involved in the flow control issue basically left it to the govern-

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266. See *supra* note 197.

267. See N.J.S.A. § 13:1E-1, -207 (West 1991 & Supp. 1993) (Solid Waste Management Act).

268. See N.J.S.A. § 13:1E-27 (West 1991 & Supp. 1993).

ments and the waste industry to fashion a compromise that would then be presented for Congressional approval. With the waste industry holding the upper hand, on account of greater funding and the *Carbone* decision, however, much of the bill favors industry interests. For example, future flow control of commercial waste is essentially not allowed.<sup>269</sup> In addition, recyclables are extremely unlikely to be controllable.<sup>270</sup> In general, the hoops through which a government must jump to continue a designation process make it extremely costly to engage in flow control of any type of waste.

Basically, the bill is structured to phase out flow control gradually, protecting, as a concession to investors, facilities that have relied on flow control in the past. It seems clear that the only issues on which the waste industry was willing to compromise were residential waste and facilities for which substantial monies were spent in expectation of being able to implement legislative flow control, essentially facilities financed with revenue bonds backed by flow control ordinances. These problems were exacerbated in S. 2345, which would not permit flow control of residential waste in the future,<sup>271</sup> and sought to abolish contract and franchise flow control as well,<sup>272</sup> although it did expand the definition of "committed to the designation."<sup>273</sup>

Despite these shortcomings, it may be possible to solve some problems with the Pallone bill in a revised version in the current session. For example, the bill is unclear in its definitions as to whether sludge is considered a municipal solid waste,<sup>274</sup> yet under RCRA, the act this bill would amend, sludge is defined to be a municipal solid waste.<sup>275</sup> Additionally, the bill needs more examples of what constitutes "committing" to the designation of a facility, including put-or-pay contracts and steps towards construction of a facility.<sup>276</sup> If a municipality has already made significant commitments towards resolving waste management problems, the bill must assure that such a municipality's plans will be covered.

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269. Cf. S. 2345, 103d Cong., 2d Sess., 140 CONG. REC. H11,407 (1994); and H.R. 4683, 103d Cong., 2d Sess. (1994). For a complete discussion, see *infra* part VI.B.2.

270. See H.R. 4683, 103d Cong., 2d Sess. § (a)(3).

271. H.R. 4683, 103d Cong., 2d Sess. § II(a).

272. *Id.* at § II(9)(2)(B).

273. *Id.* at § II(h)(1).

274. See *Id.* at § (i)(3)(A).

275. See 42 U.S.C. § 6903(27) (1983 & Supp. 1994).

276. These have already been included in S. 2345, but local governments need to consider if such changes would be adequate.

### C. Fundamental Concerns

Regardless of any opportunity to modify H.R. 4683 and S. 2345, there are two fundamental problems with the Congressional process developing the flow control bills. First, too many waste management systems that are currently operating are left out of the grandfathering provisions. For example, in California, where many millions of dollars have been spent to develop waste management systems to best serve the needs of the public, there has been no need in the past to rely on legislative flow control, because, effectively, economic flow control existed.<sup>277</sup> Relying on this situation, California has developed one of the most environmentally progressive statewide integrated waste management schemes, including a diversion rate goal of 50 percent in the near future.<sup>278</sup> Without the threat of legislative flow control, haulers may be able to take the California waste to temporarily cheaper disposal sites, including landfills, thereby thwarting the long-term environmental planning of the municipalities. Without the waste, the California facilities will lose money, money that is needed to pay off debt incurred for the facilities as well as to operate the non-facility aspects of a waste management program (for example, recycling education). This will endanger the long-term viability of these systems and hinder the plans of California localities to provide for a stable, self-sufficient, environmentally sound disposal program.

The most serious concern with respect to the bills being debated by Congress is the status of the four alternative methods of flow control discussed earlier.<sup>279</sup> The Pallone bill authorizes the exercise of "flow control authority," which is defined as the authority to control the movement of solid waste or recyclable materials and direct their transportation to one or more facilities.<sup>280</sup> This provision could be read either to include or exclude the four alternative means of achieving flow control. If it does include other non-legislative methods, the bill would severely limit a local government's ability to engage in any form of flow control. A reasonable interpretation of the provision, however, is that municipal hauling and contract hauling, as forms of flow control that do not involve legislative action of the type described in the bill, should not be covered

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277. This observation is based on the firm's experience in servicing numerous clients in California.

278. See Cal. Pub. Res. Code § 41780. For an explanation of waste diversion, see *supra* notes 63-65.

279. See *supra* part V.

280. H.R. 4683(i)(1).

by the Pallone bill. In addition, economic flow control, which is really an indirect means of achieving flow control that does not involve actively exercising control over waste movement, likely would not be covered by the bill. Franchise flow control, which has a more regulatory aspect, may be more likely to be addressed by the bill. The attempt to eliminate future franchise flow control in S. 2345 should also raise some red flags for municipalities. California, for instance, relies heavily on franchising and, as noted earlier, many local governments could benefit from its implementation. It should be of paramount importance to local governments not to lose the ability to engage in these forms of flow control. As discussed in Part V, these methods do not significantly affect interstate commerce and Congress should not heed the waste management industry's arguments about prohibiting or restricting their use. All local governments must look closely at the issue as it is considered again and decide what is best for themselves. Operating without any such law at all should not be discounted.

#### **D. Import Restrictions**

As noted earlier, Congress also addressed a related issue—permitting states to impose restrictions on the import of solid waste by landfills and incinerators.<sup>281</sup> Clearly, if Congress were to bestow such authority on states, local governments would have profound new difficulties in exporting solid waste. With export options limited and likely increasing in cost, the result would be an augmented reliance on in-state solutions to solid waste management problems, and perhaps more self-reliance by municipalities. If local governments do choose to sponsor public facilities, they will naturally want to ensure sufficient waste streams to such facilities, thus causing them to turn to flow control.<sup>282</sup>

With an import restriction law in effect, flow control would become a more pressing issue for local governments. If a compromise flow control bill limiting prospective flow control is enacted as well, the four alternative methods—municipal collection, contract flow control, franchise flow control and economic flow control—

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281. See S. 2345, Title I.

282. The bills passed by the House and Senate each address this matter, and it remains to be seen in the next session exactly what developments will result. Generally speaking, however, the bills permit state governors to cap imports of municipal solid waste at 1993 levels or below. Certain allowances are made for host community agreements and permits that allow for the import of out-of-state waste, as well as existing contracts between the landfill or incinerator and the out of state waste supplier.



should become the methods of choice for ensuring the viability of waste management facilities.

## VI. Conclusion

Garbage will always ultimately be the government's problem. Evolving environmental standards and state and federal policies will continue to require reasoned responses from local governments and municipal solid waste flow control is a vital cog in many jurisdictions' solid waste management solutions. Without flow control of some form, governments' ability to plan and provide for the most environmentally sound and economically acceptable solutions will wane, leaving the public vulnerable to the vagaries of a private market that does not have a duty to protect the public health and safety. The *Carbone* decision has blunted one of the local governments chief weapons—legislative flow control—and it appears Congress will not supply an adequate answer for many solid waste systems. More than ever, alternatives to legislative flow control will be needed to enable municipalities to fulfill their solid waste duties, to comply with federal and state mandates, and to provide workable, environmentally-sound, long-term solid waste programs serving the interests of the public health and safety. Local governments must act soon by examining these options and deciding which will best serve the public.