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## The Environment Held in Trust for Future Generations or the Dormant Commerce Clause Held Hostage to the Invisible Hand of the Market

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1995]

THE ENVIRONMENT HELD IN TRUST FOR FUTURE GENERATIONS OR THE DORMANT COMMERCE CLAUSE HELD HOSTAGE TO THE INVISIBLE HAND OF THE MARKET?

C.M.A. McCAULIFF\*

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I. INTRODUCTION

THE dormant Commerce Clause of the United States Constitution<sup>1</sup> has once again proved a stumbling block for environmen-

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1. The United States Constitution grants Congress the authority to "regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. 1, § 8, cl. 3. This constitutional provision arose from trade difficulties under the Articles of Confederation; see THE FEDERALIST NO. 42, at 267-68 (James Madison) (Clinton Rossiter ed., 1961) ("A very material object of this power was the relief of the States which import and export through other States from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former."). Even in the absence of a federal statute, the Commerce Clause can restrict state regulation; this "dormant" aspect of the Commerce Clause is a judge-made doctrine. See *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 35 (1980) ("Although the Clause speaks in terms of powers bestowed upon Congress, the Court has long recognized that it also limits the power of the States to erect barriers against interstate trade.").

tal solutions to liquid waste disposal and solid waste flow control alike, because the financing on which these projects depends is so precarious. This article examines the effect of the United States Supreme Court's current dormant Commerce Clause jurisprudence on the law and decisions of the United States Court of Appeals for the Third Circuit in the important waste recycling area. It concludes that the dormant Commerce Clause should not be interpreted to require dismantling current environmental, health and safety programs built up in response to serious problems and federal mandates. The specter of dismantlement arises because of the identification of the dormant Commerce Clause with the profit motivations of corporations formed to provide basic, unspecialized recycling services that were allocated, along with highly technical, expensive services, to one municipally-designated recycling company that undertook to build a state-of-the-art waste facility.

In 1978, New Jersey environmental law, designed to cope with waste when space in New Jersey landfills became scarce, was changed dramatically by the Supreme Court's decision in *City of Philadelphia v. New Jersey*.<sup>2</sup> In that case, the Court held unconstitu-

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Ever since 1824, the Justices of the Supreme Court have viewed congressional power to regulate interstate commerce as a limitation on the regulatory authority of the states. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (involving congressional statute that was evenhanded in its effect). These limitations on the permissible effects of statutes developed into the dormant Commerce Clause subsequently referred to by the Court. See *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 250 (1829) ("We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.").

2. 437 U.S. 617 (1978). *City of Philadelphia* invalidated a New Jersey statute which prohibited the import of liquid wastes collected outside New Jersey's territorial limits. *Id.* at 629. The Supreme Court held that the purpose of a regulation is not controlling when determining whether the regulation is protectionist for purposes of the dormant Commerce Clause and stated that solid waste was an article of commerce. *Id.* at 626-27. *City of Philadelphia* reversed *Hackensack Meadowlands Development Commission Authority v. Municipal Sanitary Landfill*, 348 A.2d 505, 519 (N.J. 1975), which had upheld a New Jersey statute banning disposal of out-of-state waste in New Jersey. The New Jersey statute, however, did not prohibit New Jersey waste from going out of state. *Id.* at 508 & n.2. The original suit had been motivated by landfill owners and operators who wanted to sell the space to Philadelphia and feared financial ruin if they lost the business of the City of Philadelphia. See generally Note, *Solving New Jersey's Solid Waste Problem Constitutionally—or—Filling the Great Silences with Garbage*, 32 RUTGERS L. REV. 741, 742-47 (1979) (discussing both *Hackensack Meadows* and *City of Philadelphia* decisions). Later, Kinsley Landfill had to be closed to Philadelphia waste by injunction because the landfill lacked room for the waste. *Borough of Glassboro v. Gloucester County Bd.*, 495 A.2d 49, 58-59, cert. denied, 474 U.S. 1008, and aff'g 488 A.2d 562 (N.J. Super. Ct. App. Div. 1985); see Comment, *Trial Court Order Barring the City of Philadelphia from Dumping Solid Waste at Kinsley Landfill in New Jersey is Not an Unconstitutional Burden*

tional a state statute that had permitted, because of limited space, certain New Jersey landfills including Kinsley Landfill to accept only in-state trash.<sup>3</sup> Notwithstanding the Court's decision that the statute was unconstitutional, the Kinsley Landfill eventually refused to accept Philadelphia waste because of the scarcity of space at that site, as well as at hundreds of other landfills.<sup>4</sup> State environmental laws of this type might be deemed a centrally important building block in today's federalism, yet the Court held that the state law fell afoul of that manifestation of federalism, the dormant Commerce Clause, which has been called the "charter of free trade."<sup>5</sup>

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*On Interstate Commerce*, 17 RUTGERS L.J. 363, 364 (1986) (discussing *Glassboro* court's conclusion that Kinsley Landfill's closure to Philadelphia did not violate Commerce Clause); see also Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, The Dormant Commerce Clause, and The Federal Mantra*, 71 OR. L. REV. 409, 411 (1992) (discussing use of dormant Commerce Clause "in the context of a state's right to protect its environment and barriers to vindication of such rights").

The Supreme Court continued the position it developed in *City of Philadelphia* in two subsequent cases. See *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Nat'l Resources*, 504 U.S. 353, 355 (1992) (holding unconstitutional Michigan statute that prohibited private landfill operators from accepting solid waste that originated outside county in which their facility was located); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 336 (1992) (holding that Alabama's state-imposed disposal fee on hazardous wastes generated outside state but disposed of at facility in-state violated Commerce Clause); see also Allen J. Danzig, *The Commerce Clause and Interstate Waste Disposal: New Jersey's Options After the Philadelphia Decision*, 11 RUT.-CAM. L.J. 31 (1979) (providing analysis and discussing future effects of Supreme Court's decision in *City of Philadelphia*).

3. *City of Philadelphia*, 437 U.S. at 618-19.

4. *Glassboro*, 495 A.2d at 58. Closures like the Kinsley Landfill were not uncommon. In *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701 (3d Cir. 1995), the United States Court of Appeals for the Third Circuit reproduced some of the historical background to the waste crisis from a summary of a New Jersey Department of Environmental Protection and Energy Report:

By the early 1980s, the department had closed, or was in the process of closing, over 300 unsafe or unregulated landfills that posed serious environmental hazards or had exhausted capacity. However, the department's persistent actions to implement rigorous environmental standards on landfill construction and operations, coupled with a steady influx of millions of tons of waste annually from neighboring states during the 1970s, resulted in a serious shortfall of disposal capacity in the state . . .

*Id.* at 704-05.

5. Richard A. Posner, *The Constitution as an Economic Document: A Symposium Commemorating the Bicentennial of the United States Constitution*, 56 GEO. WASH. L. REV. 4, 17 (1987). The Commerce Clause is a feature of the federal system; in libertarian terms, the Commerce Clause is a charter for free trade and deals not with personal, but economic liberties because the dormant Commerce Clause forbids "states to erect barriers to interstate commerce unless Congress authorizes them." *Id.* In addition to the dormant Commerce Clause, Judge Posner lists other constitutional devices for promoting interstate commerce, such as the Privileges and Immunities Clause of Article IV ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States") and the Takings Clause of the Fifth Amendment ("nor shall private property be taken for public

Equally significant is the Supreme Court's 1994 decision in *C&A Carbone, Inc. v. Town of Clarkstown*,<sup>6</sup> which reversed the long-standing flow control law of the Third Circuit<sup>7</sup> as well as case law in New Jersey,<sup>8</sup> Pennsylvania<sup>9</sup> and Delaware.<sup>10</sup> In *Carbone*, the local

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use, without just compensation"). *Id.* at 17-18. In addition, the Tenth Amendment, which reserves undelegated powers to the states, necessarily deals with federalism. *See* *New York v. United States*, 505 U.S. 144, 160 (1992) ("Most of our recent cases interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws."); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 73 (1989) ("The Tenth Amendment is treated as a statement that states possess residual sovereign powers, but the extent of those sovereign powers is measured by the area left for state action after Congress has validly exercised its delegated powers."); *see also* CHARLES L. BLACK, JR., *PERSPECTIVES IN CONSTITUTIONAL LAW* 25 (rev. ed. 1979) (discussing federalism and asserting that our federal system has basis in political structure of national government). Professor Black argues that antidiscrimination fits into the Privileges and Immunities Clause. *Id.* at 65. Significantly, the decisions of the Supreme Court involving dormant Commerce Clause analysis run counter to the promotion of federalism in two recent cases, *United States v. Lopez*, 115 S. Ct. 1624 (1995), and *New York v. United States*, 505 U.S. 144 (1992).

6. 114 S. Ct. 1677 (1994).

7. *Id.* at 1680. In *Carbone*, the article of commerce was not solid waste but the processing and disposing of the solid waste. *Id.*

8. *See* Deborah T. Poritz, *New Jersey's Approach: Regulation of Waste Flows—Control of Rates*, in *MUNICIPAL SOLID WASTE: DISPOSAL STRATEGIES, ENVIRONMENTAL REGULATION, AND CONTRACTS AND FINANCING* 185, 189 (ALI-ABA Course of Study: Materials, No. C 355 (1988)) (noting that since 1970, New Jersey has provided cornerstone legislation to develop long-term options for adequate and safe waste disposal); *see also* *In re Waste Disposal Agreement*, 568 A.2d 547, 554-55 (N.J. Super. Ct. App. Div.) (stating that Department of Environmental Protection's (DEP) policy against out-of-state disposal was based on health and safety concerns, areas traditionally regulated by the state under its police powers), *cert. denied*, 583 A.2d 337 (N.J. 1990); *City of Elizabeth v. Department of Env'tl. Protection*, 486 A.2d 356, 361 (N.J. Super. Ct. App. Div. 1984) (recognizing difference between economic protection and solid waste regulation under police power of local and state governments). *Waste Disposal Agreement* was not deemed a case of economic protectionism or economic discrimination. 568 A.2d at 554. The DEP acts under police power invoked to insure health and safety. *Id.* "The thrust of New Jersey's policy is to protect our environment over the long term by insuring the existence of an essential public service, solid waste disposal, when the critical time and need arrives." *Id.* Similarly, the court in *In the Matter of Fiorillo Bros. of N.J., Inc.*, 577 A.2d 1316 (N.J. Super. Ct. App. Div.), *cert. denied*, 585 A.2d 371 (N.J. 1990), upheld New Jersey emergency waste flow orders finding that they did not burden interstate commerce and were designed to accomplish a legitimate state interest by efficiently removing garbage from New Jersey streets. *Id.* at 1322-23.

9. *See* *Delaware County v. Raymond T. Opdenaker & Sons, Inc.*, 652 A.2d 434 (Pa. Commw. Ct. 1994). *Delaware County* involved a challenge to the county's flow control ordinance that required all waste generated in the county to be delivered to designated facilities. *Id.* at 435 n.1. The court refused to strike down the ordinance because haulers were not going out of state and the county used a bidding process open to out of state companies. *Id.* at 437-38. However, *Carbone* has caused different outcomes in other Pennsylvania cases. *See* *Empire Sanitary Landfill, Inc. v. Department of Env'tl. Resources*, 645 A.2d 413, 419 (Pa. Commw. Ct. 1994) (comparing *Carbone* and declaring Lehigh County's flow control ordinance invalid under *Pike v. Bruce Church*); *Tri-County Indus., Inc. v. County of Mercer*,

flow control ordinance directed local waste to the county-designated facility and C & A Carbone, Inc. (C & A Carbone), a light waste processor, wanted to “cream off” that part of the business from the designated facility.<sup>11</sup> Again the dormant Commerce Clause trumped carefully crafted statutes designed to cope with difficult environmental problems and the equally difficult financing of their solutions.

These two Supreme Court decisions are perhaps most relevant to the Third Circuit because New Jersey and its Second Circuit neighbor New York have historically been the largest producers and exporters of waste.<sup>12</sup> Indeed, C & A Carbone itself, which sought entry into the Clarkstown market, submitted an amicus brief the next year in the first case in which the Third Circuit applied *Carbone*. That case, *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*,<sup>13</sup> raised essentially the same is-

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No. 93-592 (W.D. Pa. Oct 12, 1994), *rev'd sub nom.* Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788 (3d Cir. 1995)). In *Tri-County*, the hauler wanted to bring waste to an unauthorized site. *Id.* at 795. The court invalidated the flow control ordinance for discriminating against interstate commerce. *Id.* at 796. The court said that the use of a single site is the issue. *Id.* at 800. The court further implied that any processing and disposal program not completely open to competition could be considered a violation of the Commerce Clause. *Id.*; see also *Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntingdon Solid Waste Auth.*, 877 F. Supp. 935, 942 (M.D. Pa. 1994) (memorandum opinion) (applying *Carbone* analysis and holding that flow control policy discriminated on its face on basis of origin of waste because waste generated in county had to be disposed of in county, but waste generated elsewhere did not).

10. See *Harvey & Harvey, Inc. v. Delaware Solid Waste Auth.*, 600 F. Supp. 1369, 1379-80 (D. Del. 1985) (requiring solid waste to use in-state facilities and stating that regulation is not discriminatory but rather is even-handed).

11. *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1680 (1994). “Cream off” refers to a practice occurring before the development of homogenized milk. In milk making, the cream would rest at the top of the milk container and the user could remove this rich cream, leaving skim below. Similarly, the unskilled waste processors can attract the customer who needs easily-performed recycling of cardboard by offering a lower price for that simple service. The tax payers, however, are left with an even higher bill for the more complicated recycling services, because the designated waste facility has been left without the lucrative, easy recycling and the facility is underused.

12. Kirsten Engel, *Reconsidering the National Market in Solid Waste: Trade-offs in Equity, Efficiency, Environmental Protection, and State Autonomy*, 73 N.C. L. REV. 1481, 1490 (1995). In 1992, the net exports of these two states exceeded six million tons, or 34% of the total quantity of waste that travels in interstate commerce (excluding the amount of waste shipped to Ontario). *Id.* Solid waste is exported primarily from states in the Northeast to states in the Midwest. *Id.* at 1493. Thus, *Blue Circle Cement v. Board of County Commissioners*, 27 F.3d 1499 (10th Cir. 1994), did not find the flow control ordinance in question discriminatory and remanded for application of the *Pike* balancing test. *Id.* at 1512.

13. 48 F.3d 701 (3d Cir. 1995).

sues in the Third Circuit as *Carbone* had in the Supreme Court.<sup>14</sup> While the framing of the legal issue in terms of the dormant Commerce Clause makes it appear that the Supreme Court's requirements are concerned only with commerce and finance, the environment itself is implicated collaterally, like so much damage from a smartly targeted bomb.<sup>15</sup>

Historically, the waste projects have proven to be financially risky because the true cost of environmental pollution is not borne by the polluters themselves but rather is shifted to society at large through local governments.<sup>16</sup> This financial riskiness requires local governments to make financial guarantees and security provisions to build and operate the waste facilities, in turn providing one local business with assurance that the local waste flow will be processed through that facility.<sup>17</sup> These security arrangements are placed in

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14. See *id.* at 703-04 (finding that New Jersey's waste flow regulations violated dormant Commerce Clause). The *Atlantic Coast* court did not want to invite chaos into this potentially precarious situation. A preliminary injunction against enforcement of flow control was denied. *Id.* at 709-10. For further discussion on the *Atlantic Coast* decision, see *infra* notes 19-27 and accompanying text.

The decision in *Carbone* has effected numerous local judicial decisions. Not only has *Atlantic Coast* been remanded by the Third Circuit, but a similar case is pending in the United States District Court for the District of New Jersey involving the Borough of Haddon Heights.

15. The military phrase, "collateral" damage from bombs, which we learned from watching the Gulf War, has to do with the untargeted but often inevitable result of damage to people caught in the targeted area. The Supreme Court's framing of the legal issue to protect any would-be entrants to the waste recycling business, in-state or out-of-state, invites entrants who make the financing of comprehensive waste facilities much more difficult.

16. The complications of this field are legendary and have given rise to an extensive body of expert, technical literature by economists, scientists, engineers and cross-disciplinarians, among others. Nevertheless, the courts have had to make choices when confronted with legal issues arising from business, environmental and zoning disputes involving the disposal of waste, which itself is a technical term invoking disputes. If waste is seen as a raw material then the question may be analyzed from the point of view that waste facilities need to acquire continuing supplies of this raw material to run their facilities. On the other hand, the needs of local governmental municipalities may be analyzed from the point of view of the police powers of the government to protect the health and safety of the local populace and to assure stability in this area. These competing concerns give rise to much of the litigation about waste.

17. Eric S. Petersen & David N. Abramowitz, *Municipal Solid Waste Flow Control in the Post-Carbone World*, 22 *FORDHAM URB. L.J.* 361, 364 (1995). Peterson and Abramowitz discuss financing through a variety of methods: "put-or-pay contracts between private owner and a local government, to general obligation debt used to finance the construction of a facility, to project-specific revenue" bonds, or relying on the delivery of solid waste to the facility to generate revenues to pay off debt or fulfill the government's delivery obligation under a put or pay contract. *Id.* at 361. After legislative flow control ordinances were struck down, the economic stability of solid waste facilities was in danger, potentially "lead[ing] to increased environmental risks and liabilities for local governments and their taxpayers." *Id.* at 362.

jeopardy when they attract the unwelcome inspection of the dormant Commerce Clause as other businesses seek to “cream off” the lighter recyclables to avail themselves of the same financial guarantees provided for the initial business that is taking care of the waste under the statute in question.<sup>18</sup>

The financial difficulty of the municipalities in erecting full service waste facilities versus the desire of free-riders to enter the light recycling business resurfaced in the *Atlantic Coast* decision, which applied the analysis developed in *Carbone*.<sup>19</sup> *Atlantic Coast* was a Pennsylvania corporation formed in 1989 to operate a transfer station and recycling center for construction and demolition (C & D) debris from buildings.<sup>20</sup> *Atlantic Coast* sent its debris to an Ohio landfill and subsequently pursued status as a designated facility in New Jersey.<sup>21</sup> *Atlantic Coast*'s application was rejected.<sup>22</sup> Furthermore, because tipping fees were high, *Atlantic Coast* could not afford to enter the New Jersey market in this manner either.<sup>23</sup>

The Third Circuit applied what it called the “heightened scrutiny” discrimination test, familiar from equal protection analysis, under the influence of *Carbone*. It therefore abandoned the less stringent balancing test previously developed by the Court in *Pike v.*

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Congress has recognized that it is necessary to protect the approximately \$18 billion in debt, including municipal bonds, that have been invested to manage waste. 140 CONG. REC. H10,307 (daily ed. Sept. 29, 1994). This could have a profound impact on the environment if courts prohibit local governmental subsidization of waste facilities as interference with interstate commerce because a state-of-the-art, environmentally sound facility cannot compete with an unlined landfill or dump on a dollar per ton basis. Michael D. Diederich, Jr., *Does Garbage Have Standing? Democracy, Flow Control and a Principled Constitutional Approach to Municipal Solid Waste Management*, 11 PACE ENVTL. L. REV. 157, 255 (1993).

18. See generally A. Dan Tarlock, *Environmental Protection: The Potential Misfit Between Equity and Efficiency*, 63 U. COLO. L. REV. 871 (1992) (discussing interstate transportation of solid waste).

19. *Atlantic Coast Demolition and Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701, 703-04 (3d Cir. 1995).

20. *Id.* at 708. *Atlantic Coast* processes the construction and demolition debris by separating the recyclable materials from the non-recyclable. *Id.* The recyclable residue waste is then shipped to landfills for disposal. *Id.*

21. *Id.* at 708.

22. *Id.* Because of its proximity to New Jersey's southern counties, *Atlantic Coast* unsuccessfully sought to be included as a designated facility under the New Jersey plan in order to escape the tipping fees. *Id.* at 709.

23. *Id.* “Tipping fees are the rates that a disposal facility or transfer station charges the hauler who deposits waste at the facility.” *Id.* at 707 n.10 (citation omitted). The phrase “tipping fees” is used because trucks delivering waste must “tip” the back-end of the truck to drop off the waste. A transfer station is a facility that receives unsorted trash, processes it by baling, and sends it onward to disposal sights like landfills. *Id.* at 705 n.6.



*Bruce Church*<sup>24</sup> with respect to Commerce Clause litigation.<sup>25</sup> The dormant Commerce Clause applies in waste cases because waste from mixed loads containing both recyclable material and nonrecyclable waste has to be returned to each district's designated facility for separation unless the facility is compensated for lost revenue, thus interfering with the free flow of trade.<sup>26</sup> Additionally, the Third Circuit rejected the argument that the market participant exemption to dormant Commerce Clause analysis applied to New Jersey.<sup>27</sup>

Furthermore, the Third Circuit, again applying *Carbone*, has decided two cases involving Pennsylvania flow control ordinances in a recent consolidated appeal in *Harvey & Harvey, Inc. v. County of Chester*.<sup>28</sup> Here, the Third Circuit set its focus on the "process" of designating a single facility for servicing waste in a given local area, the length of the designation period and the likelihood of designat-

24. 397 U.S. 137 (1970). In *Pike*, the Supreme Court set forth the balancing test in Commerce Clause analysis as follows:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

*Id.* at 142 (citation omitted). For speculation about the meaning of the Third Circuit's choice of the term "heightened scrutiny" to characterize the Supreme Court's discrimination test in dormant Commerce Clause analysis, see *infra* note 59.

25. *Atlantic Coast*, 48 F.3d at 710. The *Atlantic Coast* court likened the New Jersey flow control ordinance to the Clarkstown ordinance in *Carbone* and concluded that they both favored the district's designated facilities at the expense of out-of-state providers. *Id.* at 712. As a result, the *Atlantic Coast* court found *Carbone*'s "heightened scrutiny" test more appropriate because New Jersey was regulating a market that the Commerce Clause intended to be open to non-local competitors. *Id.*

26. *Id.* at 707.

27. *Id.* at 715-17. The Supreme Court has recognized an exception from the restraints of the dormant Commerce Clause for otherwise discriminatory action taken by a governmental entity in its role as a market participant, rather than as a market regulator. *Id.* at 715-16. "When a governmental entity enters the market place in a capacity analogous to that of private market participants and makes decisions analogous to those made by private market participants, its decisions are not subject to dormant Commerce Clause scrutiny." *Id.* at 715. For further discussion of the market participant exemption, see *infra* notes 102-11 and accompanying text.

28. 68 F.3d 788 (3d Cir. 1995). The statute at issue in *Harvey* was the Municipal Waste Planning, Recycling and Waste Reduction Act, PA. STAT. ANN. tit. 53, § 4000 (Supp. 1995), which directs each county to plan for the long-term processing and ultimate disposal of its waste. *Id.* § 4000.303.

ing an out-of-state provider, and remanded for further proceedings in light of *Atlantic Coast* and *Harvey & Harvey*.<sup>29</sup> Unlike *Atlantic Coast*, however, *Harvey & Harvey* had a dissenting opinion de-emphasizing the process used to select the waste service providers because the effect of the flow control ordinance is clearly discriminatory when one waste processing facility is designated.<sup>30</sup> Heightened scrutiny is, therefore, necessarily demanded.

Thus, two overall concerns arising from the need to deal with our waste bring about the most recent dormant Commerce Clause litigation in the Third Circuit. First, the local government must fulfill its ancient function of protecting public health and safety through its police powers. Therefore, the need for stability in dealing with the never-ending generation of waste in our society and the concurrent financial difficulties of funding waste services lead local government to make arrangements covering all waste in the area under their charge. Once a statutory mechanism with its financial arrangement is in place, the interests of the wider waste business community, which deals in recyclables and other lighter aspects of the business, is aroused to provide the less expensive part of this service.

Second, because the general waste businesses witness an opportunity for great profitability in the business around the new facility, these less specialized businesses have an incentive to sue under the dormant Commerce Clause. In this litigation, these private waste businesses, in effect, are arguing that the government simply cannot look at the waste problem in isolation but must factor into its projects opportunities for surrounding businesses to participate. Courts, especially the Supreme Court and the Third Circuit following the Supreme Court, have been hearing their pleas. With state-sanctioned financing arrangements of expensive environmental projects in the public interest<sup>31</sup> (and therefore collaterally with

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29. *Harvey*, 68 F.3d at 803-09.

30. *Id.* at 809-11 (Nygaard, J., dissenting). Judge Nygaard found that "[r]egardless of the designation process employed, in each case a designation was made in the context of a flow control scheme; in each case, that flow control designation constituted an impermissible discrimination against interstate commerce and by effect alone triggered heightened scrutiny." *Id.* at 809 (Nygaard, J., dissenting).

31. See ROSEMARY O'LEARY, ENVIRONMENTAL CHANGE: FEDERAL COURTS AND THE EPA 170-71 (1993). O'Leary stresses the need for consistent policy which considers welfare of localities, states and nation as whole. *Id.* Solid waste transport should be integrated within the overall policy area of solid waste management, complementing rather than contradicting efforts to reduce solid waste and safely dispose of waste. Congressional inaction created the opportunity for the courts to establish inconsistent decisions, and "[c]learly litigation is not the best way to for-

public health and safety) at stake, it is important to examine the history and philosophy behind this reversal of fortune in Third Circuit law. Part II of this Article presents the impact of *Carbone* on previously settled Third Circuit law.<sup>32</sup> Part III offers critiques of the *Atlantic Coast* decision which reversed Third Circuit law.<sup>33</sup> Part IV cautions against sacrificing public interest in environmental safety on the altar of free trade.<sup>34</sup>

## II. ATLANTIC COAST APPLIES CARBONE TO OVERRULE TRADITIONAL THIRD CIRCUIT LAW

These environmental difficulties were originally addressed in the context of the federal environmental legislation of the 1970s and 1980s, namely the Resource Conservation and Recovery Act of 1976 (RCRA)<sup>35</sup> and the Solid Waste Disposal Act amendments to RCRA in 1980.<sup>36</sup> Both showed congressional concern over the financing costs for the construction of waste management facilities, although Congress never provided much federal financial assistance to states and municipalities for this construction.<sup>37</sup> Indeed, before *Carbone*, the legislative history of these acts was generally interpreted to require local flow control, especially because the appropriate method of waste disposal varies with the local volume of waste generated.<sup>38</sup> It was generally assumed from the implications

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ulate environmental policy or to determine our nation's environmental priorities." *Id.* at 170; see also DEIL S. WRIGHT, UNDERSTANDING INTERGOVERNMENTAL RELATIONS 387 (3d ed. 1988) (stating that solving hazardous waste by litigation is "almost a certain guarantee that the political process has failed").

32. For a further discussion on the effect of the Supreme Court decision in *Carbone* on Third Circuit jurisprudence, see *infra* notes 35-136 and accompanying text.

33. For a further discussion of the *Carbone*-effected decision of *Atlantic Coast*, see *infra* text accompanying notes 137-84.

34. For an analysis of the potential costs to the public and our environment if decisions like *Atlantic Coast* receive blind precedential effect, see *infra* notes 185-200 and accompanying text.

35. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6921(k) (1988) [hereinafter RCRA]. RCRA left waste management to local authorities and involved recycling.

36. The Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, §§ 18(a), 18(b), 32(d)(1)-(2), 83 Stat. 2334 (codified at 42 U.S.C. §§ 6901-6921(k) (1988)). One particular amended provision seeks to guarantee a steady supply of waste for local facilities. 42 U.S.C. § 6943(a)(5).

37. See Ann R. Mesnikoff, Note, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home*, 76 MINN. L. REV. 1219, 1224-25 nn.19-27 (1992) (discussing background of RCRA). See generally 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) (presenting project economics and financing formats that could be used for hypothetical resource recovery program).

38. See Diederich, *supra* note 17, at 191 (noting that Environmental Protec-

of these statutes that Congress had left it to the states to develop their own waste management policies by drawing up waste management plans to suit the locale in question.<sup>39</sup>

A. *Environmental Legislation Encourages the Building of Waste Facilities*

By leaving the management of their own waste to the states, the congressional statutory scheme encouraged the states to face up to their waste problems. Congress, nonetheless, refused to play a continuing role in protecting the states from constitutional challenges to their local waste ordinances when the courts started to apply "heightened scrutiny" rather than the less stringent balancing test formerly invoked.<sup>40</sup> Recent congressional inaction has placed the states at the mercy of courts that have played no role in establishing the statutory scheme to which the states have been responding.<sup>41</sup>

Partially in response to RCRA, New Jersey, Pennsylvania and Delaware enacted flow control and solid waste management statutes.<sup>42</sup> In order to finance the quality of waste facilities and ensure

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tion Act "waste regulations emphasized that state planning must reflect a project's financial feasibility" and "that in enacting RCRA, Congress envisioned the necessity that local waste be brought (flowed) to municipal facilities").

39. See Petersen & Abramowitz, *supra* note 17, at 364 (noting that EPA regulations recognize that amount of waste accumulated in particular area "will influence the technology choices for recovery and disposal, determine economies of scale, and affect marketability of resources recovered") (citing 40 C.F.R. § 255.10(c) (1993)).

40. See Petersen & Abramowitz, *supra* note 17, at 379 (noting that courts such as *J. Filiberto, Inc. v. New Jersey Department of Environmental Protection*, 857 F.2d 913 (3d Cir. 1988), *overruled by Atlantic Coast Demolition and Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701 (3d Cir. 1995), upheld these flow control laws at first, but in early 1990s courts applied "heightened scrutiny" analysis which authors labeled "the strict scrutiny analysis" referring to *DeVito Trucking, Inc. v. Rhode Island Solid Waste Management Corp.*, 770 F. Supp. 775 (D.R.I.), *aff'd*, 974 F.2d 1004 (1st Cir. 1991)). The Third Circuit had originally used the term "heightened scrutiny" in *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 398 (3d Cir. 1987).

41. See Paul S. Weiland & David Imber, Note, *Congress, the Courts and the Interstate Transport of Solid Waste*, 4 DICK. J. ENV'T L. & POL'Y 79, 80 (1994). The authors state that courts "are given the difficult job of interpreting the Constitution . . . [thus] present[ing] a situation in which the courts are actually formulating policy." *Id.* The courts apply the Constitution and congressional mandates unaware of the concerns of the states at a local level. *Id.* at 80, 86-87.

42. New Jersey first enacted waste control legislation in 1970. Solid Waste Management Act, N.J. STAT. ANN. § 13:1E-1 (West 1991 & Supp. 1995); Waste Utility Control Act, N.J. STAT. ANN. § 48:13A-4 (West Supp. 1995). The Solid Waste Management Act established a statutory framework to coordinate waste-related processes in the state. § 13:1E-2(b)(1). The Solid Waste Utility Control Act is designed to regulate the rates at which these services are provided. § 48:13A-2; see also *A.A. Mastrangelo, Inc. v. Department of Env'tl. Protection*, 449 A.2d 516, 518 (N.J. 1982) (recognizing that disposition of solid waste in New Jersey had reached

that the facility thus built could handle future waste as well as complicated recycling needs, the states were compelled to assure the contractor/processor that it would have a steady flow of business into the facility. For example, the New Jersey statutes provide for coordination of collection, disposal and use of solid waste with regulatory oversight to ensure safe, adequate and proper waste management.<sup>43</sup> Local New Jersey communities in response had to build waste facilities. The central purposes of the New Jersey statutes include " '60% recycling and disposal self-sufficiency for the nonrecyclable waste stream.' "<sup>44</sup> Accordingly, local New Jersey communities had to assure the designated processor of a flow of waste to make the building of the facility worthwhile.

Flow control implicates not only environmental considerations but also requires delicate and complicated financial arrangements. Environmentally, flow control is aimed at providing safe waste disposal over a long period of time and is adaptable to encouraging the community in waste reduction and recycling.<sup>45</sup> The provision for management and disposal of waste in the home county prevents accidents during long distance transportation and leaves the pollution near its point of origin. The major concerns of local government in waste flow control generally include potential liabilities, public health and safety, and meeting waste goals set by the state.<sup>46</sup> Flow control promotes environmental goals such as less waste production, more streamlined packaging and greater use of recycling.

Financially, flow control is a difficult project to attract long-

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crisis proportions and that legislature was responsible for state-wide regulation under Solid Waste Management Act and Solid Waste Utility Control Act of 1970).

Similarly, Pennsylvania enacted the Municipal Waste Planning, Recycling & Waste Reduction Act, Act of July 28, 1988, PA. STAT. ANN. tit. 53, §§ 4000.101-4000.1904 (West 1988 & Supp. 1995). Likewise, Delaware enacted the Solid Waste Authority Act, DEL. CODE ANN. tit. 7, § 6406(31) (1991).

43. *Atlantic Coast*, 48 F.3d at 705 (referring to Solid Waste Management Act, N.J. STAT. ANN. § 13:1E-1 (West 1991 & Supp. 1995) and Waste Utility Control Act, N.J. STAT. ANN. § 48:13A-4 (West Supp. 1995)).

44. *Atlantic Coast*, 48 F.3d at 707 (citations omitted).

45. See Diederich, *supra* note 17, at 225 & n.294 (listing additional environmental goals promoted by flow control, including inspection and monitoring of waste, technological innovation, consolidation of trucking and energy recovery through use of waste for generation of power).

46. Petersen & Abramowitz, *supra* note 17, at 407. The Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9800 (1988 & Supp. 1994), 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.' " *Id.* at 367. One means of promoting cleanup under CERCLA is through the creation of Superfund which empowers the federal government to respond to hazardous waste disposal. 42 U.S.C. §§ 9604-05, 9611-12.

term investors, because the facilities are expensive and the return of capital to the investors depends on the volume of waste coming to the facility. A commentator with a major practice in the financing of waste facilities, Eric Petersen, sets forth the various types of financial arrangements local governments have been able to negotiate.<sup>47</sup> For example, in a private project financing, the company requires a governmental pledge to supply waste to the facility and pay for its process or disposal to secure its contract.<sup>48</sup> In a corporate credit financing, the private company finances the facility with its own credit as security.<sup>49</sup> In a system financing, the governmental unit issues long-term debt to finance the facilities, which are secured by the revenues of the solid waste system.<sup>50</sup> Once these comprehensive statutory schemes were in place, businesses that were not able to funnel waste into the local facilities either challenged the constitutionality of the arrangements or, like C & A Carbone, had to funnel waste into a more expensive facility.

### B. *Applicable Dormant Commerce Clause Principles*

The dormant aspects of the Commerce Clause that limit state authority apply when Congress has not acted affirmatively to either authorize or forbid the challenged state activity. Traditionally, the Supreme Court has tried to uphold state legislation that did not interfere with interstate commerce by protecting local businesses from out-of-state competition. Formerly, the Court used, among other tests, a test analogous to the rational basis test which permitted the federal government to carry out its function unless the regulation in question had no rational basis.<sup>51</sup> That balancing test,

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47. Petersen & Abramowitz, *supra* note 17, at 371-73 & n.57. Congress obviously considered these financial matters in hearings at the time it passed RCRA, because it planned no federal appropriations to aid the states in coping with their environmental problems.

48. *Id.* at 370 n.49. For example, in *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994), Clarkstown used a "put or pay" contract to induce a provider to undertake the commitment. *Id.* at 1701 (Souter, J., dissenting). For a further discussion of "put or pay" contracts, see *infra* notes 88-91 and accompanying text.

49. Petersen & Abramowitz, *supra* note 17, at 370 n.50. Merchant facilities secure the debt by "sign[ing] contracts with several different entities, essentially selling capacity in the facility to these entities." *Id.*

50. *Id.* at 370 n.52.

51. The other, older tests did not necessarily favor the state or public interest, as the rational basis test does. Even the balancing test sets national interests and local interests against each other. The balancing test is analogous to the rational basis test insofar as the Court has, at various times, used both tests to uphold non-violative-of-the-dormant-Commerce-Clause state regulations. See *Evergreen Waste Systems v. Metropolitan Serv. Dist.*, 643 F. Supp. 127, 130 (D. Or. 1986) ("The

characteristically illustrated in *Pike v. Bruce Church*, placed the market in a context encompassing environmental and health benefits and other societal values such as public safety.<sup>52</sup> Historically, the framework established by the *Pike* Court had been the major test for dormant Commerce Clause analysis in the Third Circuit. As one case stated, Commerce Clause case law “yields two lines of analysis: first, whether the ordinance discriminates against interstate commerce [as in *City of Philadelphia v. New Jersey*<sup>53</sup>]; and second, whether the ordinance imposes a burden on interstate commerce that is ‘clearly excessive in relation to putative local benefits’ [as in *Pike v. Bruce Church*].”<sup>54</sup>

In *Pike*, the Court held that a facially neutral regulation enacted for a legitimate local purpose unduly burdens interstate commerce only if, after examination, that burden is deemed clearly excessive in relation to the “putative local benefits.”<sup>55</sup> Thus, under *Pike*, the Court upheld non-discriminatory local legislation.<sup>56</sup> Significantly, *Pike* could be interpreted as requiring a balancing test (*Pike* balancing test) when any *undue burdens* on interstate commerce resulted from a state regulation.<sup>57</sup>

More recently, in *Maine v. Taylor*,<sup>58</sup> the Court developed a new test that requires greater scrutiny of the state practice in question.<sup>59</sup>

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ordinance satisfies *Bruce Church*, which requires that the ordinance: (1) regulate evenhandedly; (2) be based on a legitimate local public purpose; (3) have only an incidental effect on interstate commerce; and (4) not burden commerce excessively in relation to putative local benefits.”)

52. 397 U.S. 137, 143 (1970); see Winkfield F. Twyman, Jr., *Beyond Purpose: Addressing State Discrimination in Interstate Commerce*, 46 S.C. L. REV. 381, 420-23 (1995) (describing different theories as to how Court should balance state regulations that have a “discriminatory effect” on interstate commerce against federal interest) (citing Noel T. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940)).

53. 437 U.S. 617 (1978).

54. *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1682 (1994) (quoting *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970)).

55. *Pike*, 397 U.S. at 142 (citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960)).

56. *Id.*

57. *Id.* For a description of the balancing test in *Pike*, see *supra* note 24.

58. 477 U.S. 131 (1986).

59. *Id.* at 140. According to *Maine v. Taylor*, a state statute that affirmatively discriminates against interstate commerce will be upheld only if two conditions are satisfied: “the statute must serve a legitimate local purpose, and the purpose must be one that cannot be served as well by available nondiscriminatory means.” *Id.* Applying this standard, the *Maine* Court upheld a ban on the importation of live baitfish, despite the obvious benefit to local baitfish dealers, because of the threat of contamination of the natural waters of Maine which do not harbor parasites common to other waters. *Id.* at 146-47. In *Maine*, resident Robert Taylor tried to import live baitfish from outside the state for commercial sale, which was in viola-

The test becomes not whether the local area has tried to prevent access to the local market or to keep prices high for local businesses to enjoy but whether the market operates to maximize business profit, whatever other values might hang in the balance.<sup>60</sup> The test for dormant Commerce Clause analysis with respect to waste regulation after *Carbone* views discrimination against the market as the sole criterion of the legitimacy of the regulation.

With this as background, we turn to the Third Circuit's waste cases. Traditionally, an analysis of the relevant Third Circuit dormant Commerce Clause cases concerning landfill management started with the Third Circuit approach under *J. Filiberto Sanitation, Inc. v. New Jersey Department of Environmental Protection*.<sup>61</sup> In *Filiberto*, the New Jersey Solid Waste Management Act (SWMA)<sup>62</sup> directed the flow of in-state waste to a state transfer station.<sup>63</sup> A Hunterdon County regulation in the form of an ordinance required all county-generated trash to be shipped to the county transfer station which

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tion of a Maine regulation prohibiting such importation. *Id.* at 132. Subsequently, a federal grand jury indicted Taylor for violating a federal statute which criminalizes the transportation of fish in interstate commerce in violation of state law. *Id.* at 132-33. Taylor sued under the dormant Commerce Clause, claiming that the state statute "unconstitutionally burden[ed] interstate commerce." *Id.* at 133. Possible spread of disease by wild fish was given as the reason for the regulation, and Maine demonstrated the unavailability of less discriminatory alternatives. *Id.* at 140-41. The Supreme Court did not know what the environmental dangers actually were but would not invalidate the regulation. *Id.* at 148. Because adequate means of testing baitfish for parasites did not exist, the Court determined that the ban was the least restrictive alternative. *Id.* at 151.

Most importantly, in effect, the Third Circuit by using *Maine's* term "heightened scrutiny" to characterize the Supreme Court's recent dormant Commerce clause review of challenges to state regulations recognizes that the Court has established tiers of scrutiny in this area through its notion of per se discrimination.

Less notably, the balancing test used in *Pike* may be contrasted with the per se discrimination test of *Maine v. Taylor*. To reiterate, the per se discrimination test introduces a new tier of greater scrutiny into dormant Commerce Clause cases when the Court believes that other values play a greater role in the state's behavior than market considerations do.

60. *Id.* at 151. In conclusion, the majority stated:

The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce. As long as a State does not needlessly obstruct interstate trade or attempt to "place itself in a position of economic isolation," it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.

*Id.* (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935)).

61. 857 F.2d 913 (3d Cir. 1988), *overruled by* *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701 (3d Cir. 1995).

62. N.J. STAT. ANN. §§ 13:1E-1 to 1E-198 (West 1991 & Supp. 1995).

63. *Filiberto*, 857 F.2d at 915.



opened in 1985.<sup>64</sup> The costs of the transfer station were to be financed by tipping fees collected at the facility and set by the county.<sup>65</sup> The Third Circuit noted that SWMA efficiently organized the collection and disposition of solid waste in the state and discouraged illegal dumping.<sup>66</sup> According to the court, the only economic injury present was the additional cost of disposal within the state.<sup>67</sup> Accordingly, the court did not complete the *Pike* balancing test because the regulation had no cognizable impact on interstate commerce.<sup>68</sup>

The Third Circuit in *Filiberto* chose the *Pike* balancing test over the newly available "heightened scrutiny" test of *Maine v. Taylor* because of the implied congressional approval of the state schemes devised in response to RCRA, which suggested that there was no locally-motivated plan to prefer local businesses to out-of-town businesses, thereby discriminating against interstate commerce.<sup>69</sup> The *Filiberto* court determined that these state measures were designed to ameliorate the rapid deterioration of conditions for the disposal of waste.<sup>70</sup> Flow control was "genuinely aimed at the legitimate goal of alleviating a trash crisis."<sup>71</sup> Further, the court did not deem the use of flow control to send local waste to the designated local facility a protectionist measure; rather, the court recognized that flow control served important and legitimate local interests.<sup>72</sup> Moreover, the court maintained that the hauler's higher tipping cost "relates to the wisdom of the statute, not to its burden on commerce."<sup>73</sup> As the only disposal facility in the county, the trans-

64. *Id.*

65. *Id.* at 916. For a definition of tipping fees, see *supra* note 23.

66. *Id.* at 920 (quoting testimony of New Jersey Department's principal planner).

67. *Id.* at 921. "The only significant economic burden emphasized in the complaint and the briefing is a burden on in-state collectors, like the plaintiffs, who will be required to pay higher disposal fees for the disposal services which [the legislature] has found to be essential to the health and well being of [state] residents." *Id.* (quoting *Harvey & Harvey v. Delaware Solid Waste Auth.*, 600 F. Supp. 1369, 1380 (D. Del. 1985)).

68. *Id.* at 922-23. "[T]he only burdens which implicate the Commerce Clause balancing analysis are those that discriminate against interstate commerce. . . . Once it is clear no such discrimination has been alleged, 'the inquiry as to the burden on interstate commerce should end.'" *Id.* at 922.

69. *Id.* at 919. "If . . . the Rule is genuinely aimed at the legitimate goal of alleviating a trash crisis, and seeks to achieve that goal by means that do not transfer the burden of the solution onto out-of-state interests, it is subject to the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)." *Id.*

70. *Id.* at 922.

71. *Id.* at 919.

72. *Id.* at 920.

73. *Id.* at 921.

fer station was considered irreplaceable.<sup>74</sup> Therefore, the court concluded that the county needed to make long-term disposal arrangements and the transfer station could not adequately perform without the flow control regulations.<sup>75</sup>

As previously stated, the *Filiberto* court's decision and analysis reflected the traditional position espoused by the Third Circuit. The flow control rules allowed the county to capture a waste stream thus guaranteeing the facility's financial viability.<sup>76</sup> Notably, the court recognized the creation of the station as a legitimate public purpose designed to permit the county to engage in long-term planning to provide for disposal of the waste.<sup>77</sup> This traditional approach was dramatically changed by the Supreme Court's decision in *Carbone*, which ultimately led to the Third Circuit's overruling of *Filiberto* by its decision in *Atlantic Coast*.

### C. *Carbone Demanded an About-Face of Third Circuit Law*

The Supreme Court's new concern with discrimination against interstate commerce by local protectionism emphasizes the role of the market by encouraging market entry, and consequently, de-emphasizes public interest, governmental functions and health and safety regulations.<sup>78</sup> The rebirth of interest in the free market as the sole value in waste cases occurred in *City of Philadelphia v. New Jersey*.<sup>79</sup> There, the Supreme Court reversed a New Jersey Supreme Court decision that had held that the New Jersey waste statute in question was not only constitutional but also protected the environment resulting in only a slight burden on interstate commerce.<sup>80</sup> The Supreme Court, however, viewed protection of local landfills as discriminating against competition because of the different treatment of in-state and out-of-state waste.<sup>81</sup>

Once this "discrimination-based model" is used, the inquiry becomes narrowly focused on market entry by out-of-state corporations into local areas. In its "discrimination-based model," the

74. *Id.* at 922.

75. *Id.*

76. *Id.* at 920-21.

77. *Id.*

78. See generally Ray A. Brown, *Police Power-Legislation for Health and Personal Safety*, 42 HARV. L. REV. 866 (1929) (discussing state's duty to protect its citizens and judiciary's duty to balance interests in advancing certain legislation).

79. 437 U.S. 617 (1978).

80. *Id.* at 629.

81. *Id.* at 627. "[A] state may not accord its own inhabitants a preferred right of access over consumers in other states to natural resources located within its borders." *Id.*

Supreme Court centered its examination on the interstate flow of goods or services and concluded that the Court may strike a regulation down if any harm to private out-of-state business profit occurs due to protection of local business.<sup>82</sup> This determination is made apart from whatever good the regulation does in areas other than market entry and apart from the reason for using the discriminatory regulation in the first place.<sup>83</sup> Under this heightened scrutiny, the state must justify the discrimination beyond the merely legitimate environmental objective, whereas formerly, under *Pike* the state only had to prove a legitimate interest, typical of any rational basis review.<sup>84</sup>

This "discrimination-based model" provided the rationale for the majority in *C & A Carbone, Inc. v. Town of Clarkstown*,<sup>85</sup> there the initial processing of the waste in Clarkstown was done by one processing center.<sup>86</sup> To finance the construction and operation of the transfer station, the town entered into a five-year contract with a private contractor.<sup>87</sup> In order to induce the company to build, the town: 1) guaranteed a minimum garbage flow at a specified disposal charge over the five years, 2) agreed to a "put or pay" provision, and 3) passed a flow control ordinance, Local Law 9.<sup>88</sup> Under a "put or pay" provision, the local government guarantees the designated facility a certain amount of business; thus, if the business fails to materialize, the government makes up the difference by paying

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82. *Id.* at 624. "[W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected. . . . The crucial inquiry, therefore must be directed to determine whether [the statute in question] is basically a protectionist measure, or whether it can legitimately be viewed as a law directed to legitimate local concern . . ." *Id.*

83. *But see Exxon v. Governor of Maryland*, 437 U.S. 117, 127 (1978) (holding that statute discriminated against interstate firms, however, dormant Commerce Clause does not protect market operations or structures). See Donald H. Regan, *Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1117 (1986) (discussing need for reformulation of efficiency objection using *Exxon* and focusing on cost-based justification); Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CAL. L. REV. 1203, 1214-15 (1986) (questioning enduring Supreme Court doctrine of distinguishing between state regulations discriminating against out-of-state goods and those against out-of-state retailers of those goods).

84. Twyman, *supra* note 52, at 398. "The state must justify such discrimination 'in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.'" *Id.* (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977)).

85. 114 S. Ct. 1677 (1994).

86. *Id.* at 1680.

87. *Id.*

88. *Id.* For various types of financing arrangements, see Petersen & Abramowitz, *supra* note 17.

fees to the facility as though the waste had been delivered to the designated facility.<sup>89</sup> There was no prohibition on interstate movement of trash from Local Law 9, which favored a single processor, although going through the designated facility first required paying a tipping fee higher than Carbone's charges.<sup>90</sup> Therefore, the Supreme Court could have employed a lower standard of review, because the ordinance could be construed as facially neutral. Local Law 9 did not raise the cost of servicing the waste once the waste entered the national market because local residents paid for all trash they generated.<sup>91</sup>

The majority nevertheless found that Local Law 9 was discriminatory and therefore, simply endorsed a different type of regulation for the states to use; namely a regulation establishing uniform standards for every waste business that chose to provide waste service rather than having the town select one expert firm that could comply with Clarkstown's standard.<sup>92</sup> C & A Carbone, the light waste processor suing the town of Clarkstown for prohibiting its entry into the less expensive recycling market, argued that the purpose of the local law was to save the town from the prospect of paying its "put or pay" guarantee.<sup>93</sup> Any benefits of flow control could be achieved by the non-discriminatory means of competing in the marketplace, entering into long-term contracts with suppliers of waste and increasing local taxes or utility fees.<sup>94</sup> The politically unpopular features of these alternatives do not detract from their constitutional acceptability.<sup>95</sup> Thus, *Carbone* truly becomes a question of economic opportunity for such contractors like C & A Carbone who recognized that voters did not approve of the costs that the taxpayers would have to assume in order to permit C & A Carbone to enjoy a private business profit. Here, the dormant Commerce Clause, in effect, operates as the ultimate charter of free trade by favoring business over the environment, the taxpayers, local govern-

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89. *Id.* at 1693 (Souter, J., dissenting). "Put or pay" refers to the process whereby a town makes an estimate of prospective trash generation by residents in determining the size of a waste facility, and then must deliver that amount to the facility owner, or pay substantial compensation for failure to do so. *Id.* (Souter, J., dissenting); see also Petersen, *supra* note 16, at 370 (stating that "put or pay" contracts "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").

90. *Carbone*, 114 S. Ct. at 1681, 1693, 1699-1700.

91. *Id.* at 1693 (Souter, J., dissenting).

92. *Id.* at 1683.

93. *Id.* at 1684. "Clarkstown admit[s] the flow control ordinance is a financing measure." *Id.*

94. *Id.* at 1683-84.

95. *Id.* at 1702.

mental arrangements and the creditors who helped to finance the waste facilities.

According to the majority opinion in *Carbone*, interstate commerce is affected because (1) C & A Carbone processes out-of-state waste, while the flow control ordinance “drives up the cost” of disposal for the out-of-state waste, and (2) if out-of-state businesses wanted to dispose of waste in Clarkstown, they would have to use the designated local operator who charged more than C & A Carbone.<sup>96</sup> Having a designated operator “just ma[de] the protectionist effect of the ordinance more acute” because no one else could build a waste disposal facility in Clarkstown.<sup>97</sup> The Court, in Justice Kennedy’s graphic opinion, pictured Clarkstown as hoarding solid waste and squelching competition.<sup>98</sup> The majority specifically discounted the argument of necessity or crisis due to the scarcity of landfill space as hundreds of sites become filled to capacity and pollution costs escalate.<sup>99</sup>

Justice O’Connor, in concurrence, found that an excessive burden test was better than holding the ordinance discriminatory, because C & A Carbone was an in-town processor and was treated in the same way as every other processor except the designated facility.<sup>100</sup> Because the town’s purpose was to generate revenue, the concurrence asserted that the town could raise revenue by less burdensome means than choosing a designated facility which would exclude all other waste processors.<sup>101</sup> Justice O’Connor balanced local benefits against the burden that the regulation imposed on interstate commerce.<sup>102</sup> Indeed, Justice O’Connor rejected bond counsel’s argument that RCRA provided explicit authorization for the town’s flow control ordinance on the grounds that health and safety flow control is much more burdensome than uniform safety

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96. *Id.* at 1681; *cf.* *United States v. Lopez*, 115 S. Ct. 1624 (1995) (making same argument, albeit more successfully, about not yet entering into the stream of commerce).

97. *Carbone*, 114 S. Ct. at 1683.

98. *See id.* (stating that “the offending local laws hoard a local resource . . . for the benefit of local businesses that treat it [and] squelch[ ] competition in the waste-processing service altogether”).

99. *Id.* “The teaching of our cases is that these arguments must be rejected absent the clearest showing that the unobstructed flow [of] interstate commerce itself is unable to solve the local problem.” *Id.*

100. *Id.* at 1687-88 (O’Connor, J., concurring). Justice O’Connor stated that Local Law 9 “‘discriminates’ evenhandedly against all potential participants in the waste processing business, while benefitting only the chosen operator of the transfer facility.” *Id.* at 1689 (O’Connor, J., concurring).

101. *Id.* at 1690 (O’Connor, J., concurring).

102. *Id.* at 1689 (O’Connor, J., concurring).

regulations.<sup>103</sup> In doing so, Justice O'Connor made an important contribution by stating that the flow control ordinance at issue was not facially discriminatory (or discriminatory in its effects) against interstate commerce because C & A Carbone and other in-town waste processors were treated no differently from out-of-town processors.<sup>104</sup> Finally, Justice O'Connor concluded that because nearly half the states had flow control ordinances, "the free movement of solid waste in the stream of commerce" would trigger a "balkanization [that] the Clause is primarily intended to prevent."<sup>105</sup>

Justice Souter, in dissent, also recognized that the flow control ordinance had economic consequences.<sup>106</sup> Noting that C & A Carbone's facility lost profits in Clarkstown due to the higher fees it had to pay there, Justice Souter stated that this loss resulting from the ordinance was not a burden that violated the Constitution's Commerce Clause.<sup>107</sup> In contrast, the majority opinion did not address the reason for the disparity in cost between the designated proprietor and the local waste business dealing in recyclables or other easily treated waste. The dissenting opinion pointed out that the designated proprietor was "essentially an agent of the municipal government, which (unlike Carbone or other private trash processors) must ensure the removal of waste according to acceptable standards of public health."<sup>108</sup> Indeed, private businesses would not have built the waste facility although "the locality needs [it] in order to abate (or guarantee against creating) a public nuisance."<sup>109</sup>

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103. *See id.* (O'Connor, J., concurring). "The Court generally defers to health and safety regulations because 'their burden usually falls on local economic interests as well as other States' economic interests, thus insuring that a States's own political processes will serve as a check against unduly burdensome regulations.'" *Id.* (O'Connor, J., concurring) (quoting *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 n.18 (1978)).

104. *Id.* (O'Connor, J., concurring). The *Pike* balancing test would therefore be used but Justice O'Connor suggests that Clarkstown could not win even with the less stringent balancing test. *See id.* (O'Connor, J., concurring).

105. *Id.* at 1690 (O'Connor, J., concurring). In contrast, Justice Souter asserted that C & A Carbone could comply with both New York and New Jersey's flow control ordinances. *Id.* at 1700-01 n.16 (Souter, J., dissenting). However, Justice O'Connor estimated that eventually some of the many flow control ordinances were bound to lead to some inconsistency. *Id.* at 1690 (O'Connor, J., concurring).

106. *Id.* at 1700-01 (Souter, J., dissenting).

107. *Id.* (Souter, J., dissenting). "Business lost in Clarkstown as a result of a Clarkstown ordinance is not a burden that offends the Constitution." *Id.* at 1701 (Souter, J., dissenting).

108. *Id.* at 1695 (Souter, J., dissenting).

109. *Id.* at 1697 (Souter, J., dissenting).

D. *The Aftermath of Carbone in the Third Circuit*

*Carbone* rendered the result in *Filiberto* unacceptable and forced the Third Circuit to change its doctrinal analysis. In *Atlantic Coast*, Judge Stapleton, writing for the court, overruled *Filiberto* in light of the Supreme Court decision in *Carbone*.<sup>110</sup> What may be unaffected by the *Carbone* decision is the viability of *Swin Resource System, Inc. v. Lycoming County*,<sup>111</sup> which employed the very limited market participant exemption from the operation of the dormant Commerce Clause.<sup>112</sup> The market participant exemption has generally applied when the state, through contract conditions, favors the local economy for governmental purposes. The market participant exemption permits a county-operated landfill to charge a higher fee for waste generated outside a local area than for locally-generated waste without violating the dormant Commerce Clause. *City of Philadelphia v. New Jersey* had left open the question of whether state-

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110. See *Atlantic Coast Demolition and Recycling v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701, 713 n.17 (3d Cir. 1995). Nevertheless, prior to the *Carbone* decision, several commentators distinguished *City of Philadelphia v. New Jersey* from the type of waste flow control situation addressed in *Atlantic Coast* insofar as the waste in *Atlantic Coast* did not enter into interstate commerce, an argument later successfully presented to the Supreme Court in *United States v. Lopez*, 115 S. Ct. 1624 (1995). As one environmental litigator contrasted the situations in *City of Philadelphia* (which dealt with out-of-state waste prohibited from entering New Jersey) and *Atlantic Coast* (which dealt with prohibitions against exporting New Jersey waste to another state):

Export barriers pertaining to locally generated waste are completely different from import restrictions pertaining to waste which is in the stream of commerce. Export barriers do not impose one jurisdiction's will upon another . . . . Export barriers eliminate waste before the need arises to place it into commerce or the need for outside disposal service.

Diederich, *supra* note 17, at 221.

111. 883 F.2d 245 (3d Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990).

112. *Id.* at 249. The dissent said the market participant exemption is "a peculiar eruption of Dixieism." *Id.* at 257 (Gibbons, C.J., dissenting). See generally Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989) (deciphering foundation of market participant exemption); Diederich, *supra* note 17, at 226-31 (discussing difficulties inherent in market participant exemption); Paul S. Kline, *Publicly-Owned Landfills and Local Preferences: A Study of the Market Participant Doctrine*, 96 DICK. L. REV. 331 (1992) (reviewing *Swin* decision and history of market participant exemption); David Pomper, *Recycling Philadelphia v. New Jersey: The Dormant Commerce Clause, Postindustrial "Natural" Resources, and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309 (1989) (arguing for broadened market participant exemption allowing states to retain natural resources). For different approaches to whether, according to the market participant exemption, landfills should be classified as services or natural resources, see Bradford Mank, *Out-of-State Trash: Solid Waste and the Dormant Commerce Clause*, 38 WASH. U. J. URB. & CONTEMP. L. 25, 42 (1990); William L. Kovacs & Anthony A. Anderson, *States as Market Participants in Solid Waste Disposal Services—Fair Competition of the Destruction of the Private Sector*, 18 ENVTL. L. 779, 815-16 (1988). For further discussion of the market participant exemption, see *supra* note 27 and accompanying text.

owned waste facilities may prevent out-of-state waste from being imported when the state is a participant in the market rather than a market regulator.<sup>113</sup> In *Swin*, Lycoming County operated a landfill that charged higher disposal fees for waste generated beyond its five and one-half county service area in an attempt to preserve its landfill capacity for local residents.<sup>114</sup> The Third Circuit held that the county acted as a market participant, not a market regulator, and therefore, the county's actions were not susceptible to scrutiny under the dormant Commerce Clause.<sup>115</sup> Accordingly, the court upheld the fee schedule favoring local waste.<sup>116</sup> Further, the court rejected the contention that the market participant exemption did not apply to a landfill on the grounds that it was a natural resource.<sup>117</sup>

This market participant exemption enables "the people to determine as conditions demand . . . what services and functions the public welfare requires."<sup>118</sup> While *Swin* indicates that the market participant exemption remains viable,<sup>119</sup> the facts of that case make the exemption applicable to a narrow set of circumstances. Furthermore, if we use other categories, this exemption is not necessary. For example, an argument *Carbone* rejects, that local waste in the county has not entered the flow of commerce and therefore is not subject to the dormant Commerce Clause, would obviate the need for the exemption.<sup>120</sup> Under current law, however, a county

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113. See *Oregon Waste Sys. v. Department of Envtl. Quality*, 114 S. Ct. 1345 (1994). *Oregon Waste Systems* illustrates that the market participant exemption rarely applies. The Court held that a state statute directing private landfills to add a mandated surcharge on waste generated out of state was impermissibly discriminatory. *Id.* at 1350. The Court declined to address the issue whether Oregon could accomplish its cost spreading through market participation. *Id.* at 1354 n.9. Significantly, *Swin* did address the issue in New Jersey. *Swin*, 883 F.2d at 248-54.

114. *Swin*, 883 F.2d at 246.

115. *Id.* at 251.

116. *Id.* at 254-55.

117. *Id.* at 251-54; see *Sporhase v. Nebraska*, 458 U.S. 941 (1982) (determining that groundwater is article of interstate commerce that state cannot prohibit sale of to other states); Richard S. Harnsberger et al., *Interstate Transfers of Water: State Options after Sporhase*, 70 NEB. L. REV. 754, 809-10 (1991) (discussing natural resource exception and constitutional options available to states attempting to regulate transfers of groundwater out-of-state).

118. *Swin*, 883 F.2d at 251 (citing *Reeves, Inc. v. Stake*, 447 U.S. 429, 438 n.11 (1976)).

119. *Id.* at 249. See generally Charles Gray, *Keeping the Home Team at Home*, 74 CAL. L. REV. 1329, 1344-47 (1986) (providing analysis of market participant doctrine); Michael R. Harpring, Comment, *Out Like Yesterday's Garbage: Municipal Solid Waste and the Need for Congressional Action*, 40 CATH. U. L. REV. 851, 872-74 (1991) (same).

120. *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1681 (1994). The argument that interstate commerce is not implicated by a county's local waste



or municipality must maintain outright ownership of the waste facility in order to favor local trash without violating the dormant Commerce Clause. Furthermore, flow control ordinances, as regulatory measures, do not fall into the class of local action generally found in the market participant cases. When the state or local government is not a contracting party, Commerce Clause scrutiny will be applied.<sup>121</sup>

One surprising aspect in *Atlantic Coast* was the employment of the "heightened scrutiny" standard when New Jersey used the public utility concept for waste facilities because of the prior history of organized crime's involvement in the waste industry.<sup>122</sup> Given the difficulty of the problem and the concerted effort by the State of New Jersey to combat the influence of crime on the industry, it might have been assumed that the Court, utilizing a balancing test method, would recognize the weight of the public interest in the municipal establishment of designated waste facilities. Recently, however, the Supreme Court applied the "heightened scrutiny" test to a protectionist state public utility regulation in *Wyoming v. Oklahoma*.<sup>123</sup> Likewise, in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*,<sup>124</sup> the Supreme Court stated that public utility regulation is not a special category for Commerce Clause purposes.<sup>125</sup> The Supreme Court, however, used the *Pike* balancing

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may prove more viable after a recent Supreme Court decision. See *United States v. Lopez*, 115 S. Ct. 1624 (1995) (holding possession of guns in school zone is not in interstate commerce for purpose of invoking Congress' authority under Commerce Clause).

121. See, e.g., *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984). In *South-Central Timber*, the Supreme Court asserted that a state cannot impose restrictions even if privity of contract exists. *Id.* at 97. "[T]he doctrine is not carte blanche to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity." *Id.* The Court required that the state be a major participant in the market and that the market be narrowly defined. *Id.* at 97-98. Therefore, the Court concluded that although Alaska was a participant in the timber market, the state could not dictate the terms of processing because it was not a participant in the secondary market. *Id.* at 98-99.

122. *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701, 704 (3d Cir. 1995) (describing crisis during 1970s in private unregulated waste disposal market and listing cases which documented illegalities).

123. 502 U.S. 437 (1992).

124. 461 U.S. 375 (1983).

125. *Id.* at 395; see also *Atlantic Coast*, 48 F.3d at 713 ("[W]e do not read the dormant Commerce Clause jurisprudence to suggest that state utility regulation is to be judged by different standards than other state regulation. When state utility regulation is protectionist, the Supreme Court has employed heightened scrutiny; where it is not, a benefits and burdens analysis has been applied.").

test on the state and local government to review the state's regulations of others in the market.<sup>126</sup> Accordingly, following the Supreme Court's rationale, the Third Circuit in *Atlantic Coast* treated New Jersey as a market regulator. The Third Circuit applied *Carbone*, deeming the New Jersey flow control ordinance a discriminatory measure.<sup>127</sup> The Third Circuit also used the "heightened scrutiny" test, even though New Jersey, as the most densely populated state, suffers an overall shortfall of disposal capacity.

After applying the *Carbone* analysis, the Third Circuit remanded *Atlantic Coast*.<sup>128</sup> On remand, the district court concluded that in reliance on a steady rate of revenue, Atlantic County undertook financial responsibilities for its waste facilities.<sup>129</sup> Accordingly, it incurred one billion dollars in debt which was guaranteed by several counties, the Port Authority and financial institutions.<sup>130</sup> In addition, default on the bonds was possible in these circumstances.<sup>131</sup> Thus, the court determined that the disruption resulting from the suit would discourage (1) "the creation of new waste disposal facilities," and (2) "the maintenance and expansion of existing facilities" unless Atlantic County implemented a new comprehensive regulatory scheme.<sup>132</sup> The local governments admitted that they had no clear feasible alternatives to the current scheme.<sup>133</sup> The district court stated that the lack of alternatives alone did not meet the onerous burden of showing that even the relatively simple alternatives of *Carbone* (general taxes or municipal bonds) were not feasible alternatives to the current discriminatory regime.<sup>134</sup> On June 9, 1995, the court therefore asked the state to submit an alternative plan within sixty days, so it could grant Atlantic Coast's mo-

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126. *Arkansas Electric Cooperative Corp.*, 461 U.S. at 392-93. The Court used the *Pike* test, balancing local interests against interstate commerce interest & declined to use heightened scrutiny because "economic protectionism is not implicated here." *Id.* at 393.

127. *Atlantic Coast*, 48 F.3d at 710-13.

128. *Id.* at 717-18. The remanded case is *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 893 F. Supp. 301 (D.N.J. 1995). Judge Irenas' opinion came down on November 28, 1995. It is presently before Judge Irenas, and the latest action, a conditional grant of plaintiff's motion for pendente lite relief, was on June 6th, 1995.

129. 893 F. Supp. at 306.

130. *Id.*

131. *Id.* "Wholesale disruption of the waste flow regulations could impair the ability of the county authorities to finance this debt and could ultimately force them into default on the bonds or contractual obligations." *Id.*

132. *Id.* at 307.

133. *Id.* at 308.

134. *Id.*

tion for preliminary injunctive relief.<sup>135</sup>

This "discrimination" interpretation of the dormant Commerce Clause and its attendant "heightened scrutiny" burdens on the states leave the local and state government environmental protection dependent on facts that only the government can prove. The interpretation, however, does not deal entirely with the dangers to the environment itself or to public health. This is because it is unclear how long it may take before the difficulties in financing and the disruption to the environment will become obvious and reach a crisis level. Even when applying strict scrutiny, courts seem to disregard Justice Blackmun's admonition in *Maine v. Taylor* that "the commerce clause cannot be read as requiring the [states] to sit idly by and wait until potentially irreversible environmental damage has occurred."<sup>136</sup>

### III. THE PERSPECTIVES FOR CRITIQUING *CARBONE* AS IT APPLIES TO *ATLANTIC COAST*

The opinions in *Carbone* provide a perspective for examining the problem in *Atlantic Coast*. The tensions of balancing the needs of the environment with the demands of free trade appeared on the surface of *Carbone*, when Justice Souter in dissent assumed the old New England mantle of protecting the states' police power for promulgating health and safety regulations, a mantle once proudly worn by Justice Horace Gray, who in the nineteenth century dissented from decisions striking down state laws involving the police powers.<sup>137</sup> On the other hand, Justice Kennedy's majority opinion in *Carbone* began with the assertion that "[w]hile the immediate effect of the [flow control] ordinance is to direct local transport of solid waste to a designated site within the local jurisdiction, its economic effects are interstate in reach."<sup>138</sup>

Thus, in *Carbone*, Justice Kennedy followed *City of Philadelphia*, to the effect that New Jersey behaved in a protectionist manner to isolate itself from a problem by erecting a barrier against the movement of interstate trade. As in *City of Philadelphia*, the *Carbone* Court refused to apply the balancing test that *Pike* permitted.<sup>139</sup> The *Car-*

135. *Id.* at 312.

136. *Maine v. Taylor*, 477 U.S. 131, 148 (1986).

137. See Samuel Williston, *Horace Gray*, in 8 GREAT AMERICAN LAWYERS 139, 139-88 (William D. Lewis ed., 1909) (providing appreciation of Justice Gray, United State Supreme Court (1882-1901)).

138. *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1681 (1994).

139. *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-54 & n.4 (1938) (upholding, under rational basis test, federal statute that prevented out-of-

*bone* Court stated: "The teaching of our cases is that these arguments must be rejected absent the clearest showing that the unobstructed flow of interstate commerce itself is unable to solve the local problem. The Commerce Clause presumes a national market free from local legislation that discriminates in favor of local interests."<sup>140</sup> The Court suggested that governmental regulation had the alternative of imposing safety conditions on C & A Carbone to ensure that private businesses "do not underprice the market by cutting corners on environmental safety."<sup>141</sup> Read this way, the flow control ordinance is deemed to be protectionist. As the Court noted: "It ensures that the town-sponsored facility will be profitable, so that the local contractor can build it and Clarkstown can buy it back at nominal cost in five years. In other words . . . the flow control ordinance is a financing measure."<sup>142</sup> According to the *Carbone* majority, the long-term provision for stable, safe waste-processing could have been subsidized by different financial arrangements such as "general taxes or municipal bonds," thereby forcing governmental ownership of waste facilities onto states, counties and municipalities to avoid the heightened scrutiny of the new dormant Commerce Clause test.<sup>143</sup> Finally, the Court admitted that the flow control ordinance "may not in explicit terms seek to regulate interstate commerce," but the Court determined that out-of-state competition is harmed "nonetheless by its practical effect and design."<sup>144</sup>

This result, however, evoked a strong dissent from Justice Souter, joined by Chief Justice Rehnquist and Justice Blackmun. Justice Souter began with the strong precedential history that the dormant Commerce Clause's protection of access to local markets has traditionally been limited to striking down laws to improve "the competitive position of local economic actors, just because they are local,

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state shipment of filled milk *but* articulating in footnote four rationale for using more stringent standard of review than rational basis in special circumstances); Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (explaining difficulty in adapting *Carolene's* formula to combat modern prejudice against "discrete and insular minorities").

140. *Carbone*, 114 S. Ct. at 1683.

141. *Id.*

142. *Id.* at 1684.

143. *Id.* Again, it was left to the dissent to point out that, "in any event it is far from clear that the alternative to flow control (i.e., subsidies from general tax revenues or municipal bonds) would be less disruptive of interstate commerce than flow control, since a subsidized competitor can effectively squelch competition by underbidding it." *Id.* at 1702 (Souter, J., dissenting).

144. *Id.* at 1684.

vis-à-vis their foreign competitors.”<sup>145</sup> The decision in *Carbone* extends the ambit of the dormant Commerce Clause to the public arena, while earlier cases traditionally dealt with favoring local products or local businesses over out-of-state alternatives. Clarkstown’s transfer station was essentially a municipal facility built and operated under a municipal contract, rendering it a public enterprise.<sup>146</sup> This was the heart of the dissent: the public interest was being served by the provision of a local waste facility and at the same time was being paid for by the local waste producers in their fees to use the facility that the municipality had commissioned.<sup>147</sup> The local government “enter[ed] the market to serve the public interest of local citizens quite apart from private interest in private gain.”<sup>148</sup> In showing that the public interest was at work, the dissenting opinion took pains to explain factually why “[a]ny whiff of economic protectionism [was] far from obvious.”<sup>149</sup> Indeed, Clarkstown undertook to build the waste facility because the state insisted upon the closure of the unsound landfill that the town was using.<sup>150</sup>

In some sense it is the absence of evidence that proves the point: if Clarkstown had the financial resources to build the transfer station itself, rather than sponsoring it and arranging to have it built, the market participant exemption would have protected it from invalidation under the dormant Commerce Clause. C & A Carbone did not mention any outside transfer stations that could handle the local business, nor did it state that any loss of business from the ordinance had occurred: “if the record supported an inference that above-market pricing at the Clarkstown transfer station caused less trash to flow to out-of-state landfills and incinerators, that, too, might have constitutional significance.”<sup>151</sup> The financing of the waste facility through flow control is an aspect of the public interest because of the great investment required to build a safe waste facility, the lim-

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145. *Id.* at 1695 (Souter, J., dissenting) (quoting Regan, *supra* note 83, at 1138).

146. *Id.* at 1693-98 (Souter, J., dissenting).

147. *Id.* (Souter, J., dissenting). Indeed, the dissent took this idea further, stating that the record “shows that the burden falls entirely on Clarkstown residents.” *Id.* at 1700 (Souter, J., dissenting).

148. *Id.* at 1697 (Souter, J., dissenting).

149. *Id.* at 1700 (Souter, J., dissenting). In *Carbone*, the public interest was in environmental protection, health and safety. *Id.* at 1683. These interests fall within the values of federalism, state police powers and such venerable precedents as *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829).

150. *Carbone*, 114 S. Ct. at 1693 (Souter, J., dissenting).

151. *Id.* at 1700 (Souter, J., dissenting) (emphasis added).

ited budgets of municipalities and the political considerations that prevent unpalatable rises in taxes. Finally, the public interest is served by flow control because C & A Carbone would otherwise be able to "rely on the municipal facility when that was advantageous but opt out whenever the transfer station's price rose above the market price," thus causing the local residents to assume the burden of payment for C & A Carbone's private business profits.<sup>152</sup>

The brevity of the Court's opinion underlines the fact that a single value is at stake: the operation of the market for entrants into the waste disposal business in Clarkstown. No complications such as the quality of the disposal that the ordinance called for disturb this single vision of market entry. Why is the more expensive, safer disposition of the waste not weighed against disposition in unlined landfills? Why is Carbone's selection of recyclable cardboard and other low-priced, less-difficult-to-handle waste irrelevant to the Court's opinion?<sup>153</sup> In effect, what the less sophisticated waste handlers like C & A Carbone do is deal only with easy recycling materials, naturally charging lower fees to those users, but leaving the taxpayers to make up the difference in other cases under the "put or pay" arrangement. The presence or absence of an actual loss of out-of-state business played no part in the Court's opinion because its interpretation of the dormant Commerce Clause was normative: the Court is committed to the extended view of the market as the touchstone of the dormant Commerce Clause, rather than to "the right to compete on terms independent of one's location."<sup>154</sup> The major value to be protected under this framing of the issue is additional waste businesses' entry into the market for waste disposal and cheaper prices for businesses using the cardboard recycling services.<sup>155</sup> This type of reasoning "dumbs down" the constitutional protection from an overall sense of even-handedness to serving as a handmaiden for private business profit. With such a circumscribed approach, no other considerations need enter into the decision-

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152. *Id.* at 1702 (Souter, J., dissenting). C & A Carbone (Carbone) stated that customers must pay \$11 more per ton to use the designated facility at the Clarkstown transfer station because Carbone deals in recyclables that do not need state-of-the-art waste technology. *Id.* at 1699 (Souter, J., dissenting).

153. *But see id.* (Souter, J., dissenting) (finding significant that "90 percent of Carbone's waste stream comprises recyclable cardboard, while the Clarkstown facility takes all manner of less valuable waste, which it treats with state-of-the-art environmental technology not employed at Carbone's more rudimentary plant").

154. *Id.* (Souter, J., dissenting).

155. *See, e.g.*, Briefs of Amici Curiae in Support of Petitioner, C & A Carbone, Inc. v. Town of Clarkstown, 113 S. Ct. 2411 (1993) (No. 92-1402) (including Chemical Manufacturers Association and American Automobile Manufacturers Association, among other businesses).

making process, and the primacy of interstate entry into the waste business necessarily overwhelms local public interest.<sup>156</sup>

The *Carbone* case, whatever its environmental merits or demerits,<sup>157</sup> adopts a particular economic approach which might fairly be characterized as compatible with an economic libertarian philosophy. In that regard, *Carbone* harks back to the attempt earlier in the century to shape similar results under the Due Process Clause in *Lochner v. New York*<sup>158</sup> by adopting a particular economic philosophy. Before the decision in *Carbone*, Judge Richard Posner, the leading proponent of using economic insights into legal issues, wrote about the dangers of exclusively economic approaches to the Constitution. While Judge Posner was not discussing any particular case, he warned in general terms against extensive alignment of the Constitution to the economic libertarian approach on the grounds that too close a connection with any single approach exacts a costly exclusion of other possible solutions and interpretations:

Like any form of aggressive constitutionalism, whether left-wing or right-wing, the economic libertarian approach (whether it takes the form of reinterpretation of the existing Constitution, amendment, or both) diminishes the role of democracy — potentially dramatically. . . . What is envisaged therefore is a drastic curtailment, across the board, in the scope of permissible legislative, executive, and administrative action. . . . The scope of democratic government would not quite be limited to the selection and oversight of persons administering a small number of relatively uncontroversial functions . . . . But that is the direction in which the proposal tends.<sup>159</sup>

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156. See Laura Gabrysch, Note, *Dormant Commerce Clause—Flow Control Ordinances That Require Disposal of Trash at a Designated Facility Violate the Dormant Commerce Clause*, 26 ST. MARY'S L.J. 563 (1995) (explaining that Supreme Court has restricted use of dormant Commerce Clause as test for free entry into market).

157. See Sidney M. Wolf, *The Solid Waste Crisis: Flow Control and the Commerce Clause*, 39 S.D. L. REV. 529, 530 n.15 (1994) (suggesting that flow control does not provide enough protection for major environmental goals of reducing production of waste and recycling).

158. 198 U.S. 45 (1905); see PAUL KENS, *JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK* (1990) (detailing *Lochner* history and setting forth its effects on economic and legal theories); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987) (explaining that *Lochner* Court required government neutrality, defining this notion as whether state threatened shift of common-law distribution of wealth and entitlements); see also Gary C. Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361, 1420 (1979) (noting that in balancing legislative ends, Supreme Court is "unleashed" to substitute its policy judgments for those of state legislatures).

159. Posner, *supra* note 5, at 21; see also Martin H. Redish & Shane V. Nugent,

While the likely dangers of an exclusive approach are more extensive than a single case might impose, it is nevertheless instructive to examine the effect of *Carbone* on state environmental legislation from the point of view of democratic political practice, which the Supreme Court, as an unelected body, does not represent.<sup>160</sup> Of course, Congress, representing the nationally elected majority, if it so decides, can undo any ill effects arising from the dormant Commerce Clause decisions of the Supreme Court, although what is necessary to evoke congressional response in any particular case is frequently uncertain.<sup>161</sup>

Judge Posner's concerns can be applied to the situation in *Atlantic Coast*. The New Jersey legislature passed a statute to deal with a difficult waste disposal situation requiring intricately balanced financing.<sup>162</sup> According to Judge Posner, the Commerce Clause protects against the danger of the federal system "degenerating into a loose confederation, riddled with externalities," referring, in effect, to those who can shift part of their private economic costs to the taxpaying public.<sup>163</sup> Therefore, the New Jersey statute is subject to being tested by the fire of the dormant Commerce Clause. Using

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*The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 581-90 (arguing that free trade between states should only be a constitutional principle if such words appear in text of Constitution and not if merely judge-made).

160. See generally Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMMENTARY 395, 400-10 (1986) (exploring possible judicial roles in state regulation). Farber suggests that the "practical effects of current [Commerce Clause] doctrine may be more profound, however, than individual cases suggest. Because the outcomes of the cases are so unpredictable, the doctrine may well have a chilling effect on legitimate state regulation." *Id.* at 414.

161. Representative Chris Smith, Republican from New Jersey of the House Energy & Commerce Committee, introduced an amendment to RCRA's Solid Waste Disposal Act. The bill was referred to the House Commerce Committee. Representative Smith stated that Mercer County could lose \$71 million in bonds. 140 CONG. REC. H5457, 5458 (daily ed. June 30, 1994) (statement of Rep. Smith); see 141 CONG. REC. H291 (daily ed. Feb. 8, 1995) (statement of Rep. Smith) (asserting that restoration of flow control authority to state and local governments is necessary because of significant debt amassed by communities). Senator Frank Lautenberg, Democrat from New Jersey, stated that New Jersey has an investment of more than \$2 billion in flow control facilities. 140 CONG. REC. S7371, 7372 (daily ed. June 21, 1994) (statement of Sen. Lautenberg). See generally Engel, *supra* note 12, at 1546-51 (discussing congressional options for managing distribution of nation's solid waste).

162. *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701, 702 (3d Cir. 1995).

163. Posner, *supra* note 5, at 28. See generally William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355 (1994) (explaining that Commerce Clause jurisprudence is concerned with maintaining boundaries between state and national authority and is "natural laboratory" for development of federalist theory).



the current interpretation of the dormant Commerce Clause, the waste businesses that wish to come from outside the area to which the waste statute or ordinance applies may take advantage of the dormant Commerce Clause if they are offering, at least in the beginning, cheaper prices because they do not have to pay the cost of building the waste facility or cannot provide the range of services the designated facility offers.<sup>164</sup> In the end, however, the costs affected by the challenging business, either to the environment or to the taxpayer may prove to be far greater.<sup>165</sup>

One commentator, Sidney Wolf, sees the opposite danger. Recognizing the seriousness of the "garbage" problem in the United States, he nevertheless focuses on constitutional jurisdiction and worries more that "[t]he courts which have sanctioned flow control have simply ignored or distorted the prior decisions of the Supreme Court regarding waste flow. This may arguably be good environmental policy but it is not good constitutional jurisprudence."<sup>166</sup> But even this assertion is disputed in this very vexed area of law with its extremely complicated facts, as an analogy to nineteenth-century quarantine and meat inspection cases shows.<sup>167</sup> Fur-

164. See Engel, *supra* note 11, at 1514-15 & n.144. The startup costs are higher, but continued reliance on out-of-state disposal is expected to prove even costlier in the future than actively building new disposal facilities. *Id.* at 1514-15 & n.143. Testimony during congressional hearings suggests that cheaper export of solid waste allows avoidance in waste reduction, recycling and upgrading disposal facilities. *Id.* at 1517 n.153 (citing *Interstate Transportation of Solid Waste: Hearings Before the Subcomm. on Transportation and Hazardous Materials of the Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 80, 300 (1991) (statement of Allen Hershkowitz, Natural Resources Defense Council)).

165. See Mesnikoff, *supra* note 37, at 1241-42 n.107 (stating that counties are reassessing whether it is financially feasible without flow control to install composting facilities and providing example of county that put its composting plans on hold, fearing Commerce Clause litigation would deprive facility of flow of waste necessary for financing). If a new facility eliminated the need to export waste, private haulers would have incentives to tie up the plant in Commerce Clause litigation. See Petersen & Abramowitz, *supra* note 17, at 390 (stating that two Ohio facilities have already shut down because of concerns about waste supply in absence of legislative flow control). See generally Charles T. DuMars, *State Market Power and Environmental Protection: A State's Right to Exclude Garbage in Interstate Commerce*, 21 N.M. L. REV. 37 (1990) (examining continuing marginalization of environmental and health concerns in name of free trade).

166. Wolf, *supra* note 157, at 568 (citation omitted). In further support of his argument, Wolf noted that "Americans produce more garbage, both per person and in absolute amounts, than any other nation in the world." *Id.* at 529.

167. At the time, the quarantine cases were not deemed violative of the dormant Commerce Clause. The quarantine laws banned the importation of noxious articles which endangered the public health. See ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876*, at 143-66 (1985) (discussing impact of *Slaughterhouse Cases*). See generally Charles W. McCurdy, *The Knight Sugar Decision of 1895 and The Modernization of American Corporation Law, 1869-1903*, 53 BUS. HIST. REV.

thermore, the intent of the Commerce Clause may not originally have been to institute free trade, which was simply one of many aspects of general welfare entrusted to Congress.<sup>168</sup> If that is the case, the Court's current judicial activism may disturb not only the constitutional balance favoring federalism, in the form of state and local laws, but also the balance favoring democracy, in the form of statutes and policies made by elected representatives.

Some recent views of federalism set forth the prospect of returning power to the states as the ultimate repositories of democracy. For example, in *New York v. United States*,<sup>169</sup> which deals with a federal statute enacted pursuant to the congressional commerce power rather than dormant Commerce Clause, Justice O'Connor held that a requirement that the states assume responsibility for radioactive waste located in their jurisdictions was unconstitutional on the grounds of coercion.<sup>170</sup> The Court found that Congress had numerous methods of getting New York to do what it wished without violating the Constitution.<sup>171</sup> Thus, federalism could be pro-

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304 (1979) (discussing forces transforming American corporate law); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970, 1004-05 (1975) (warning generally against linking earlier laissez-faire philosophy's economic materialism too closely with judiciary).

168. Thomas K. Anson & P.M. Schenkkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 TEX. L. REV. 71, 78-79 n.31 (1980). No evidence exists that the Commerce Clause was intended to institute free trade or that the courts were authorized to supervise state legislation. *Id.*; see also Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491-93 (1987) (book review) (asserting position that original intent of Constitutional framers and ratifiers was to increase power of states and decrease power of federal government).

169. 505 U.S. 144 (1992).

170. *Id.* at 149. At issue was a federal statute in search of a state-based solution for the radioactive waste disposal problem. *Id.* at 169-70. The statute could be understood either as mandating regulation or as offering a series of incentives to the state for carrying out federal policy. *Id.* Justice O'Connor asserted that the federal government must respect state governments as the seat of autonomous legislative processes and that the court has the duty to police congressional encroachment on the autonomy of the states in obedience to the spirit of the Tenth Amendment. *Id.* at 174-77; see H.J. Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993) (discussing Justice O'Connor's concept of federalism in *New York v. United States*); see also *Gregory v. Ashcroft*, 501 U.S. 452, 456-70 (1991) (examining applicability of federal age discrimination statute to states' mandatory retirement ages for judges).

171. *New York*, 505 U.S. at 166-69. First, the Court noted that Congress' spending power enabled Congress to "attach conditions on the receipt of federal funds." *Id.* at 167 (quoting *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)). In utilizing this method, however, Congress must establish conditions that bear "some relationship" to the purpose of the federal funds. *Id.*

Second, the Court proposed the notion of "cooperative federalism." *Id.* This arrangement could be used where Congress has Commerce Clause authority to

moted without thwarting congressional will. Federalism, however, does not extend protection to state legislation that the Supreme Court deems violative of the national market. Accordingly, the role of dormant Commerce Clause jurisprudence in this new federalism regulates, and indeed, limits, what the states can do in their democratic attempts to solve local problems.

At present in the waste control situation, rather than have Congress either legislate solutions or mandate that the states devise solutions within certain parameters, the states are free to devise their own solutions. Nevertheless, the Supreme Court serves as the guardian of whether the states have paid sufficient attention to free trade in their regulations and legislation. The traditional statement of the role of the dormant Commerce Clause as the charter of free trade has not changed.<sup>172</sup> What may be bringing about different results in dormant Commerce Clause cases striking down local ordinances and statutes is the conclusion that the Court draws from the factual presentations of the cases. For example, protection for entrants with limited environmental technological capabilities was permitted under the majority opinion in *Carbone* that struck down the local waste flow ordinance in Rockland County. As commentators Eskridge and Ferejohn concluded: "what matters is the Court's perception of external effects."<sup>173</sup> These authors point out that earlier cases upholding local legislation with insignificant external effects might not be upheld today because of the primacy economic arguments presently enjoy.<sup>174</sup> In that sense, free trade becomes the overriding concern that can cause entire schemes, provisions and building projects to be halted, should the regulation later be deemed to have violated free trade, whether intentionally or incidentally. That harm to free trade is the time bomb that vitiates the

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regulate private activity. *Id.* In that situation, the Court recognized Congress' power "to offer states the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *Id.* (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)).

172. See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-26 (1935) (detailing Commerce Clause analysis with respect to pricing of out-of-state milk). Justice Cardozo, explaining the rationale for the dormant Commerce Clause, stated that the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Id.* at 523. *But see* Regan, *supra* note 83, at 1252 (characterizing above passage by Justice Cardozo as "rhetorically inflated" description of "the evil of protectionism [and n]othing more").

173. Eskridge & Ferejohn, *supra* note 163, at 1397.

174. *Id.* at 1397-98 (citing *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), finding constitutional state law that required state licensed pilots in Philadelphia harbor).

state legislation.<sup>175</sup>

The economic aspects of federalism, as expressed in the Commerce Clause and practiced by the Supreme Court in its dormant Commerce Clause jurisprudence, become relatively more or less important in scope according to the value given to the principle of democracy. When the Supreme Court puts a premium on democracy, it emphasizes the right of state-elected legislatures to act under their police powers.<sup>176</sup> When the Court is more mindful of *laissez-faire*, the dormant Commerce Clause cases emphasize the "charter of free trade." Other commentators have seen the same danger that Judge Posner warned us about.<sup>177</sup> Additionally, Professor Daniel Farber concludes that the constitutional provision in the Commerce Clause for free trade does not justify expansive judicial review:

Even in relatively unimportant areas, there is something to be said for allowing the people of a state to determine their laws through the democratic process. These values of federalism and democratic self-rule are impaired when a federal court imposes its own view of desirable social policy on the states.<sup>178</sup>

Applying Farber's insight to *Carbone*, the majority of the present Court is not allowing a balancing test for state legislation when

175. See Regan, *supra* note 83, at 1093 (explaining that dormant Commerce Clause jurisprudence concerning "movement-of-goods" cases has dealt exclusively with Supreme Court prohibiting states from engaging in "purposeful [economic] protectionism").

176. See *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827) (Marshall, C.J.) (holding unconstitutional license fee for sale of imports and illustrating Supreme Court's early recognition of police power); SIDNEY FINE, *LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT, 1865-1901*, at 151-62 (1964) (discussing role of strong adherents of *laissez-faire* in restricting role of police power); C.M.A. McCauliff, *Constitutional Jurisprudence of History and Natural Law: Complementary or Rival Modes of Discourse?*, 24 CAL. W. L. REV. 287, 293-311 (1988) (discussing Justice Horace Gray's role in supporting state police power and Justice Stephen Field's circumscription of state police powers during post-civil war liberalism).

177. See generally Edmund W. Kitch, *Regulation and the American Common Market*, in *REGULATION, FEDERALISM AND INTERSTATE COMMERCE* 9, 36-45 (A. Dan Tarlock ed., 1981) (comparing state and federal roles in American common market); Earl M. Maltz, *How Much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47, 58-64 (1981) (finding that inherent problems in Supreme Court's balancing test for Commerce Clause cases have led to inconsistent Commerce Clause jurisprudence).

178. Farber, *supra* note 160, at 414. Moreover, Farber stated that "[u]nder current doctrine, courts are asked to decide whether *laissez-faire* is better national policy than state regulation. Such policy determinations are better left with more democratic institutions." *Id.*

that legislation may adversely affect out-of-state firms. In his dissenting opinion in *Carbone*, Justice Souter was careful to recognize the need to balance the benefits of a flow control ordinance against the possible economic harm it might cause to people in other states.<sup>179</sup> Unlike the majority, Justice Souter found no per se discrimination.<sup>180</sup> Notably, decisions invalidating state regulations under the dormant Commerce Clause advance judicial power vis-à-vis state power, challenging by implication the strength of both federalism and democratically-elected state legislatures.

At various points in our history, different accommodations have been made between economic libertarianism (and its earlier incarnations) and the extreme claims of democracy.<sup>181</sup> Both approaches go too far. In the past and more recently, however, moderate parties and administrators, from the Whigs of yesterday to the economic regulators of today (who see private business, if not in partnership with government, then at least as two legitimate constituents of the commonwealth), have struck a workable balance between socialism, on the one hand, and leaving the market unfettered, on the other hand. Such a balance is never permanent and is always subject to reassessment.<sup>182</sup> "In our modern society, a tension exists between those values favoring individual freedom

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179. *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1699 (1994) (Souter, J., dissenting) (stating that balancing test weighs "nature of the burden on interstate commerce, the nature of the local interest, and the availability of alternative methods for advancing the local interest without hindering the national one") (citing *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970)).

180. *Carbone*, 114 S. Ct. at 1698-1702 (Souter, J., dissenting).

181. See, e.g., Roger J. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L.F. 230, 231 (noting that *laissez-faire* "commanded easy acceptance" in 19th century, but "had ceased to be acceptable by the depression years, the years of reckoning for the age of heedlessness"); see also Aaron Director, *Preface to HENRY C. SIMONS, ECONOMIC POLICY FOR A FREE SOCIETY*, at v, vi (1948):

There may once have been substantial merit in the notion that the free-market system would steadily gain in strength if only it were freed of widespread state interference. By 1934, it became evident that a combination of the negative attitude, which permitted the proliferation of monopoly power, and promiscuous political interference, which strengthened such power, threatened "disintegration and collapse" of the economic organization. And only the "wisest measures by the state" could restore and maintain a free-market system.

*Id.*

182. See Paul S. Dempsey, *Market Failure and Regulatory Failure as Catalysts for Political Change: The Choice Between Imperfect Regulation and Imperfect Competition*, 46 WASH. & LEE L. REV. 1, 7 (1989) (stating that "economic regulation often attempts to replicate the pricing and service levels that would exist in a competitive market, while ensuring the protection of public interest values which are not a high priority in a *laissez-faire* environment").

and those favoring social control.”<sup>183</sup> Extreme positions on both the right (with its unfettered market) and the overly-controlling left send warning calls to the electorate about particular current dangers, but only set the general, basic conditions of society during revolutions. As we swing between these extreme positions today, the voice of viable moderation is often crying in the wilderness, while it is the voice that most needs to be heard.<sup>184</sup>

#### IV. CONCLUSION: THE THIRD CIRCUIT PRESIDES OVER TRIMMED ENVIRONMENTAL SAILS IN DEFERENCE TO FREE TRADE

The importance of the dormant Commerce Clause to those who value free trade as a central constituent of the economic libertarian interpretation of the Constitution cannot be over-estimated. The arguments they make return us to the times of the original constitutional debates in the early history of our nation, in that every assumption and previous choice of value is ripe for discussion and reassessment. Therefore, the Supreme Court decisions are only the legal reflection of the fundamental values which we bring to an interpretation of the Constitution. Burkean historicism would lean towards consistent use of precedents and slow departure from long-standing historical trends. But if we step back from the current situation, it is evident that the pendulum of predominating interpretation and theory has swung back and forth more than once in the two-hundred-year history of our Constitution.<sup>185</sup> Use of the Commerce Clause to strike down state laws is not by itself inconsistent with democratic or popular rule. Indeed, no conflict at all exists when Congress invalidates state laws on the grounds of interference with interstate laws.<sup>186</sup> Economic libertarianism as a “con-

183. FRIEDRICH KESSLER ET AL., *CONTRACTS: CASES AND MATERIALS* 2 (3d ed. 1986).

184. See Dempsey, *supra* note 182, at 40 (“Can we find a prudent middle ground between excessive regulation and excessive *laissez faire*? . . . [The] careful adjustment of the appropriate level of government vis-a-vis the market . . . poses the most challenging opportunity for creative minds during the next decade.”).

185. See, e.g., McCauliff, *supra* note 176, 293-311 (discussing differing views of state police power); Sunstein, *supra* note 158, at 874 (describing requirement of government neutrality put forth by Supreme Court in *Lochner*); see also Dempsey, *supra* note 182, at 39 (discussing how economic regulation tries to replicate competitive market while ensuring public interest not otherwise safeguarded by *laissez-faire* environment); Eskridge & Ferejohn, *supra* note 163, at 1359-60 (citing Taney, Fuller & Taft Courts as limiting congressional power over state and local issues in years 1828, 1860, 1896, 1932 and 1980).

186. It may, however, be inconsistent with democratic principles that once Congress has enacted a law which the states apparently accept, the Court, as an appointed body, nevertheless strikes down the law on Commerce Clause grounds. See, e.g., *United States v. Lopez*, 115 S. Ct. 1624 (1995) (declaring unconstitutional

servative" philosophy is not so much conserving as it is actively seeking to set forth an interpretation of the Constitution that was absent in the recent past, and indeed arguably absent at the adoption of the Constitution.<sup>187</sup> The methodologies used to achieve this new vision are basically policy arguments, focusing away from the recent precedents emerging from the New Deal, consumerism and the era of environmental awakening and concern. Americans are privileged to be living at a time when our constitutional arguments are taken very seriously and have great, and even grave, consequences.

The danger in this momentous reassessment, however, is the possible demotion or even loss of other centrally important values in the process. The faculty of seeing things whole must not be lost<sup>188</sup> as Americans seek reform.<sup>189</sup> An analysis borrowed from outside constitutional law, but not far removed from free trade and freedom of contract, demonstrates that there are two basic analytical approaches to constitutional questions. The first involves singling out one major cornerstone of the Constitution which must at

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law prohibiting firearms in school zones, although school zones would be safer if they were gun-free); *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994) (demonstrating that Congress and states could be seen as having had understanding about states' responsibilities in erecting waste facilities, but Court nevertheless invalidated flow control laws, even though environment and public interest may be better served by long-term planning for waste facilities).

187. See, e.g., John J. Gibbons, *Keynote Address, Symposium: Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 260, 265 (1981) (accepting Commerce Clause invalidation of state legislation as democratic insofar as the Court represents "the national majority"); see *Swin Resource Sys., Inc. v. Lycoming County*, 883 F.2d 245, 257-62 (3d Cir. 1989) (Gibbons, J., dissenting) (disagreeing with majority view that applied market participant exception), *cert. denied*, 493 U.S. 1077 (1990); Mank, *supra* note 112, at 37-41 (discussing Judge Gibbons' analysis of market participation doctrine); see also Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 442 n.89 (1982) (noting that appropriate branch of government to represent majority is representative legislature, elected by people, rather than unelected judiciary); *id.* at 430 (suggesting that Constitution made no attempt to deal extensively with free trade unlike later constitutions such as Australian constitution); Anson & Schenkkan, *supra* note 168, at 78-80 (same). See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 8-6, at 578-81 (2d ed. 1988) (discussing Court's adoption of economic philosophy); Posner, *supra* note 5, at 10-24 (same).

188. See C.M.A. McCauliff, *Freedom of Contract Revisited: Johnson Controls*, JOURNAL OF CONTRACT LAW (forthcoming 1996) (citing STROUD F. C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* (2d ed. 1981) for rule of law and importance of faculty of seeing things whole to development of law).

189. See C.M.A. McCauliff, *Law as a Principle of Reform: Reflections from Sixteenth-Century England*, 40 RUTGERS L. REV. 429 (1988) (describing broad legal and religious background to idea of necessary and continuing reform in human institutions in thoughts of Richard Hooker (1554-1600), prominent source for work of great Whig, John Locke (1632-1704)).

all times be protected. The second involves using a panoply of reasonable arguments to weave together a picture of the underlying values which the Constitution must protect, including democratic government, the public interest, health and safety, and the environment.<sup>190</sup> It may be that both of these approaches are equally important for the continued health of the Constitution and democratic government, but that at one period or another, either the single value (which is free trade at present) or the bundle of intertwined values must take the fore. Thus, the single value may be necessary to bring about a radical reform, and greater attention to multiple values may be needed during ordinary, stable times. Today, when several Justices, to say nothing of legal commentators and other branches of the government, find significant deterioration in the conditions of our lives, perhaps the only way to focus on reexamination of the basic tenets of our Constitution is to single out one individual value as a metaphor for the whole Constitution. Choosing one extreme value might best express the desire for a change in attitude by symbolizing the reformers' approach because the choice of a more moderate shared or centrist value would not underline the need for change. Today's single value for the economic libertarian is the free market, manifested in the waste financing cases as free interstate trade protected by the dormant Commerce Clause. Both the free market and social responsibility offer core values that contribute to a well-balanced society. Imbalance arises from sacrifice of either of the two. While the ideological pendulum is swinging back and forth between the extremes of too much government regulation to unfettered *laissez-faire*, it becomes very important to speak out for the values of the approach momentarily in danger of being lost in the stampede to get onto the current swing.

The notion of trusteeship and police powers acts as a corrective when we depart too far from the balance of competing values of individual freedom and social controls, thus potentially endangering the values and culture of the American way of life that the Constitution is designed to protect.<sup>191</sup> The public interest is dam-

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190. See generally Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM. & MARY L. REV. 1379 (1995) (exploring Cardozo's and Posner's use of creativity and ingenuity in legal opinions). For another broad, inclusive approach to judicial decision-making and democracy, see Friedrich Kessler, *Natural Law, Justice and Democracy—Some Reflections on Three Types of Thinking about Law and Justice*, 19 TUL. L. REV. 32, 59-60 (1944) (noting that political democracy must be supplemented by economic and social democracy so that freedom of contract is set in context to secure meaningful liberty).

191. See *Atkin v. Kansas*, 191 U.S. 207, 222-23 (1903) (asserting that state sov-



aged by too aggressive an extension of the dormant Commerce Clause. "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."<sup>192</sup> Environmental and health and safety provisions are among the most important state sovereignty areas<sup>193</sup> and it is only through vigorous debate that balance can be restored. This is healthy constitutionalism. The environment which conservationists must pass along to the next generation, also in a healthy condition, may, however, bear the risk of this constitutional realignment. The values which the police power should most protect are health and safety measures, and by extension the environment, on which our health and safety depends.<sup>194</sup> The Third Circuit, long a protector of the environment in this most fragile and crucial environmental area, is nevertheless bound by Supreme Court precedent which, after *Carbone*, is protecting private economic profits at the expense of the public interest in an unsound departure from traditional state sovereignty in environmental protection.

We may therefore expect to find more decisions like *Atlantic Coast* in the future. The current Congress has pending various bills dealing with flow control, but it remains unlikely that Congress will act to regularize the situation in solid waste transfer now, although Congress considered all this in hearings at the time it passed RCRA, which was taken as the encouragement for flow control initially.<sup>195</sup> The original congressional policy was based on the need for steady long-term facilities, which are very expensive to build. Public health and safety provided the reason for the legislature's action. While the Constitution itself ranks extremely high among all the

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ereignty recognizes state as "trustee for its people"); see also Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970) (outlining contemporary doctrine of public trust and explaining that "trusteeship" constrains states in land dealings).

192. Petersen & Abramowitz, *supra* note 17, at 391.

193. See *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) (recognizing that "[l]egislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of . . . the police power").

194. See Twyman, *supra* note 52, at 431-38 (discussing discrimination-in-effect model for Commerce Clause analysis and noting that health and safety regulations warrant protection).

195. See generally Petersen & Abramowitz, *supra* note 17, at 371 (noting that early flow control ordinances became "primary means by which local governments could support their facilities and secure a steady revenue stream").

values we, as Americans, want to protect, if we do not do so prudently, we may imperil the environment as well as important societal choices deserving of preservation. For example, the Supreme Court failed to recognize solid waste, which damages large areas of land and adjoining groundwater, as a health hazard<sup>196</sup> serious enough to permit the states to use flow control either of external waste into the state<sup>197</sup> or of local waste within a county.<sup>198</sup>

Further, judicial and theoretical use of a market analysis in the first place may reduce the environment to commodity status. The marketing of pollution and the purchase of the environment "assumes that environmental benefits are things that citizens must purchase, rather than that citizens have an entitlement to a pristine environment that polluters must purchase."<sup>199</sup> It is undeniable that there are societal and economic costs to pollution because polluters are allowed, in the course of their normal business activity, to leave the consequences and costs of cleaning up the environment to society. That, in itself, is a market failure. In allocating costs of doing business, the market does not take into account the environmental and societal damage the polluter causes. That market failure simply provides one more reason to say that "the buck stops," not with whatever the market system provides, but with whatever we, as reasoning human beings, decide we wish to do in solving environmental, or indeed any other, problems subject to constitutional analysis. "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."<sup>200</sup> It may be that *Atlantic Coast* will require a solution similar to Kinsley Landfill after *City of Philadelphia*, when the scarcity of space in Kinsley grew acute and the state court had to permit New Jersey to exclude waste from Philadelphia after all. If the present danger in the facts of *Atlantic Coast* calls for emergency measures in the pending remand of *Atlantic Coast* to deal with yet another crisis, the moderate voice exiled to the wilderness will be allowed to be heard again in the arena of dormant Commerce Clause jurisprudence.

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196. See ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 203-04 (1992) (explaining hazards of municipal wastes).

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

198. *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994).

199. Engel, *supra* note 12, at 1511 n.135.

200. Petersen, *supra* note 17, at 416.

