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"SSC Corp. v. Town of Smithtown and USA Recycling, Inc. v. Town of Babylon:" Reinvigoration of the Market Participant Exception in the Arena of Municipal Solid Waste Management

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Recent Development

SSC Corp. v. Town of Smithtown and *USA Recycling, Inc. v. Town of Babylon:* Reinvigoration of the Market Participant Exception in the Arena of Municipal Solid Waste Management

I. INTRODUCTION

Residents and commercial enterprises in the United States generate an enormous amount of solid waste. The responsibility of managing the collection and storage of this waste has traditionally

been a municipal function,[1] and disposal of the waste is a dilemma that perpetually confronts the states.[2] With the advent of stricter federal guidelines concerning the disposal of solid waste, state and local governments have been forced to implement creative approaches to handle an ever-increasing supply of garbage.[3]

The two predominant strategies used by local governments to address the dilemma are import restrictions and export restrictions.[4] Import restrictions protect landfills by limiting the amount of waste entering the jurisdiction.[5] Responding to environmental concerns over landfills, Congress recently encouraged states and municipalities to construct more environmentally efficient facilities.[6] However, these incinerators, recycling facilities, and other waste transfer and disposal facilities incur tremendous expenses.[7] Therefore, municipalities have pursued a second strategy of imposing export restrictions in order to support the facilities.[8] The "flow control" ordinance, a common example of an export restriction, regulates the

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1. See generally Eric S. Petersen and David N. Abramowitz, *Municipal Solid Waste Flow Control in the Post-*Carbone *World*, 22 Fordham Urban L. J. 361 (1995) (discussing the role of local governments concerning waste management in ligbt of mandates from Congress and the Supreme Court).

2. For a discussion of the solid waste dilemma, see generally Sidney M. Wolf, *The Solid Waste Crisis: Flow Control and the Commerce Clause*, 39 S.D. L. Rev. 529 (1994) (describing the massive amount of garbage produced by Americans and efforts to address the problem); Philip Weinberg, *Congress, the Courts, and Solid Waste Transport: Good Fences Don't Always Make Good Neighbors*, 25 Envir. L. 57 (1995) (same); Daniel M. Weisberg, Comment, *Taking Out the Trash—Where Will We Put All This Garbage?*, 10 Pace Envir. L. Rev. 925 (1993) (same); Jonathan P. Meyers, Note, *Confronting the Garbage Crisis: Increased Federal Involvement as a Means of Addressing Municipal Solid Waste Disposal*, 79 Georgetown L. J. 567 (1991) (same).

3. Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA), which delegated to the states the responsibility to provide for the adequate disposal of solid waste. Pub. L. No. 94-580, 90 Stat. 2795, codified at 42 U.S.C. §§ 6901 et seq. (1988 ed. & Supp. V). A primary consequence of RCRA was the gradual phasing out of open dumps and landfills. See William L. Kovacs and Anthony A. Anderson, *States as Market Participants in Solid Waste Disposal Services—Fair Competition or the Destruction of the Private Sector?*, 18 Envir. L. 779, 780-82 (1988) (discussing the impact of RCRA); Weinberg, 25 Envir. L. at 57-58 (cited in note 2) (analyzing statos' reactions to RCRA and the expanding volume of wasto). See generally 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 (1995) (providing a perspective on the current state of municipal solid waste management).

4. Wolf, 39 S.D. L. Rev. at 531-32 (cited in note 2).

5. Weinberg, 25 Envir. L. at 58 (cited in note 2) (mentioning the strategy of import bans); Meyers, 79 Georgetown L. J. at 575 (cited in note 2) (same).

6. See RCRA § 4003(a)(2), 42 U.S.C. § 6943(a)(2) (requiring states that receive financial assistance under RCRA to "prohibit the establishment of new open dumps" and to mandato that all solid wasto be either "utilized for resource recovery" or "disposed of in sanitary landfills"). See also note 3.

7. See Wolf, 39 S.D. L. Rev. at 537 (cited in note 2) (discussing the enormous costs of wasto facilities).

8. See Petorsen and Abramowitz, 22 Fordham Urban L. J. at 364-65 (cited in note 1) (discussing the enactment of export restrictions in response to congressional pressure).

flow of garbage by dictating that waste generated within the jurisdiction be transported to specific waste disposal or transport facilities.[9] Export restrictions ensure that a sufficient volume of waste is transported to facilities in which the municipality retains a financial stake.[10]

The Supreme Court, however, has struck down certain forms of both import and export restrictions as violations of the Dormant Commerce Clause.[11] Historically, governmental defendants could avoid dormant commerce clause scrutiny by claiming the market participant exception. Under this exception, if a state acts as a market participant rather than a market regulator, it may be immune from dormant commerce clause scrutiny.[12]

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9. Wolf, 39 S.D. L. Rev. at 532, 536-39 (cited in note 2); Petersen and Abramowitz, 22 Fordham Urban L. J. at 364-65 (cited in note 1).

10. Essentially, the financial arrangement between the municipalities and the disposal facilities has been a "put-or-pay" arrangement. Wolf, 39 S.D. L. Rev. at 538 (cited in note 2). If a municipality does not "put" a certain amount of waste in the facility each year, it must "pay" the difference between the amount and the contractual term. Id. See Petersen and Abramowitz, 22 Fordham Urban L. J. at 371-73 (cited in note 1) (discussing the importance of export restrictions as a credit risk security); Stanley Cox, *Burying Misconceptions About Trash and Commerce: Why it is Time to Dump* Philadelphia v. New Jersey, 20 Capital U. L. Rev. 813, 840 (1991) (discussing the financial rationale for flow control).

11. See, for example, *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (invalidating an import ban scheme); *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994) (invalidating a flow control ordinance). Dormant commerce clause analysis is rooted in the Commerce Clause of the Constitution: "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several states." U.S. Const., Art. I, § 8, cl. 3. The Supreme Court has interpreted the clause to limit the authority of states to enact regulations that discriminate against interstate commerce. See, for example, *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 190 (1938) (requiring state regulation of trucks to further a legitimate interest and have a reasonable relationship to that interest); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945) (creating a balancing standard between the interest of national uniformity and the interest of a state involving a statute regulating the number of train cars). Eventually in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), the Court developed the modern formula, holding that "[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

State statutes that are facially discriminatory are virtually per se invalid. See, for example, *City of Philadelphia*, 437 U.S. at 624 (striking down a state statute that prohibited out-of-state waste from being transported in-state). Furthermore, statutes that have discriminatory effects on interstate commerce are unconstitutional unless the state can show that it is advancing a legitimate interest and that the method employed is the least burdensome alternative. See, for example, *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951) (striking down a municipal statute requiring milk to be pasteurized within a five-mile radius of the city because it disproportionately disadvantaged out-of-state dairy producers); *Hunt v. Washington Apple Advertising Commn*, 432 U.S. 333, 350 (1977) (striking down a North Carolina statute requiring all apples sold in the state to display a federal classification or none at all because it disadvantaged certain out-of-state producers).

12. See, for example, *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (upholding a Maryland subsidy program).

The essence of the market participant doctrine stems from three classic cases. In *Hughes v. Alexandria Scrap Corp.*,[13] the Supreme Court upheld a Maryland subsidy program for processing junk automobiles formerly titled in Maryland.[14] The statute forced out-of-state junk processors to adhere to stricter procedural guidelines than in-state processors.[15] The *Alexandria Scrap* Court held that since Maryland was acting as a "purchaser" by offering bounties for the automobiles, the Commerce Clause did not preclude it from "participating in the market and exercising the right to favor its own citizens over others."[16] A divided Court in *Reeves, Inc. v. Stake*[17] extended the market participant exception to instances where a state acts as a seller.[18] Central to the majority's reasoning in *Reeves* was the belief that states should enjoy the same amenities as private businesses when functioning as market participants.[19] The Court next addressed the issue in *White v. Massachusetts Council of Construction Employees, Inc.*,[20] where it upheld a Boston law requiring all construction projects funded by the city to employ city residents as at least half of their work force.[21] The *White* Court held that because Boston acted as a buyer by funding the projects, it served as a market participant and could grant preferences to its own citizens.[22]

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13. 426 U.S. 794 (1976).

14. Id. at 796-801. The intent of the statute was to alleviate the problem of abandoned vehicles. Id. at 796.

15. Id. at 800-01.

16. Id. at 810.

17. 447 U.S. 429 (1980). *Reeves* involved a state-owned South Dakota cement plant that limited its sales to state residents. Id. at 432.

18. Id. at 436-37. According to the Court,

> [t]he basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulaters makes good sense and sound law. As that case explains, the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.

Id. (citations omitted).

19. Id. at 439. Noting the "similarities [between] private businesses and public entities when they function in the marketplace," as well as " 'the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal,' " the Court concluded that "[e]venhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints." Id. at 438-39, 439 n.12 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

20. 460 U.S. 204 (1983).

21. Id. at 205-06.

22. Id. at 207. A puzzling aspect of the decision, however, was the Court's struggle to define limits for the exception. On one hand, *White* was consistent with *Alexandria Scrap* and *Reeves* as it maintained that the effects of Bosten's activity on the labor market (of which it was

These three cases indicated that analysis should focus simply on whether the new governmental entity acted as a regulator or as a participant. *South-Central Timber Development, Inc. v. Wunnicke*,[23] however, suggested additional requirements for the scope of the market participant exception. In *South-Central Timber*, a plurality of the Court struck down an Alaska statute mandating that all state-owned timber be processed in Alaska[24] and refused to recognize the market participant exception when a state "impose[d] conditions downstream."[25] A critical factor for the Court in distinguishing *South-Central Timber* from *Alexandria Scrap*, *Reeves*, and *White* was the fact that unlike the governmental actors in those cases, Alaska was not a participant in the downstream market being impacted.[26] However, the Court struggled to distinguish the impact on the

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not a participant) were "not relevant to the inquiry" of whether Boston was a market participant. Id. at 209-10. On the other hand, the Court did acknowledge that the scope of the exception does have limitations. Id. at 211 n.7. Yet the Court maintained that it was "unnecessary in this case to define those limits with precision, except to say that we think the Commerce Clause does not require the city to stop at the boundary of formal privity of contract." Id. An important factor for the majority's reasoning was that because the city was expending its own funds, "[e]veryone affected by the order [was], in a substantial if informal sense, 'working for the city.'" Id. It could be argued that the Court insinuated that the downstream labor market really was not affected since the workers were essentially agents of the city. See Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 Mich. L. Rev. 395, 467 (1989) (maintaining that this analysis is "puzzling" and "blink[s] at reality"). Nevertheless, the classic market participant analysis would ignore the economic effect on other downstream markets and merely focus on whether the government was acting as a proprietor or a regulator with respect to the market at issue. See Richard H. Seamon, Note, *The Market Participant Test in Dormant Commerce Clause Analysis—Protecting Protectionism?*, 1985 Duke L. J. 697, 720-21 (stating that the classic market participant analysis does not focus on downstream markets).

23. 467 U.S. 82 (1984).

24. Id. at 84.

25. Id. at 95. The downstream market in this instance was the timber processing market. Id.

26. Id. at 98. The plurality opinion stressed that the market participant exception "is not *carte blanche* to impose any conditions that the State has the economic power to dictato." Id. at 97. The opinion explains:

> Alaska contends that it is participating in the processed timber market, although it acknowledges that it participates in no way in the actual processing. South-Central argues, on the other hand, that although the State may he a participant in the timber market, it is using its leverage in that market to exert a regulatory effect in the processing market, in which it is not a participant. We agree with the latter position.

Id. (citations omitted). The Court later indicated tbat Alaska could have permissibly achieved its goal by means of "vertical integration." Id. at 99. Thus, it appears that the Court would likely have exculpated Alaska's activity if it had participated in both markets. See Bruce B. Weyhrauch, Note, South-Contral Timber Development, Inc. v. Wunnicke: *The Commerce Clause and the Market Participant Doctrine*, 15 Envir. L. 593, 613 (1995) (contending that Alaska "might have prevailed" had it participated in the processing market, but noting the negative consequences of this loophole). This notion appears to have bearing on the Second Circuit's analysis in *SSC Corp.* See 66 F.3d 502, 515 (2d Cir. 1995). See also Parts III.A.2 and IV.

upstream labor market in *White*.[27] The *South-Central Timber* Court further emphasized three factors that were not present in *Reeves*: "foreign commerce, a natural resource, and restrictions on resale."[28]

South-Central Timber presents considerable confusion concerning the parameters of the market participant exception. In particular, the Court's troubling distinction between the fact pattern in *White* and that in *South-Central Timber* has provided unclear precedent for state and local actors seeking guidelines concerning what constitutes impermissible meddling with downstream markets. Because the Supreme Court has avoided explicitly addressing the market participant exception since *South-Central Timber*, this uncertainty lingers.

Given the primary role of municipalities in the business of solid waste disposal, the market participant exception strongly influences municipal solid waste management. Several lower courts have considered whether municipalities may take advantage of the exception as it relates to waste management.[29] This Recent Development examines the market participation exception for municipalities, with a particular focus on its relation to export restrictions on solid waste.

The most notable decisions concerning the market participant exception as applied to export restrictions are the Second Circuit's recent holdings in *SSC Corp. v. Town of Smithtown*[30] and *USA Recycling, Inc. v. Town of Babylon*.[31] These two cases will likely ensure the viability of the market participant exception as a legitimate mechanism by which municipalities may address the problem of solid waste management. Prior to these two cases, the Third Circuit had recognized the market participant exception in the context of import restrictions;[32] *SSC Corp.* and *USA Recycling* authorize the exception for export restrictions as well. The holdings also limit the Supreme Court's decision in *C & A Carbone, Inc. v. Town of Clarkstown, New*

27. The Court maintained that in comparison to Boston's activity, Alaska's practice restricts the post-purchase activity of the purchaser, rather than merely the purchasing activity. In contrast to the situation in *White*, this restriction on private economic activity takes place after the completion of the parties' direct commercial obligations, rather than during the course of an ongoing commercial relationship in which the city retained a continuing proprietary interest in the subject of the contract. *South-Central Timber*, 467 U.S. at 99.

28. Id. at 96.

29. See Part II.

30. 66 F.3d 502 (2d Cir. 1995).

31. 66 F.3d 1272 (2d Cir. 1995). See Part III. The opinions in *SSC Corp.* and *USA Recycling* were issued on the same day.

32. See *Swin Resource Systems, Inc. v. Lycoming County, Pa. Through Lycoming County Solid Waste Dept.*, 883 F.2d 245 (3rd Cir. 1989). See also notes 47-50 and accompanying text.

York,[33] in which the Court struck down an export restriction ordinance because the town did not act as a market participant.[34]

The validity of *SSC Corp.* and *USA Recycling* depends upon the method of market participant analysis employed. Using the classic mode of market participant analysis set forth in *Alexandria Scrap*, *Reeves*, and *White*, the holdings seem correct. Yet, if an analysis akin to that in *South-Central Timber* were adopted, the decisions become difficult to justify. Thus, the Second Circuit's attempt to reconcile the decisions with both the classic market participant exception cases and *South-Central Timber* is inherently flawed. *SSC Corp.* and *USA Recycling* illustrate the conundrum confronting lower courts as a result of the Supreme Court's failure to articulate coherently the market participant doctrine.

SSC Corp. and *USA Recycling* also examine the possible negative effects of granting governments too much power under the market participant exception. An inevitable tension exists between a government's right to engage in the market as a participant and the traditional enjoyment by state and local governments of antitrust immunity. A plausible remedy for this problem is the proposal that as the market participant doctrine expands, antitrust immunity should diminish. Such an approach would help curb the abuse of power that potentially accompanies a market participant if it is not required to adhere to the same standards as private actors.

Part II of this Recent Development explores the use of the market participant exception in response to dormant commerce clause challenges to solid waste management ordinances. Part III discusses the facts of *SSC Corp.* and *USA Recycling* and summarizes the Second Circuit's decisions. Part IV analyzes the opinions in their historical context and suggests a coherent framework for the market participant doctrine which reconciles the tension between the rights of states to act as market participants and the rights of private entities to compete on a level playing field.

II. LEGAL BACKGROUND

States and municipalities have utilized both import restrictions and export restrictions to confront the solid waste crisis.[35] Both of these schemes produced the abundance of litigation that provides

33. 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994).
34. See notes 56-62 and accompanying text.
35. See notes 4-10 and accompanying text.

the context for *SSC Corp.* and *USA Recycling.* The courts have consistently struck down attempts to act as a market regulator in these instances under the Dormant Commerce Clause. In response, state and local governments have attempted to re-structure their strategies in order to utilize the market participant exception.

A. Import Restrictions

The Supreme Court has consistently limited the power of a municipality to impose restrictions on waste entering its territory. In the seminal case of *City of Philadelphia v. New Jersey*,[36] the Court struck down a state statute that prohibited the importation of waste generated out-of-state.[37] Stressing the "evil of protectionism," the *City of Philadelphia* Court maintained that the state's regulation unconstitutionally discriminated against interstate commerce.[38] Nevertheless, the Court suggested it might have ruled differently if the state had owned the landfills protected by the restriction.[39] The Court invalidated similar restrictions in three other cases. In *Fort Gratiot Sanitary Landfill v. Michigan Dept. of Nat. Resources*,[40] the Court relied on *City of Philadelphia* to strike down a Michigan statute requiring private landfill owners to obtain county approval before accepting waste generated out-of-county.[41] In *Chemical Waste Management, Inc. v. Hunt*,[42] the Court invalidated an Alabama statute that imposed a higher disposal tax on imported hazardous waste.[43] Finally, in *Oregon Waste Systems, Inc. v. Department of*

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36. 437 U.S. 617 (1978).

37. Id. at 618.

38. Id. at 626. The Court held that "[t]he New Jersey law blocks the importation of waste in an obvious effort to saddle those outside the Stato with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites. That legislative effort is clearly impermissible under the Commerce Clause of the Constitution." Id. at 629.

39. Id. at 627 n.6. Specifically, the Court asserted that it would "express no opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state-owned resources." Id.

40. 504 U.S. 353 (1992).

41. Id. at 355-57, 359-60. The Court noted that the effect of the statute was to grant local waste generaters "complete protection from competition from out-of-state waste producers." Id. at 361. See generally Shaun Anderson, Comment, Fort Gratiot Sanitary Landfill v. Michigan Dept. of Natural Resources: *Solid Waste Management and the Dormant Commerce Clause*, 28 New. Eng. L. Rev. 745 (1994) (observing the Court's emphasis on principles espoused in *City of Philadelphia*).

42. 504 U.S. 334 (1992). The opinions of *Chemical Waste* and *Fort Gratiot* were issued on the same day.

43. Id. at 336-37, 343. Applying strict scrutiny, the Court maintained that the statute's "additional fee facially discriminates against hazardous waste generated in States other than Alabama." Id. at 342. In a dissenting opinion, Chief Justice Rehnquist suggested that if the disposal facility were owned by the state, the market participant doctrine would preclude judicial

Environmental Quality of the State of Oregon,[44] the Court invalidated an Oregon statute imposing a greater surcharge on out-of-state waste.[45]

A few lower courts have addressed the *City of Philadelphia* Court's implication that the market participant exception should immunize import restrictions from scrutiny if the state owns the landfills in question.[46] In *Swin Resources, Inc. v. Lycoming County, Pa. Through Lycoming County Solid Waste Dept.*,[47] the Third Circuit considered a municipal regulation protecting a landfill operated by the county.[48] The landfill charged a higher disposal or "tipping" fee for waste generated outside the surrounding six counties.[49] Citing the supreme court market participant cases, the Third Circuit upheld the county's practice.[50] Other lower courts have issued similar holdings.[51]

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review. Id. at 351 (Rehnquist, C.J., dissenting). According to Rehnquist, "Alabama may, under the market participant doctrine, open its own facility catering only to Alabama customers." Id. (citations omitted).

44. 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994).

45. 114 S. Ct. at 1355. The Court rejected the state's assertion that the system was fair, noting that in-state haulers were already paying general taxes such as an income tax. Id. at 1353 (citing *Washington v. United States*, 460 U.S. 536, 546 n.11 (1983)). For a discussion of intrastate bans on waste imports imposed by local communities, see Weisberg, 10 Pace Envir. L. Rev. at 937-40 (cited in note 2).

46. See note 39 and accompanying text.

47. 883 F.2d 245 (3rd Cir. 1989).

48. Id. at 247.

49. Id. at 248. A tipping fee is a surcharge (usually per ton) placed on waste that is disposed at a given facility. Engel, 73 N.C. L. Rev. at 1491 n.40 (cited in note 3).

50. *Swin*, 883 F.2d at 248-51. According to the court:

> In setting these prices and volume conditions, Lycoming has not crossed the line that Alaska crossed when that state attempted to regulate the timber-processing market by conditioning its timber sales on guarantees that the purchasers would act in a certain way in a downstream market. The price and volume conditions to which Swin objects do not pertain to the operation of private landfills and do not apply beyond the immediate market in which Lycoming transacts business.
>
> If Maryland may decree that only those with Maryland auto hulks will receive state bounties, it would seem that Lycoming can similarly decree that only local trash will be disposed of in its landfill on favorable terms. If South Dakota may give preference to local concrete buyers when a severe shortage makes that resource scarce, it would seem that Lycoming may similarly give preference to local garbage (and hence local garbage-producing residents) when a shortage of disposal sites makes landfills scarce. And if Bosten may limit jobs to local residents, we see no reason why Lycoming may not limit preferential use of its landfill to local garbage (and hence local garbage-producing residents).

Id. at 250. The court avoided addressing the application of the exception to situations involving natural resources. Id. at 251-54. Citing *Reeves*, the court maintained a narrow interpretation of "natural resources," and refused to include land available for landfills as part of the definition. Id. at 254. A bitter dissent written by Chief Judge Gibbons characterized Lycoming's practice as "a peculiar eruption of Dixieism." Id. at 257 (Gibbons, C.J., dissenting).

A potential problem with the majority's reasoning is that the property for the landfill was leased by the federal government and that Lycoming obtained a substantial amount of federal grant money from the Appalachian Regional Commission in order to build the landfill. Id. at

Nevertheless, the Ninth Circuit rejected the ownership approach in *Washington State Bldg. and Const. Trades Council, AFL-CIO v. Spellman*.[52] This case can be reconciled with *Swin*, however, because it struck down a state statute that prohibited imported waste from being transported not only to the state-owned disposal site but also to anywhere else within the state borders.[53]

B. Export Restrictions

The Court recently limited the use of export restrictions as well. In the 1980s and early 1990s, several lower courts struggled with the constitutionality of flow control ordinances.[54] These restric-

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247. In *White*, the Supreme Court acknowledged the significance but avoided directly addressing the issue of whether the market participant exception applied in projects partly financed with state funds. 460 U.S. at 212-15. The Third Circuit, however, maintained that the issue was "irrelevant" without providing sufficient elaboration. *Swin*, 883 F.3d at 250. See Paul S. Kline, *Publicly-Owned Landfills and Local Preferences: A Study of the Market Participant Doctrine*, 96 Dickinson L. Rev. 331, 391-94 (1992) (criticizing *Swin* and suggesting that the market participant doctrine does not apply when federal subsidization is involved).

51. See, for example, *Lefrancois v. State of Rhode Island*, 669 F. Supp. 1204, 1212 (D.R.I. 1987) (upholding a Rhode Island statute prohibiting the transportation of out-of-state waste to a state-owned landfill based on the market participant exception); *Evergreen Waste Systems, Inc. v. Metropolitan Service Dist.*, 643 F. Supp. 127, 131 (D. Or. 1986) (upholding a Portland municipal ordinance prohibiting the disposal of out-of-district wasto at the city-owned landfill); *Shayne Bros., Inc. v. District of Columbia*, 592 F. Supp. 1128, 1134 (D.D.C. 1984) (utilizing the market participant doctrine to uphold a District of Columbia statute banning the disposal of imported waste at District-owned facilities without prior permission); *County Commrs of Charles County v. Stevens*, 299 Md. 203, 473 A.2d 12, 19 (1984) (upholding a county ordinance prohibiting disposal of out-of-county waste at a county-owned facility). These cases also rejected the notion that landfill sites should be identified as natural resources. See Coenen, 88 Mich. L. Rev. at 460-62 (cited in note 22) (commending the above cited courts' interpretation of the natural resource exception with regard to solid waste); Kovacs and Anderson, 18 Envir. L. at 796-800, 810-13 (cited in note 3) (criticizing the above cited courts for not considering landfills to be a natural resource). For further discussion of the natural resource exception to the market participant doctrine with regard to solid waste, see Paul S. Weiland and Daniel Imber, *Congress, the Courts and the Interstate Transport of Solid Waste*, 4 Dickinson J. Envir. L. & Policy 79, 84-85 (1994) (discussing the problem of classifying landfills as natural resources); Meyers, 79 Georgetown L. J. at 578-79 (cited in note 2) (same); Michael J. Polelle, *A Critique of the Market Participant Exception*, 15 Whittier L. Rev. 647, 672-74 (1994) (same); Kline, 96 Dickinson L. Rev. at 404-413 (cited in note 50) (same); Bradford C. Mank, *Out-of-State Trash: Solid Waste and the Dormant Commerce Clause*, 38 Wash. U. J. Urban & Contemp. L. 25, 43-51 (1990) (arguing that landfills are a "mixture" of natural resources and services); David Pomper, Comment, *Recycling* Philadelphia v. New Jersey: *The Dormant Commerce Clause, Postindustrial "Natural" Resources, and the Solid Waste Crisis*, 137 U. Pa. L. Rev. 1309, 1323, 1331-33 (1989) (same).

52. 684 F.2d 627 (9th Cir. 1982).

53. Id. at 631. This convinced the Ninth Circuit that the stato of Washington was acting with regulatory interests as opposed te economic interests. Id. The court also noted that the stato's imposition of criminal penalties was an act "which only a state and not a mere proprieter can enforce." Id.

54. See, for example, *J. Filiberto Sanitation, Inc. v. New Jersey Dept. of Envir. Protection*, 557 F.2d 913, 921-22 (3rd Cir. 1988) (emphasizing evenhandedness while upholding a county

tions remained the center of much constitutional debate until the Supreme Court's 1994 decision in *Carbone,* where the Court established that a government acting in its regulatory mode cannot impose export restrictions on solid waste.[55] In *Carbone,* the Court invalidated a Clarkstown, New York, flow control ordinance that required all waste within town limits to be transported to a transfer station designated by the town.[56] The transfer station charged a tipping fee and segregated recyclable items from nonrecyclable waste before transporting them to appropriate facilities.[57]

The Court found that the ordinance discriminated against interstate commerce for two reasons.[58] First, it increased the cost for out-of-state waste generators, since they incurred an additional expense for disposing nonrecyclables at the transfer station.[59] Second, the preference for the local transfer station prevented out-of-state companies from competing with the local station.[60] Since the ordi-

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ordinance requiring that all county garhage be transported to a county-owned transfer station from which the county facilitated the disposal), overruled in part by *Atlantic Coast Demolition & Recycling v. Board of Chosen Freeholders of Atlantic City,* 48 F.3d 701 (3rd Cir. 1995); *Hybud Equipment Corp. v. City of Akron, Ohio,* 654 F.2d 1187, 1194-95 (6th Cir. 1981) (upholding a city flow control ordinance because it "f[e]ll hardest" on the city's residents, who retained a voice in the political process), vacated 455 U.S. 93 (1982); *Harvey & Harvey, Inc. v. Delaware Solid Waste Authority,* 600 F. Supp. 1369, 1380 (D. Del. 1985) (upholding an evenhanded state flow control statute with only an incidental effect on interstate commerce). But see *Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp.,* 770 F. Supp. 775, 783 (D.R.I. 1991) (enjoining a state flow control ordinance which the court found did not apply evenhandedly because it established an absolute ban on exporting solid waste, conferring a direct economic advantage to the state-owned solid waste facility to the detriment of the out-of-state competitor); *Waste Systems Corp. v. County of Martin, Minn.,* 985 F.2d 1381, 1388 (8th Cir. 1993) (striking down a Minnesota county flow control ordinance as a protectionist measure which discriminated against interstate commerce). See also Martin E. Gold, *Solid Waste Management and the Constitution's Commerce Clause,* 25 Urban Law. 21, 47 (1993) (characterizing *DeVito* and *Waste Systems* as "particularly worrisome because the market participation exception for publicly owned facilities could have been, but was not, applied in those two exportation cases").

55. 114 S. Ct. at 1683-84.

56. Id. at 1684. The ordinance applied to waste generated within the town as well as waste generated outside the town but brought into the town. Violators of the ordinance faced a fine and incarceration. The town arranged for a private company to build the transfer station and operate it for five years. Id. at 1680.

57. Id. The tipping fee was set at $81 per ton, which exceeded the private market price. Id. The plaintiff, C & A Carbone, operated a recycling facility in Clarkstown, where it also separated recyclables from nonrecyclables. The ordinance prevented Carbone from hauling nonrecyclables itself and mandated that Carbone "pay a tipping fee on trash that Carbone ha[d] already sorted." Id. at 1681.

58. Id. at 1681-83. The Court recognized that the processing and disposal services constitutsd the articles of commerce rather than the waste itself. Id. at 1682.

59. Id. at 1681.

60. Id. "The ordinance thus deprives out-of-state businesses of access to a local market." Id.

nance was facially discriminatory, the Court applied strict scrutiny,[61] striking it down because less burdensome alternatives were available to support the transfer station, including the subsidization of the facility by means of bonds or "general taxes."[62]

Before *Carbone*, only one case of note existed in which a government asserted the market participant exception as a defense to its export restriction practice. In *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*,[63] an Alabama district court invalidated an export restriction scheme devised by three cities.[64] These cities, along with other local governments in the region, had formed an "authority" to provide for the efficient disposal of solid waste.[65] The authority planned to construct a waste disposal facility and three transfer stations.[66] Contracts between the authority and the cities required each city to adopt a flow control ordinance mandating that all waste generated within its borders be delivered to the authority.[67] The contracts further required that the cities prohibit the construction of other disposal facilities.[68] One of the cities, Geneva, passed an ordinance maintaining that the city possessed ownership rights in all garbage generated within its borders.[69] It also prohibited private haulers from contracting with its residents unless the haulers had a contract with the city.[70]

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61. Id. at 1682-83.

62. Id. at 1684. This option was also mentioned by Justice O'Connor in her concurring opinion. Id. at 1690 (O'Connor, J., concurring). Justice O'Connor maintained that the transfer station could have been financed permissibly by lowering its tipping fee "to a level competitive with other waste processing facilities." Id. Justice O'Connor did not join the majority because she felt that the ordinance did not discriminate against interstate commerce. Id. at 1687-89. Instead, she thought the ordinance had a burdensome impact on interstate commerce and, thus, applied the *Pike* formula. Id. at 1687, 1689-91. See note 11 (describing the *Pike* standard).

63. 814 F. Supp. 1566 (M.D. Ala. 1993), affirmed without opinion 29 F.3d 641 (11th Cir. 1994).

64. Id. The three cities, Headland, Geneva, and Ozark, were the named representatives of thirty-six local governments that intended to adopt laws regulating the disposal of solid waste generated and collected within their borders. Id. at 1569.

65. Id. The authority was a public non-profit organization.

66. Id. at 1569-70. The authority expected to finance the project through revenue bonds secured by the promise of its tipping fee revenue. Id. at 1570 & n.5.

67. Id. at 1570.

68. Id. This import restriction was similar to the one struck down in *Spellman*. See notes 52-53 and accompanying text.

69. *Waste Recycling*, 814 F. Supp. at 1570. The intent of the city was to establish that it had a "proprietary interest in all waste within its borders and that, as a result, it [could] require private haulers to contract directly with the city te collect all commercial waste and direct all transactions involving this waste without regard to commerce clause restrictions." Id. at 1575.

70. Id. at 1570. The Headland flow control ordinance granted the city the option of collecting waste or allowing private haulers to contract directly with waste producers. Id. But under either option, the waste had te be disposed of at the Authority's facility. The Ozark ordinance

The *Waste Recycling* court refused to credit a market participant exception argument and struck down the scheme.[71] The "critical question" for the court was whether the government acted as a proprietor or a regulator.[72] Contrasting the city ordinances from the statutes in *Alexandria Scrap, Reeves,* and *White,* the court found that the cities intended to ensure the financial viability of the authority rather than to compete as private enterprises.[73] In addition, the court held that the ordinances were similar to the unconstitutional *South-Central Timber* statute because the ordinances sought to "regulate outside the market in which the cities are actual participants."[74] Central to this determination was the court's finding that the authority was an entity distinct from the cities.[75] The court also noted that the ordinances impermissibly prevented solid waste from becoming a component of the interstate market, since they prohibited private haulers from transporting it out-of-state.[76] Furthermore, these ordinances prevented out-of-state companies from competing in the region.[77] The court rebuked Geneva's "vesting title" provision by characterizing it as a futile attempt to circumvent commerce clause limitations.[78] Concluding that the market participant exception was

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allowed haulers to transport the waste out-of-state, but they were forced to adhere to more stringent reporting requirements. Id.

71. Id. at 1571-77.

72. Id. at 1572.

73. Id. at 1572-73. According to the court,

> [i]n signing the user contracts, therefore, the three cities entered the solid waste markets not to compete for their own individual profit, as would private businesses, but rather they did so to assure the economic success of the Authority. The expressed intent behind these contracts and the three representative ordinances based on them is not individual market participation but hroad market regulation.

Id. at 1573. The court emphasized the torm "control" in the language of the "flow control" ordinances and maintained that this suggested regulation rather than participation. Id. Also noting other features such as imposition of penalties for violators, the court held that "[t]hese are not the types of measures which privato participants in the marketplace could implement." Id.

74. Id. at 1573.

75. Id. at 1574. Although all thirteen of the authority's board of directors were elected by the participating municipalities, "no one local government is able to direct the actions of the Authority. The Authority is therefore independent of the cities." Id. The court also noted that with respect to the market for waste collection services, Ozark's ordinance impermissibly applied to private commercial waste haulers. Since Ozark was only participating in this service market as the sole residential garbage collector, it could not extend its power as a participant in the residential market to include the commercial market, in which it was not a participant. Id.

76. Id. at 1573. As mentioned previously, Ozark's ordinance permitted the transportation of the waste across state borders, but with heightened reporting requirements. Id. at 1570.

77. Id. at 1574. The court cited *Reeves,* which applied the market participant exception, but observed that South Dakota had not "restricted the ability of private firms or sister States to set up plants within its borders." Id. at 1574-75 (quoting *Reeves,* 447 U.S. at 444).

78. Id. at 1575. The court quoted *South-Central Timber,* maintaining that "[i]t is the substance of the transaction, rather than the label attached to it, that governs Commerce Clause analysis." Id. (quoting *South-Central Timber,* 467 U.S. at 99 n.11). After scrutinizing Geneva's

not applicable, the court applied dormant commerce clause scrutiny and invalidated the authority's regulations.[79]

After *Carbone*, it was unclear whether the market participant exception remained a valid defense to cases challenging export restrictions under the Commerce Clause. The only subsequent decision to address the issue was the lower court opinion in *Southcentral Pennsylvania Waste Haulers Assn. v. Bedford-Fulton-Huntingdon Solid Waste Authority*.[80] The *Southcentral Pennsylvania* court struck down a flow control ordinance as facially discriminatory.[81] The plaintiffs raised a constitutional challenge to a three-county agreement that created a solid waste management authority which owned and operated disposal facilities.[82] By contract between the counties and the authority, all waste generated within the three counties was transported to an authority facility which charged a tipping fee for the refuse.[83] The counties argued that the market participant exception should apply since the disposal facilities were publicly owned.[84]

The district court ruled that the market participant exception did not apply to the authority scheme.[85] Relying on *South-Central Timber*, the court adopted a narrow interpretation of "market," and held that the counties were not participants in the waste collection market.[86] The court also cited *Waste Recycling* as support for its as-

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ordinance and the city's prior suggestions that solid waste is "valueless material," the court concluded that the city's provision was a "fakery and a pretext." Id. at 1575-76. The court also determined that even if Geneva possessed title te the waste, after private haulers collected the garbage the city would cease te own title. Id. at 1576.

79. Id. at 1577-83. The court found that the ordinances were facially discriminatory in addition te having a discriminatory effect on interstate commerce. Id. at 1578-80.

80. 877 F. Supp. 935 (M.D. Pa. 1994).

81. Id. at 942.

82. Id. at 937-38.

83. Id. at 938. In all three counties, private citizens and businesses contracted with private garbage haulers. Id. at 946. Violaters of the mandate faced "substantial sanctions." Id. at 938.

84. Id. at 945. Thus the counties asserted that their participation in the waste disposal market should enable them to impose restrictions in the hauling market. They further attempted to equate county residents with the county governments in order to extend tbe domain of the exception. Id. The court noted that the counties cited no case law for this proposition and concluded that if the proposition were adopted, "it is difficult te see what a locality could not do in the name of its citizens." Id. at 946.

85. Id.

86. Id. at 945-46. According to the court:

> Specifically, the market for trash collection and hauling clearly is distinct from the market for trash disposal. Equally clear is the fact that Defendants are not participants in all of these markets. Defendants do not haul waste. Nor, to the extent relevant here, do Defendants purchase waste hauling services. Rather, individual trash generaters within the Counties contract for themselves with haulers for the collection and disposal of waste.

sertion that the counties' actions resembled a government serving as a regulator rather than a participant acting with proprietary interests.[87]

III. THE INSTANT DECISIONS

The Second Circuit's decisions in *SSC Corp.* and *USA Recycling* provide strong authority for the market participant exception in the context of export restrictions. They eliminate uncertainty created by *Carbone* and provide direction for local and state governments seeking to avoid dormant commerce clause challenges.

A. SSC Corp. v. Town of Smithtown

1. Facts and Procedural Posture

In response to pressure by federal and state government in the mid-1980s,[88] the town of Smithtown, New York, entered into an agreement with the neighboring Long Island town of Huntington to create a mutual refuse disposal service.[89] The towns then contracted with Ogden Martin Systems, Inc. for the towns to finance Ogden's construction of an incinerator on Huntington land.[90] Ogden then be-

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Id. at 946.

87. Id. The court stated:

> Defendants do not seek to affect the market as would any other market participant, through the use of market power or leverage. Rather, the Counties and the Authority were able to implement the flow control policy "only because of the regulatory powers they possess as sovereigus . . . these are not the types of measures which private participants in the marketplace could implement." Defendants have not conditioned the purchase or sale of their goods but have mandated the terms and conditions under which others (i.e. individual citizens and haulers) can contract. This is market regulation and, as such, is subject to the strictures of the Commerce Clause.

Id. (quoting *Waste Recycling*, 814 F. Supp. at 1573).

88. See notes 1-10 and accompanying text.

89. *SSC Corp.*, 66 F.3d at 506. The pressure exerted by the state government is reflected in the Long Island Landfill Law of 1983, N.Y. Envir. Conserv. Law § 27-0704 (McKinney, 1984 & Supp. 1995), which imposed deadlines on communities for closing down their contaminated municipal dumps. The state legislature encouraged towns to replace these landfills with incinerators or other more productive waste management facilities by authorizing the municipalities to contract with private companies to construct and operato the facilities. Id. § 27-106; N.Y. Gen. Mun. Law § 120-w (McKinney, 1986 & Supp. 1994). Federal governmental pressure existed pursuant to RCRA which imposed regulations on landfills. *SSC Corp.*, 66 F.3d at 506 n.7. See note 6 and accompanying toxt.

90. *SSC Corp.*, 66 F.3d at 507. To finance the construction of the facility, the towns used tax-free bonds issued by the New York State Environmental Facilities Corporation, a state authority. They loaned proceeds of the bonds to Ogden and secured the bonds by a twenty-five

came sole owner and operator of the facility and the towns received the exclusive right to determine what refuse would be transported to the incinerator as well as the right to charge tipping fees.[91] Smithtown financed its portion of the agreement with the tipping fees and ad valorem property taxes.[92]

Smithtown utilized two strategies to facilitate a steady flow of waste to the incinerator and thus ensure its economic viability.[93] First, it enacted a flow control ordinance that required licensed garbage haulers to transport all refuse generated in Smithtown to the Huntington incinerator and pay a tipping fee.[94] Violators of the ordinance faced a maximum fine of $5,000 and a maximum of sixty days' imprisonment.[95] Second, Smithtown divided its residential area into ten garbage-collection districts.[96] After soliciting contract bids from private haulers for every district, the town granted the lowest bidders in each district an exclusive right to service that respective district.[97] The contract required the haulers, however, to transport all residential waste to the incinerator and pay the tipping fee.[98] Seven of these contracts were awarded to SSC Corporation, which began servicing the districts in 1992.[99] Two years later, Smithtown withheld payments to SSC after it learned that the hauler breached its contract by transporting the garbage to unauthorized incinerators.[100]

SSC sought injunctive relief from the District Court for the Eastern District of New York, claiming that the contract and the flow control ordinance violated the Commerce Clause.[101] Smithtown filed a

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year commitment to compensate Ogden for its costs related to the incinerator. The towns were obligated to reimburse Ogden regardless of the amount of waste received by the incinerator. Ultimatoly, Ogden, a private New Jersey corporation, was responsible for repaying the public bonding authority. Id.

91. Id. at 506-07.

92. Id. at 507.

93. Id.

94. Id. The ordinance applied to residential as well as commercial waste. The tipping fee was set at $65 per ton, but haulers were not charged for recyclables, which had to be transported to a nearby recycling facility. The town maintained that the purpose of the tipping fee was to encourage recycling. Id.

95. Id.

96. Id.

97. Id.

98. Id. It was expected that the bid proposal would reflect the $65 tipping fee. Id. at 507 n.14.

99. Id. at 507. SSC's bid of $218 per year per household took into account the cost of collection as well as disposal. Smithtown assessed this figure on homeowners' property tax bills, and it used the revenue to reimburse SSC under the contract. Id. at 508.

100. Id. In April, 1994, Smithtown alleged that SSC was wrongfully profiting by disposing the waste at incinerators with less expensive tipping fees. Therefore, the town board voted to withhold over $750,000 in payments owed to SSC. Id.

101. Id. The action was brought pursuant to Civil Rights Act 42 U.S.C. § 1983 (1988 ed.).

counterclaim alleging breach of contract.[102] The district court ruled in favor of SSC and invalidated Smithtown's flow control ordinance and the contract as unconstitutional restraints on interstate commerce. Claiming a market participant exception under the Dormant Commerce Clause, Smithtown appealed the case to the Second Circuit.[103]

2. The Decision

A unanimous three-judge panel affirmed the portion of the district court's opinion holding that Smithtown's flow control ordinance violated the Commerce Clause.[104] The panel reversed the district court with regard to the SSC agreements, determining that the exclusive contracts satisfied constitutional scrutiny.[105]

Addressing the flow control ordinance, the Second Circuit first discounted Smithtown's argument that it acted as a market participant.[106] According to the court, the market participant exception only applies if the defendant's actions could have been undertaken by a private entity.[107] Because Smithtown imposed criminal penalties on violators, it functioned as a regulator as opposed to a participant.[108] The court then applied dormant commerce clause analysis.[109] Citing *Carbone*, the court found that Smithtown's flow control ordinance

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102. *SSC Corp.*, 66 F.3d at 508.

103. Id. at 506.

104. Id. The opinion was written by Judge Cabranes and joined by Chief Judge Newman and Judge Van Graafeiland.

105. Id. at 506.

106. Id. at 512-13. Smithtown argued that it was acting as a participant because of its significant financial investment in the incinerator. Thus, it enacted the ordinance to protect the public stake. Id. at 512.

107. Id. at 512 (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 454-58 (1992) (invalidating an Oklahoma statute mandating that in-state electrical utilities use a minimum amount of coal mined in Oklahoma on grounds that while the state could act through a public utility as a market participant and set limits of purchased coal, it could not extend its control beyond this)). See id. at 455-58 (stating that "[w]hen a public entity participates in a market, it may sell and buy what it chooses, to or from whom it chooses, on terms of its choice; its market participation does not, however, confer upon it the right to use its regulatory power to control the actions of others in that market" (quoting *Atlantic Coast Demolition*, 48 F.3d at 717 (refusing to grant a market participant exception since the government's flow control ordinance applied to both publicly as well as privately owned disposal facilities)).

108. *SSC Corp.*, 66 F.3d at 512. The court cited *Spellman*, 684 F.2d at 631, in which the Ninth Circuit rejected the market participation classification in a situation involving " 'civil and criminal penalties which only a state and not a mere proprieter can enforce.' " *SSC Corp.*, 66 F.3d at 512. See note 52 and accompanying text. The court also noted Smithtown's threat of criminal penalties to refute the town's claim that the ordinance was identical to that in *Swin*. *SSC Corp.*, 66 F.3d at 513.

109. *SSC Corp.*, 66 F.3d at 513.

constituted facial discrimination against interstate commerce.[110] Because less burdensome alternatives were available to the town, the ordinance failed the "rigorous scrutiny" standard.[111]

Next, the court addressed Smithtown's exclusive contracts.[112] It concluded that Smithtown acted as a market participant when it entered into contractual relationships with garbage haulers.[113] Comparing the town's scheme to that of Boston in *White*, the court found that Smithtown was a "buyer" of garbage collection and disposal services.[114] Therefore, the town retained the power to mandate where its contractual haulers disposed of its waste.[115] The court, however, made a painstaking attempt to distinguish Smithtown's actions from the scenario in *South-Central Timber*.[116] The court essentially implied that it was necessary for Smithtown to

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110. Id. at 514. The court based this conclusion on the fact that the ordinance "direct[ed] all town waste to a single local disposal facility, to the exclusion of both in-state and out-of-state competitors." Id. For a discussion of *Carbone*, see notes 55-62 and accompanying text.

111. *SSC Corp.*, 66 F.3d at 514. After the court determined that the ordinance was facially discriminatery, the ordinance faced virtual per se invalidity. Id. This stringent standard requires that the ordinance be narrowly tailored in order to provide for the least burdensome alternative. See *City of Philadelphia*, 437 U.S. at 624. In the instant case, the court referred to *Carbone* in holding that less burdensome options to secure the financial viability of the incinerator included a general tax and an enactment of uniform regulations. *SSC Corp.*, 66 F.3d at 514.

112. Id. at 514-16.

113. See notos 20-22.

114. *SSC Corp.*, 66 F.3d at 515-17. The court found that Smithtown was "substantial[ly] if informal[ly]" receiving services from the contractors. Id. at 515 (citing *White*, 460 U.S. at 211 n.7). The town's stake was reinforced by its potential liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(a) (1988 ed. & Supp. V). *SSC Corp.*, 66 F.3d at 516. The court also addressed Smithtown's reasons for charging a tipping fee for use of the incinerater and then reimbursing the contractors, instead of charging no tipping fee and making no reimbursements. Id. at 515. According to the court, the tipping fees served four primary objectives: (1) they avoided the "free-rider" problem of contracting haulers dumping out-of-town waste into the town incinerator free of charge, (2) they encouraged haulers to separate recyclables because of the free disposal charge at the recycling facility, (3) they discouraged bidding contractors from "low-balling" their bids, because if a district produces more wasto than expectod then the haulers must pay the fees and assume the difference, and (4) they enabled the town to fluctuate the user fees that the citizens are charged. Id. "Thus, the principal purpose of the pass-through mechanism is to minimize the town's costs of monitoring SSC's performance under the contract." Id.

115. Id. at 517. Referring to *White*, the court held:

> If Boston could require contractors for city-funded projects to hire a certain percentage of city residents, then Smithtown can require SSC to hire town residents to drive its garbage trucks since those truck drivers would be "in a substantial if informal sense, working for the city." And if Smithtown can require SSC to hire local truck drivers, then it can require the hauler to use local incinerating services as well. It makes no difference in our estimation whether those services are provided by a private company like Ogden, or by a public entity like Smithtown.

Id. at 515 (quoting *White*, 460 U.S. at 211 n.7).

116. Id.

be a participant in the disposal market as well as the hauling market.[117]

The *SSC Corp.* court expressly rejected the Alabama district court's analysis in *Waste Recycling*.[118] According to the Second Circuit, a state activity motivated by a protectionist objective is not inherently market regulation.[119] Furthermore, the court repudiated the notion that a municipality must retain a proprietary interest in the waste in order for it to impose contractual restrictions.[120]

Responding to SSC Corp.'s contention that Smithtown was acting as a market regulator because otherwise it would be susceptible to antitrust law,[121] the court first expressed doubt that market participants are even subject to antitrust law.[122] Even so, the court rejected SSC Corp.'s logically inverted argument on the principle that courts should avoid construing a statute in a manner that raises a constitutional issue.[123]

B. USA Recycling, Inc. v. Town of Babylon

1. Facts and Procedural Posture

USA Recycling, decided on the same day as *SSC Corp.*, involved a similar fact pattern. Plaintiff USA Recycling, Inc., a solid waste recycling management business, brought suit against the Town of Babylon, New York, and Babylon Source Separation Commercial,

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117. Id. For a detailed discussion of this problematic analysis undertaken by the court, see notes 23-29.

118. *SSC Corp.*, 66 F.3d at 516. For a discussion of *Waste Recycling*, see notes 63-79 and accompanying text.

119. *SSC Corp.*, 66 F.3d at 516. The court referred to the Supreme Court's market participation framework in support of the proposition that "policies, while perhaps 'protectionist' in a loose sense, reflect the essential and patently unobjectionable purpose of state government—to serve the citizens of the State." Id. (quoting *Reeves*, 447 U.S. at 442).

120. Id. at 516. Citing *Carbone*, the court maintained that Smithtown bad a valuable interest in the hauling and disposal services themselves. Id.

121. Id. at 517.

122. Id. The court cited precedent indicating that since Smithtown was acting pursuant to state policy, it should receive antitrust immunity. According to the court, "the antitrust laws do not prohibit local government from engaging in anticompetitive conduct 'pursuant to state policy to displace competition with regulation or monopoly public service.'" Id. (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978).

123. Id. at 518. According to the court, "SSC would have us engage in a sort of reverse-*Ashwander* analysis and construe Smithtown's activity as violating the Commerce Clause rather than the antitrust laws." Id. (citing *Ashwander v. Tennessee Vallcy Authority*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) (stating that "even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided")).

Inc. (BSSCI), a private waste hauler.[124] USA Recycling alleged that the town's creation of a commercial garbage district discriminated against interstate commerce and, therefore, violated the Commerce Clause.[125] The allegations centered around an arrangement made between Babylon, another Ogden incinerator, and BSSCI.

Pursuant to a mandate issued by the New York legislature, Babylon entered into a contract with Ogden to establish a waste incinerator. Babylon financed the construction of the incinerator, which was owned by the town but built and operated by Ogden.[126] Babylon was required to pay Ogden a service fee for operating the incinerator, regardless of the amount of waste disposed there.[127] Furthermore, Babylon had to haul a minimum amount of 225,000 tons of garbage to the incinerator per year.[128]

Confronted with the problem of protecting the financial viability of the incinerator while adhering to constitutional guidelines, Babylon created a commercial waste district.[129] This district was to be exclusively serviced by a single waste hauler, BSSCI.[130] A five-year service agreement between Babylon and BSSCI permitted BSSCI to dispose a maximum of 96,000 tons of waste at the incinerator at no charge.[131] If BSSCI needed to dispose of waste in excess of this amount, it had the option of either delivering it to Babylon's incinerator and paying a tipping fee, or delivering it elsewhere and being solely responsible for costs.[132] The town financed the arrangement by imposing an annual assessment on commercial parcel owners in the district.[133]

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124. *USA Recycling*, 66 F.3d at 1280-81.

125. Id. at 1275-76.

126. Id. at 1276-77. After soliciting offers from sixty-nine businesses in eighteen states and Canada, Babylon received bids for the incinerator from five companies. The incinerator and land on which it was built were owned by Babylon but leased to Ogden. Id. at 1277.

127. Id. at 1277-78.

128. Id.

129. Id. at 1278. Prior to the creation of the district, Babylon utilized a flow control ordinance, which required all waste generated in the town to be disposed at the incinerator. Furthermore, Babylon charged tipping fees to all private haulers based on the amount of waste that was delivered to the incinerator. After the Supreme Court's decision in *Carbone*, the city repealed the ordinance. Id.

130. Id. at 1279. BSSCI was the successful bidder for the contract. Id.

131. Id. The service agreement obligated Babylon to pay BSSCI a base amount of $22.75 per week for each commercial parcel, plus additional fees for excessive waste. Although the parties stipulated for a maximum limit of free disposal at the incinerator, BSSCI was permitted to haul an unlimited amount of recyclable refuse to a municipal recycling facility. Id.

132. Id. Babylon retained the right to require BSSCI to deliver the waste to any other disposal facility selected by the town. In this event, BSSCI would be reimbursed by Babylon for tipping fees. Nevertheless, Babylon chose not to exercise this right. Id.

133. Id. Each basic parcel was obligated to pay $1500 in return for "basic service." A parcel was responsible for additional user fees if it contained more than one business or if a company

Several plaintiffs, including USA Recycling,[134] filed suit in the District Court for the Eastern District of New York, seeking a preliminary injunction.[135] USA Recycling specifically alleged that Babylon's waste management system structurally discriminated against interstate commerce because it excluded private garbage collectors from the district, permitted BSSCI to dispose of waste at the town incinerator free of charge, and charged user fees exclusively to commercial property owners located within the district.[136]

The district court found that the agreement violated the Commerce Clause.[137] Relying on the Supreme Court's recent ruling in *Carbone*, the court held that the city's scheme created a discriminatory effect on interstate commerce.[138] The defendants appealed to the Second Circuit.[139]

2. The Decision

The Second Circuit reversed the district court's decision and upheld the constitutionality of Babylon's scheme.[140] First, the court addressed Babylon's relationship with the property owners and businesses located in the commercial district and found that the town did not act as a market participant when it enacted the ordinance eliminating the private market for commercial waste hauling.[141] Referring

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or a parcel generated waste that exceeded the "basic service" amount of one cubic yard of refuse and one half cubic yard of recyclables per week. Id. The Babylon Town Code was amended to reflect the exclusive arrangement with BSSCI. The town also made it illegal for commercial wasto generators to dispose of refuse in a manner disassociated with BSSCI absent the granting of a "special exemption" by the town board following the demonstration of "exceptional circumstances." Id. at 1280.

134. Other plaintiffs included numerous garbage collection and transportation companies, a waste disposal facility located out-of-state, and several individuals and businesses who owned commercial property and businesses located in Babylon. Id. at 1280-81.

135. *USA Recycling, Inc. v. Town of Babylon*, No. 95-7129 (E.D.N.Y. 1995). Originally two separate actions were brought by separate groups of plaintiffs. The second case filed in the district court was *A.A. & M. Carting Services, Inc. v. Town of Babylon*, No. 95 7131 (E.D.N.Y. 1995). The district court held a separate hearing on the *USA Recycling* plaintiffs' injunctive motion but ultimately issued an order consolidating the cases. *USA Recycling*, 66 F.3d at 1280.

136. *USA Recycling*, 66 F.3d at 1280.

137. Id.

138. Id. at 1280. The district court also issued the preliminary injunction despite its finding that the plaintiffs would not suffer irreparable harm by the arrangement. Id. Chief Judge Thomas C. Platt issued this injunction as well as the injunction in *SSC Corp.*

139. Id. at 1272.

140. Id. at 1276. The same three-judge panel that decided the *SSC Corp.* case unanimously decided this case as well. See note 104. Judge Cabranes again wrote the opinion.

141. *USA Recycling*, 66 F.3d at 1282.

to *SSC Corp.*, the court emphasized that imposition of civil and criminal sanctions constituted market regulation.[142]

Since Babylon acted as a market regulator in this respect, the court next considered whether the ordinance had a discriminatory effect on interstate commerce.[143] A key aspect of this analysis concerned USA Recycling's claim that Babylon's financing approach discriminated against interstate commerce by imposing a tax only on property in the commercial district rather than the entire town.[144] USA Recycling cited language in *Carbone* indicating that a town could subsidize a disposal facility only by means of "general taxes or municipal bonds."[145] USA Recycling argued that "general taxes" connoted town-wide taxes as opposed to "special assessments" levied on a particular area.[146] The court, however, interpreted "general taxes" as nondiscriminatory levies that are uniformly applied to in-state and out-of-state companies.[147] Therefore, the Second Circuit determined that Babylon's scheme fell within the domain of the

142. Id. See Part IV.A. Although the court would later recognize that Babylon was acting as a market participant when it purchased hauling services from BSSCI, it held that this did not enable the town to regulate "carte blanche." *USA Recycling*, 66 F.3d at 1282.

143. *USA Recycling*, 66 F.3d at 1283. The court found that the ordinance did not favor in-state garbage collectors over out-of-state collectors, and did not have the effect of aiding local collectors to the detriment of in-state and out-of-state collectors. Id. In addition, responding to the plaintiffs' claim that the arrangement was a "facade" for a flow control ordinance that discriminated against in-state and out-of-state competitors, the court asserted that because Babylon had eliminated the market, the town itself was no longer a seller of garbage services. Id. Instead the town was acting as the "lone provider" and was fulfilling its governmental obligation. Id. The court held that "the payment of taxes in return for municipal services is not comparable to a forced business transaction that the ordinances in *Carbone* and *Smithtown* required, and that rendered those ordinances discriminatory against interstate commerce. In short, because Babylon is not selling anything, it cannot be considered to be a favored single local proprietor as in Carbone." Id. Babylon's decision to hire a private hauler, BSSCI, had no bearing on the issue because BSSCI was acting as an agent of the town. Id. at 1284.

144. Id. at 1285. The plaintiffs claimed that the taxes violated the Commerce Clause because they targeted potential customers of out-of-state garbage collection businesses. Id.

145. Id. (citing *Carbone*, 114 S. Ct. at 1684).

146. Id. Plaintiffs argued that Babylon had imposed a special assessment instead of a general tax and, therefore, was not exempted by the language in *Carbone*. Id.

147. Id. The court focused on *Carbone*'s citation to *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988), which held that "[d]irect subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause]; discriminatory taxation of out-of-state manufacturers does." The court also illustrated that distinctions between general taxes and special assessments have only been significant when applying the four-prong test te determine whether the levies are "fairly related to services provided to the State." *USA Recycling*, 66 F.3d at 1285 n.12 (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)).

The court further noted that accepting the plaintiffs' argnment that the Commerce Clause prohibits taxes aimed exclusively at businesses would "sweep away everything from state corporate income taxes to corporate franchise taxes." *USA Recycling*, 66 F.3d at 1286. The court also emphasized the importance of special assignments by pointing out that New York law permits local governments to create "improvement districts" for the purpose of providing a variety of municipal services, which are primarily financed by means of "special assignments." Id.

"general taxes" notion espoused in *Carbone*.[148] Finding that Babylon's elimination of the market for commercial garbage collection did not have a discriminatory effect on interstate commerce, the court concluded that local benefits outweighed any incidental effects on commerce.[149]

Addressing Babylon's arrangement with BSSCI, the court proceeded to broaden the market participation exception.[150] USA Recycling claimed that the town showed favoritism toward BSSCI since BSSCI was the only hauler permitted to dispose of its waste at Babylon's incinerator free of charge.[151] Because Babylon owned the incinerator, the court determined that the town acted as a market participant.[152] Like the state of South Dakota in *Reeves*, the town participated as a "seller" of rights to the incinerator and thus could bargain at its discretion.[153] The court further concluded that even if Babylon were acting as a regulator, its arrangement with BSSCI would not present an undue burden on interstate commerce.[154]

Finally, the court further reinforced the market participant doctrine when it addressed Babylon's relationship with Ogden, the operator of the incinerator.[155] USA Recycling argued that Babylon's

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148. *USA Recycling*, 66 F.3d at 1285.

149. Id. at 1286-88. Applying the *Pike* standard, see note 11, the court found no reason to presume that hiring a single contractor would reduce the flow of intorstate commerce. *USA Recycling*, 66 F.3d at 1287. It considered whether individual businesses were more inclined to hire out-of-state garbage collectors than the town, acting as a single buyer, but concluded that Babylon's open bidding procedure could actually enhance interstato commerce if an out-of-state hauler were hired. Id. (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981) (holding that a state ban on nonrecyclable milk containers had an even-banded impact on interstate commerce)). The court also dismissed the plaintiffs' argument that the implementation of benefits assessments and user fees would discourage interstate commerce. It concluded that businesses wanting to hire a private hauler would effectively be forced to pay double for the amount of the service. Id. at 1287. The court viewed this attack on the tax system as a mere "reformulation of their challenge to the Town's assumption of collection duties . . . (that) [w]e have already rejected." Id.

150. Id. at 1288.

151. Id.

152. Id. at 1288-89.

153. Id. at 1289. The court also utilized the market participant exception to counter the plaintiffs' contention that the bidding process was skewed and was a mere pretext for granting a monopoly to a local company. Id. The court considered this claim to be "irrelevant," since the market participant doctrine grants vast discretion to the town to deal with whomever it chooses. Id. The court maintained that "[n]othing in the Constitution precludes a local government from hiring a local company precisely because it is local." Id. (citing *Alexandria Scrap*, 426 U.S. at 810; *White*, 460 U.S. at 207; *SSC Corp.*, 66 F.3d at 510-11).

154. Id. at 1290. The court countered the plaintiffs' argument that BSSCI's free disposal charge was effectively a subsidy by asserting that the bidding process reflected this arrangement. Id. at 1289-90. The court likewise concluded that allegations of favoritism during the bidding process were unsubstantiated. Not only was BSSCI the lowest bidder, but it had prior experience serving the town. Id. at 1290.

155. Id. at 1291.

scheme favored the local incinerator because the town basically guaranteed that all commercial waste would be transported there instead of to out-of-state incinerators.[156] Again, the court determined that since Babylon functioned as a "buyer" of services from Ogden to operate the incinerator, it fell within the market participant exception.[157] Babylon bought the incinerator services and was therefore free to reserve disposal rights for itself.[158] As a market participant, Babylon also retained the discretion to create economic incentives to aid local business.[159] The court noted that this system of "economic flow control" was consistent with Justice O'Connor's suggestion in *Carbone* that a town could satisfy constitutional scrutiny by achieving flow control through a method that offered economic incentives.[160]

USA Recycling also argued that Babylon's financing system of benefit assessments and user fees amounted to a "tax-and-subsidy scheme" constituting an unconstitutional market regulation.[161] The court conceded that the financing approach was a market regulation but nevertheless found that Ogden and BSSCI were not subsidized because resulting revenues were spent to purchase services for town residents and to compensate the businesses for specific municipal services.[162] The court concluded by indicating that a contrary ruling

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156. Id.

157. Id.

158. Id.

159. Id. The court emphasized that this notion is consistent with *Alexandria Scrap*, 426 U.S. at 810 ("Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others"). *USA Recycling*, 66 F.3d at 1291.

160. *USA Recycling*, 66 F.3d at 1291 (citing *Carbone*, 114 S. Ct. at 1690 (O'Connor, J., concurring) (maintaining that Clarkstown could have escaped constitutional scrutiny by financing its transfer station "by lowering its price for processing to a level competitive with other waste processing facilities")). The court also cited Petersen and Abramowitz, 22 Fordham Urban L. J. at 404 (cited in note 1) (stating that "[e]conomic flow control is achieved when haulers deliver solid waste te a facility because the costs of disposal at the facility, including transportation costs and tipping fees, are less than or comparable to those at alternative disposal sites"). *USA Recycling*, 66 F.3d at 1291.

161. *USA Recycling*, 66 F.3d at 1291-92. The plaintiffs relied on *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 129 L. Ed. 2d 157 (1994). *USA Recycling*, 66 F.3d at 1292. In *West Lynn Creamery*, the Supreme Court struck down a Massachusetts statute that diverted revenues from a tax on all milk sold in the state to subsidize in-state dairy farmers:

> [W]e cannot divorce the premium payments from the use to which the payments are put. It is the entire program—not just the contributions to the fund or the distributions from that fund—that simultaneously burdens interstate commerce and discriminates in favor of local producers. The choice of constitutional means—nondiscriminatory tax and local subsidy—cannot guarantee the constitutionality of the program as a whole.

114 S. Ct. at 2215.

162. *USA Recycling*, 66 F.3d at 1292. According to the court: "If anyone is 'subsidized' by the user fees, it is the municipal treasury—not any private business. And that, of course, is the point of every tax." Id. The court also concluded that Babylon's scheme was consistent with what "the Supreme Court had in mind in *Carbone*." Id. In fact, the court observed that "[n]ot

would necessarily overturn long-standing precedent in *California Reduction Company v. Sanitary Reductions Works*[163] and *Gardner v. Michigan*.[164] Although these decisions involved fifth and fourteenth amendment challenges, they specifically recognized the rights of states to enter into exclusive arrangements with private businesses to collect and dispose of municipal garbage.[165]

IV. COMMENT AND ANALYSIS

The Second Circuit's holdings in *SSC Corp.* and *USA Recycling* solidify the market participant exception as a viable defense to constitutional challenges for municipalities seeking to create restrictions on waste exports. Combined with the Third Circuit's decision in *Swin* regarding import restrictions,[166] these cases ensure that state and local governments will enjoy protection from dormant commerce clause challenges when they act as participants in the solid waste market in certain situations.

These decisions, in conjunction with other market participant exception cases, have helped to create a framework that can serve as a guideline for municipalities confronting several scenarios. One scenario involves a municipality that owns a disposal facility but permits private haulers to contract directly with its residents for waste collection. In this instance, the government would be permitted to impose import restrictions on the facility's intake of waste. It can do this because it is participating as a seller of disposal services and can deal with whomever it chooses.[167] As owner of the facility, however, it ap-

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only is this tax fairer than an *ad valorem* tax—because it taxes businesses based on the actual amount of municipal services they consume—but it also creates a greater incentive for businesses to reduce the amount of waste they generate." Id.

163. 199 U.S. 306 (1905).

164. 199 U.S. 325 (1905). See *USA Recycling*, 66 F.3d at 1294.

165. *USA Recycling*, 66 F.3d at 1293. According to the court: "If we were to rule in plaintiffs' favor, the municipal garbage systems upheld by the Court in *California Reduction* and *Gardner* would be unconstitutional, and municipalities could no longer undertake the traditional governmental function of collecting town garbage." Id. at 1294.

166. For a discussion of *Swin*, see notes 47-50 and accompanying text.

167. This was the reasoning adopted in *Swin*, *Lefrancois*, *Evergreen Waste*, *Shayne Brothers*, and *Stevens* and berrowed from *City of Philadelphia*. See notes 50-51 and accompanying text. However, most jurisdictions would require that out-of-state businesses be permitted to construct and operate a facility within the locality. Otherwise, this activity would likely be considered a regulation. This would be consistent with the reasoning in *Spellman*, borrowed from the dicta in *Reeves*. See notes 52-53 and accompanying text. But see Pomper, 137 U. Pa. L. Rev. at 1338 (cited in note 51) (arguing against a " 'monopoly exception' to the market participant exception"); Mank, 38 Wash. U. J. Urban & Contemp. L. at 42-43 (cited in note 51) (suggesting that dicta from *Reeves* makes it "unlikely that courts will refuse to apply the market

pears that the government could not impose export restrictions on the private haulers, because such restrictions would be prohibited as upstream regulations in a separate market in which the municipality is not a participant.[168]

A second scenario involves a municipality's participating in the disposal market by collecting the waste generated within its borders.[169] As in the first scenario, the municipality would be permitted to implement import restrictions by virtue of its status in the disposal market. Furthermore, courts following the Second Circuit's reasoning in *SSC Corp.* and *USA Recycling* would allow the government to impose certain export restrictions.[170] As a participant in the collection market, the municipality would retain the power either to deliver the waste as it chooses or to contract with a private party to transport the waste to a destination designated by the government.[171]

A more problematic scenario involves a municipality acting as a participant in the hauling market but not participating in the disposal market. Such a municipality would not be able to impose im-

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participant doctrine merely because strict government regulations make it difficult or impossible for private competitors to entor a market").

168. This is consistent with the Pennsylvania district court's decision in *Southcentral Pennsylvania*. See notes 80-87 and accompanying text. This proposition is also arguably consistent with the ruling in *Waste Recycling*, although the Alabama district court did not even consider the disposal facility to be owned by a municipality. *Waste Recycling*, 814 F. Supp. at 1573. However, such a scheme clearly would violate *South-Central Timber*. See 467 U.S. at 95. See also Petersen and Abramowitz, 22 Fordham Urban L. J. at 381-82 n.128 (cited in note 1) (maintaining that the "attempt to restrict the flow of waste under the guise of the government's ownership of the [disposal] facility is considered to be an impermissible downstream restriction").

169. In this scenario, the city may collect the garbage itself or creato a contractual or franchise relationship with one or more private haulers.

170. *SSC Corp.*, 66 F.3d at 515; *USA Recycling*, 66 F.3d at 1288-89.

171. *SSC Corp.*, 66 F.3d at 515. However, it could not enact a flow control ordinance similar to the regulation struck down in *Carbone*.

Babylon's export restriction scheme in *USA Recycling* appears particularly strategic. The town's arrangement with its hauler, BSSCI, did not even mandate that BSSCI transport the waste to a designated facility. *USA Recycling*, 66 F.3d at 1279. Remember, however, that in the parties' contract, Babylon reserved the right to designate a specific site. Id. See note 132. Nevertheless, since Babylon owned the disposal facility that it sought to protect, it could provide that BSSCI would not be charged a tipping fee. *USA Recycling*, 66 F.3d at 1279. Revenue lost from the collection of a tipping fee would be regained by means of a "general" tax, a method specifically advocated in *Carbone*. Id. at 1285. Therefore, Bahylon was able to manipulate market forces so that its disposal facility would be the most economically attractive destination for BSSCI. Most courts would likely consider this type of "economic flow control" to satisfy dormant commerce clause scrutiny. See Peterson and Abramowitz, 22 Fordham Urban L. J. at 404-06 (cited in note 1) (claiming that such a strategy "should be very likely to withstand Commerce Clause analysis"). See also *USA Recycling*, 66 F.3d at 1291; Richard J. Reddewig and Glenn C. Sechen, *Municipal Solid Waste: The Uncertain Future of Flow Control—A Municipal Perspective*, 26 Urban Law 801, 815 (1994) (claiming that *Carbone* "may have, and perhaps should have, been decided differently if the transfer station were municipally owned").

port restrictions on waste entering the jurisdiction.[172] Language in *SSC Corp.* suggests that it would also be forbidden from imposing export restrictions on waste generated within its borders.[173] The *SSC Corp.* court's painstaking effort to distinguish *White* and *South-Central Timber* based on Boston's participation in vertical markets leads to the conclusion that it considers participation in both the disposal market and the hauling market as a necessary prerequisite for the ability to impose export restrictions.[174] Apparently, the court reasoned that if a municipality is not participating in the downstream disposal market, then *South-Central Timber* will prevent export restrictions.[175]

A. Reconciling South-Central Timber

The final scenario exposes the only flaw in the Second Circuit's analysis: its attempt to reconcile its decision in *SSC Corp.* with both *White* and *South-Central Timber.*

This is an impossible task because the two cannot be reconciled. The Supreme Court's decision in *South-Central Timber* is a vain attempt to justify an opposite conclusion from *White* in essentially the same situation. Thus, any attempt to apply one of the cases runs afoul of the other, creating a confusion of the issue.[176]

Any distinction between the circumstances in *White* and the scenario in *South-Central Timber* is simply illusory. Despite the *South-Central Timber* plurality's attempt at differentiation, Boston's meddling upstream in the labor market is clearly analogous to Alaska's meddling downstream in the timber processing market. During the initial determination of whether the market participant exception should apply, courts should focus on the state's activity rather than the effect of its participation.[177] The opinion appears to be

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172. Otherwise, it would contradict *City of Philadelphia.* Any argument that it is acting as a participant because of its activity as a waste hauler clearly would be futile, since there is no connection between its position as a hauler and the disposal of out-of-state waste at a private facility.

173. 66 F.3d at 515.

174. Id. See also notes 116-17 and accompanying text.

175. *SSC Corp.*, 66 F.3d at 515.

176. It would also be plausible simply to confine *South-Central Timber* te its factual context. But see Coenen, 88 Mich. L. Rev. at 473 (cited in note 22) (stating that *South-Central Timber* should prevail and that the permissible upstream effect present in *White* should be limited to the context of construction workers).

177. On a practical level it would be nonsensical to impose a formalistic constraint on the ability to impact a vertical market. In reality, many businesses use economic forces te impact a market in which they are not a participant. See Weyhrauch, 15 Envir. L. at 615 (cited in note

"unduly formalistic"[178] in light of the fact that the state could have achieved the same result by utilizing different avenues.[179] Rebuking *South-Central Timber* would create a clearer standard as opposed to creating an arbitrary delineation of what constitutes unacceptable downstream intrusion.[180]

Lower courts should simply consider the *South-Central Timber* decision as an anomaly and confine it to its facts. This would enable the courts to apply the cohesive framework of the classic market participant exception decisions: *Alexandria Scrap*, *White*, and *Reeves*. Under this analysis, it should be inconsequential whether the government participates in a vertical market. Inquiry would cease after determining whether a government is acting as a regulator by exercising regulatory power or as a participant by exercising economic pressure. According to this logic, Smithtown could use its economic power as a market participant as leverage to command its waste haulers to dispose the garbage at any site designated by the town. Likewise, Babylon could take advantage of its participation in both

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26) (recognizing that "most markets extend far and wide and will exert economic forces on other markets either under the auspices of regulation or the dynamics of market participation").

178. *South-Central Timber*, 467 U.S. at 103 (Rehnquist, J., dissenting).

179. The plurality even conceded, yet found it "unimportant," that Alaska could have achieved its objective by "selling only to Alaska processors, by vertical integration, or by direct subsidy." Id. at 99.

180. As an exasperated Justice Jackson once stated: "I give up. Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.'" *Securities and Exch. Commn v. Chenery Co.*, 332 U.S. 194, 214 (1947) (Jackson, J., dissenting).

Many commentators have expressed discontent with the analysis in *South-Central Timber*. See, for example, Weyhrauch, 15 Envir. L. at 608, 615 (cited in note 26) (maintaining that the decision "does more te obfuscate" the distinction between market participants and market regulators); Seamon, 1985 Duke L. J. at 722 (cited in note 22) (contending that *South-Central Timber* "complicates the present state of the dormant commerce clause analysis without improving it"); Polelle, 15 Whittier L. Rev. at 676 (cited in note 51) (noting the "formalistic and problematic" nature of the decision). But see Coenen, 88 Mich. L. Rev. at 353-54 (cited in note 22) (mentioning the "heightened regard to formalism" and arguing that these concerns "counsel against bright-line rules applied with an indifference te the form of state participation"). For a theoretical analysis and critique of the market participant doctrine, see generally id. at 398 (proposing that the "Court's market-participant decisions reflect a sound, if complex, accommodation of competing constitutional values"); Christine H. Kellett, *The Market Participant Doctrine: No Longer "Good Sense" or "Sound Law,"* 9 Temple Envir. L. & Tech. J. 169 (1990) (advocating the abandonment of the doctrine); Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487 (1981) (justifying the exception on the grounds that state residents have a right to use their resources for their own self interest); Laurence Tribe, *Constitutional Choices* 144-46 (Harvard U., 1985) (maintaining that states that create commerce have a greater entitlement to the benefits of the exception); Mark P. Gergen, *The Selfish State and the Market*, 66 Tex. L. Rev. 1097 (1988) (advocating the utilization of economic efficiency theory to establish a framework of analysis for constructing the market participant exception); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091 (1986) (defending the exemption on the premise that state spending programs are inherently less discriminatory than taxes and regulations).

markets to create economic incentives that would encourage BSSCI to dispose of its waste at the municipal incinerator.

The Second Circuit cannot be faulted for attempting to reconcile *White* and *South-Central Timber* in *SSC Corp.* [181] The Supreme Court has failed to articulate a coherent, consistent elucidation of the market participant doctrine. Until the Court sufficiently clarifies the doctrine, overrules *South-Central Timber*, overrules principles of the three classic cases, or overrules the entire market participant exception, lower courts will continue to struggle with the reconciliation of *South-Central Timber* with *Alexandria Scrap*, *White*, and *Reeves*.

Abandoning *South-Central Timber* would leave clearer guidelines for municipalities seeking to fulfill the task of solid waste management. Adopting the classical view would permit municipalities that enter the waste hauling markets as participants to exert economic pressure in the form of bargaining power that would essentially result in export restrictions. As long as the municipality exercised economic power and not regulatory power, the market participant exception would shield it from dormant commerce clause scrutiny. Although it remains difficult to determine whether a governmental

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181. The crux of the issue in *SSC Corp.* concerned whether Smithtown's hauling contract "more closely resemble[d]" the scenario in *White* or the scenario in *South-Central Timber*, 66 F.3d at 514. The *SSC Corp.* court attempted to compare Smithtown's scheme to that of Boston hy claiming that Smithtewn was "a 'major participant' in *two* 'discreto, identifiable class[es] of economic activity.'" Id. (quoting *White*, 460 U.S. at 211 n.7) (emphasis added). The problem with this analogy lies in its manipulation of the quote in *White* and misinterpretation of its reasoning. Arguably, the *White* court was attempting to claim that a separate upstream lahor market was not affected by Boston's activity since the workers were agents of the city in a "substantial if informal sense." *White*, 460 U.S. at 211 n.7. The *White* majority thus only acknowledged the existence of a single market instead of two entirely distinct markets. Therefore, the Second Circuit's manipulation of the decision's language, by making it plural, distorts the logic of the *White* court.

In reality, Smithtewn's practice clearly impacted a downstream market. The spurious distinction between *White* and *South-Central Timber* cannot he reconciled in *SSC Corp.* Just as Alaska attempted te enact mandates concerning where purchasers could process their timber, Smithtewn attempted to dictate where garbage collectors could haul the waste. Theoretically, both of these impositions create an impact on a downstream market. Furthermore, both cases resemble instances of economic pressure rather than regulatory pressure because the enactments only apply to parties that choose to deal with the governments. The Second Circuit should have acknowledged that Smithtown engaged in the same activity as Alaska and conceded the inconsistency of *SSC Corp.* and *South-Central Timber*. The only plausible response that could be asserted is that *SSC Corp.* is properly distinguishable from *South-Central Timber* since Smithtown actually participated in the downstream market. *SSC Corp.*, 66 F.3d at 516 (implying that Alaska's practice would have been permissible had it been a participant in the downstream timber processing market). Yet the essence of *South-Central Timber* entails a prohibition on participatory activity that affects a separate market. 467 U.S. at 97 ("The State may not impose conditions . . . that have a substantial regulatory effect outside of that particular market"). It should not make a difference whether the state is participating in both markets.

entity is acting as a participant or a regulator,[182] this approach would avoid the additional dilemma encountered by observing downstream markets.

B. Limiting Antitrust Immunity

The market participant exception rests on the notion that when a government acts as a market participant, it should be able to function in the same capacity as a private entity.[183] However, governments may not be capable of acting on equal footing with private businesses. In light of their inherent sovereign nature coupled with their access to a wealth of resources, governments may actually gain an advantage over private entities when shielded by the market participant exception.[184] A more prudent approach, therefore, may be to

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182. It is often extremely difficult to delineato whether a government is acting as a proprietor as opposed to a regulator. In fact, governments frequently act in a participatory and regulatory capacity simultaneously. See Pomper, 137 U. Pa. L. Rev. at 1322 (cited in note 51) (maintaining that it is "notoriously difficult to draw" a line between a state acting as a market participant and a market regulator); Kellett, 9 Temple Envir. L. & Tech. J. at 172 (cited in note 180) (stating that the classification is "subjective at best"); Karl Manheim, *New-Age Federalism and the Market Participant Doctrine*, 22 Ariz. St. L. J. 559, 606-07 (1990) (asserting that the distinction is an "illusion"). However, it has also been argued that the market participant exception demands more "flexibility" than the traditional/nontraditional standard of *National League of Cities v. Usery*, 426 U.S. 833 (1976). Kline, 96 Dickinson L. Rev. at 388-89 (cited in note 50). Kline also proposes that the "market participant/regulator label, by contrast, hinges not on whether a particular *type* of activity is involved, but on the *form* of governmental involvement." Id. at 388. Thus, it had been argued that one relevant factor is whether the government has expended financial resources. See id. at 390-91 (proposing a "test" of "whether state sales, purchases, or subsidies are made available through a program of stato spending or otherwise involve property, goods, or services owned by the state in a nonfictional sense"). For another framework, see Coenen, 88 Mich. L. Rev. at 441 (cited in note 22) (establishing a multifactoral market participant analysis).

With respect to solid wasto management, courts should weigh carefully numerous criteria in order to determine whether a municipality is acting as a market regulator or market participant. As previously noted, a state often performs the two functions simultaneously. See Kline, 96 Dickinson L. Rev. at 400 (cited in note 50) (proposing that "[a]s a rule, substantial state police regulation of an industry (the waste disposal industry in particular) should not deprive the state of the opportunity to participate in the regulated market"). But see Pomper, 137 U. Pa. L. Rev. at 1322 (cited in note 51) (stating that "[t]he regulatory purpose of such acts should not disqualify [municipalities] from application of the 'market participant' exception"); Meyers, 79 Georgetown L. J. at 579-80 (cited in note 2) (contending that "[i]f jurisdictions are simultaneously regulating the landfill services market and participating in it, they should not be allowed recourse to tbe market participant exception").

183. See *Reeves*, 447 U.S. at 438-39.

184. See Polelle, 15 Whittier L. Rev. at 665 (cited in note 51) (maintaining that "[g]overnment will always have the potential for exercising greater economic power than most businesses or individuals. Its virtually unlimited power to tax and borrow in order to provide revenue for its government-run operations is a power denied to a private enterprise who is directly tied to the need to turn a profit for existence"); Kovacs and Anderson, 18 Envir. L. at 804 (cited in note 3) (arguing that currently the market participant exception "does not promote

scrutinize the custom of the private industry and ensure that the market participation exception does not provide the government with an unfair advantage over that industry.[185] Such scrutiny would ensure that a government enjoys protection under the market participant exception only when it truly acts in the same capacity as a private entity.[186]

One major problem that arises with the reinvigoration of the market participant exception is the potential for a municipality to abuse the doctrine by using it as a sword instead of a shield.[187] This occurs when a municipality achieves a competitive advantage in one market by virtue of its participation in a vertical market. In *SSC Corp.* and *USA Recycling*, Smithtown and Babylon were attempting to enhance their position in the disposal market by exercising economic pressure in the upstream hauling market. Such activity operates to the detriment of private disposal facilities attempting to compete with the facilities favored by the municipality.

A possible solution to this problem is to withdraw antitrust immunity when a state or local government acts as a market participant. This approach would serve as a check on governments that attempt to utilize the market participant exception as a loophole to avoid commerce clause scrutiny.

Generally, courts extend state antitrust immunity to local governments that act pursuant to clearly enunciated state policy.[188] In

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evenhandedness, but rather provides states an unfair advantage over private sector participants").

185. See Kline, 96 Dickinson L. Rev. at 416 (cited in note 50) (proposing that the "*Swin* court should have focused less on the *terms* of the restraint and their propensity to restrain private transactions and more on whether the resulting market influence comported with established concepts of private trade in the waste disposal industry").

186. See Barton B. Clark, Comment, *Give 'Em Enough Rope: States, Subdivisions and the Market Participant Exception to the Dormant Commerce Clause*, 60 U. Chi. L. Rev. 615, 627 (1993) (proposing that " 'market participation' should be defined as those state actions which could legally be undertaken by a private party acting in the market").

187. See James F. Ponsoldt, *Balancing Federalism and Free Markets: Toward Renewed Antitrust Policing, Privatization, or a "State Supervision" Screen for Municipal Market Participant Conduct*, 48 S.M.U. L. Rev. 1783, 1787 (1995) (discussing the attractiveness of a municipality acting as a participant monopoly, since "monopoly profits frequently provide a politically preferable alternative to taxes as a general revenue source"). Dicta by the Supreme Court has, nevertheless, asserted that a municipality, unlike a private party, poses "little or no danger that is involved in a private price-fixing arrangement." *Town of Hallie v. Eau Claire*, 471 U.S. 34, 47 (1985) (emphasis omitted). However, it has been aptly suggested that "[m]unicipalities are just as capable as private actors of violating antitrust and free market policy." Ponsoldt, 48 S.M.U. L. Rev. at 1795 n.63.

188. The Court originally granted antitrust immunity to states in *Parker v. Brown*, 317 U.S. 341 (1943). *Parker*, however, expressly avoided discussing the scenario of a state acting as a proprietor. Id. at 351-52. The Court extended antitrust exemption to municipalities in *City of Lafayette*, 435 U.S. at 413, and *Hallie*, 471 U.S. at 42. See also *SSC Corp.*, 66 F.3d at 517

Jefferson County Pharmaceutical Assn, Inc. v. Abbott Laboratories,[189] however, the Supreme Court first suggested in dicta that "there is no [antitrust] exemption for state purchases to compete with private enterprise."[190] Justice Rehnquist referred to this case in his dissent in *South-Central Timber*, maintaining that "antitrust laws apply to a State only when it is acting as a market participant."[191]

Limiting antitrust immunity for state and local governments acting as market participants would certainly promote evenhandedness.[192] The original objective of the market participant doctrine was

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(holding that Smithtown was acting pursuant to policy expounded by the New York state legislature). For a more in-depth discussion of the application of antitrust immunity to municipalities, see generally Ponsoldt, 48 S.M.U. L. Rov. 1783 (cited in note 187); Robert E. Bienstock, Comment, *Municipal Antitrust Liability: Beyond Immunity*, 73 Cal. L. Rev. 1829 (1985) (formulating guidelines for antitrust liability of nonimmune municipal defendants).

189. 460 U.S. 150 (1983).

190. Id. at 156-57. The case involved a challenge to a governmental hospital that competed with private pharmacies under the Robinson-Patman Act, 15 U.S.C. § 13 (1994 ed.). *Jefferson County*, 460 U.S. at 152.

191. *South-Central Timber*, 467 U.S. at 102 (Rehnquist, J., dissenting). Justice Rohnquist made the statoment while criticizing the plurality for relying on antitrust cases to "justify placing Alaska in the market-regulatory category." Id. at 103 (Rehnquist, J., dissenting). Justice Whito's opinion had stated that "[i]t is no defense in an action charging vertical trade restraints tbat the same end could be achieved through vertical integration." Id. at 98 (White. J.).

This principle was also enunciated in by the Court in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 374-75 (1991) (suggesting that antitrust immunity does not apply "where the State acts not in a regulatory capacity but as a participant in a given market"). See also id. at 379 ("We reiterato that, with the possible market participant exception, any action that qualifies as stato action is 'ipso facto . . . exempt from operation of the antitrust laws'" (quoting *Hoover v. Ronwin*, 466 U.S. 558, 580 (1984)). For further discussion of the ramifications of *Omni*, see Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 Cal. L. Rev. 1177, 1189-91 (1992). See also *Lafayette*, 435 U.S. at 418-22 (Burger, C.J., concurring) (arguing that *Parker* immunity was not intended to be extended to municipalities acting as market participants); *Genetech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 948 (Fed. Cir. 1993) (holding that in order for a state to enjoy antitrust immunity, its activity "must be taken in the stato's 'sovereign capacity,' and not as a market participant in competition with commercial enterprise").

It could also be argued that the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-46 (1994 ed.), serves as a "plain statoment" by Congress that it intended for municipalities to be subject to antitrust laws when acting as market participants. See *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991) (implementing the "plain statement" rule to determine congressional intent). The statute codifies antitrust immunity to be enjoyed by municipal governments when acting in a regulatory capacity. 15 U.S.C. §§ 35-36. The argument follows that the statute's silence concerning declaratory and injunctive relief (though it prohibits monetary damages) from municipal defendants arguably expresses intont to restrict *Parker* immunity. However, this contention appears to be flawed since courts have consistently segregated the statutory scope of damages from the analysis of whether the law applies to a particular party or action.

192. See Ponsoldt, 48 S.M.U. L. Rov. at 1797, 1811 (cited in note 187) (proposing that antitrust immunity should only apply to market participants whose activity is both authorized by the state and actively supported by the state); Clark, 60 U. Chi. L. Rov. at 629 (cited in note 186) (asserting that "if a state takes actions that would violate the antitrust laws if undertaken by a private party, the state [should] be subject to dormant Commerce Clause scrutiny"); Kenneth J. King, Note, *The Preemption Alternative to Municipal Antitrust Liability*, 51 Geo. Wash. L. Rov. 145, 166-69 (1982) (proposing that market participants should not be exempt from antitrust

the notion of fairness: if the government enters a market it should be able to receive the same benefits as a private actor.[193] However, a governmental proprietor that is permitted to retain antitrust immunity while bearing the cloak of a market participant receives an unfair advantage over its private competitors. Limiting this immunity would advance the original objective of maintaining evenhandedness.[194]

The Second Circuit encountered the issue of antitrust immunity in *SSC Corp.*, but did not adequately address it.[195] Although a few lower courts have faced the issue, no strong precedent exists with respect to vertical integration involving municipal solid waste management.[196]

Even if this methodology were applied in the context of *SSC Corp.* and *USA Recycling*, it appears unlikely that the practices of Smithtown or Babylon would violate antitrust law. First, courts have consistently held that municipalities may monopolize the solid waste hauling market.[197] The more intriguing antitrust question presented

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laws); Kline, 96 Dickinson L. Rev. at 380, 398-99 (cited in note 50) (same); Kovacs and Anderson, 18 Envir. L. at 805-09 (cited in note 3) (arguing that antitrust exemption provides market participants with an unfair advantage); Bienstock, 73 Cal. L. Rev. at 1869 (cited in note 188) (proposing that municipalities should be viewed as "private parties when they are challenged in a market participant capacity").

193. *Reeves*, 447 U.S. at 439 n.12.

194. The underlying principle is that "[i]f municipalities act and compete with private business, they should be subject to the same laws." Ponsoldt, 48 S.M.U. L. Rev. at 1805 n.117 (cited in note 187).

195. *SSC Corp.*, 66 F.3d at 517-18. Fault for this lies with the plaintiff, however, since it raised the issue in a backhanded fashion. Instead of asserting that antitrust laws should apply to Smithtown if it were indeed classified as a market participant, SSC argued that the town should not be characterized as a market participant, because then it would be culpable for antitrust violations. Id. at 517. Therefore, the Court provided cursory attention to the issue and basically dismissed the contention based on the axiom that statutes are interpreted in a manner that is consistont with the Constitution. Id. at 518.

Apparently SSC attempted to utilize the analogy of antitrust in order to define Smithtown as a market participant. Although it has also been suggested that antitrust concepts should help define when a government is acting as a market regulator, this presents a circular trap. The circularity occurs when market regulation is defined as that which would subject a government to antitrust laws while at the same time antitrust laws are deemed only to apply to governments acting as regulators. For a proposal of antitrust laws serving as a guideline, see Kline, 96 Dickinson L. Rev. at 400 (cited in note 50) (maintaining that "[a]ntitrust *principles* of 'monopolization' and 'attompted monopolization' should help to discern state proprietary conduct from indirect market regulation" (emphasis in original).

196. See *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419, 427-28 (8th Cir. 1983) (upholding a municipal monopoly of solid waste collection services); *Hybud*, 742 F.2d at 957-62 (same); *Seay Bros., Inc. v. Albuquerque*, 601 F. Supp. 1518, 1521-23 (D.N.M. 1985) (same); *Tri-State Rubbish, Inc. v. Waste Management, Inc.*, 803 F. Supp. 451, 461-63 (D. Me. 1992) (upholding flow control ordinance); *Savage v. Waste Management, Inc.*, 623 F. Supp. 1505, 1508-10 (D.S.C. 1985) (upholding antitrust immunity to county that created a franchise relationship with a waste collection service).

197. See notes 163-65.

concerns whether a municipality could use its monopoly position in the waste hauling market as leverage to benefit its market position in the vertical disposal market. Competitors in the disposal market would be the entities disadvantaged by arrangements that favor municipal dump sites. Nevertheless, it appears that this practice would not be an unfair trade practice. If a municipality can monopolize the hauling market, it is free to transport the garbage to any site that it chooses.[198] Therefore, creating a contractual or franchise relationship with a private hauler should not impact the municipality's right to designate a dumping site.[199]

V. CONCLUSION

State and municipal leaders faced with the solid waste crisis should be permitted to utilize creative approaches to resolve this environmental dilemma. Absent congressional preemption,[200] local governments will always face dormant commerce clause challenges to their strategies. In order to create a coherent framework on which municipalities can rely, the Supreme Court should reexamine the market participant doctrine and establish a clearer guideline. The Second Circuit's decisions in *SSC Corp.* and *USA Recycling* help to solidify the market participant exception as a viable protection for municipalities seeking ways to address the dilemma of solid waste management. Whereas the Third Circuit's decision in *Swin* legitimized the exception with respect to import bans, *SSC Corp.* and *USA Recycling* stand as prominent authority for the use of the exception with regard to export restrictions. These cases help resolve any doubt

198. See Petersen and Abramowitz, 22 Fordham Urban L. J. at 396 (cited in note 1) (asserting that if a municipality performs the task of collecting garbage, "it is indisputable that the municipality can then control where that waste is disposed").

199. There are many economic reasons why a city would desire to delegate the task to a private hauler as an agent of the city. As long as the agreement is voluntary, the analysis should not be any different from that used when the city hauled the garbage itself. See id. at 397-404 (discussing the validity of contractual and franchise relationships). Also, a city could create economic incentives to convince a private hauler to dump the garbage at a municipally favored site, such as in *USA Recycling*. See 66 F.3d at 1291. See also Petersen and Abramowitz, 22 Fordham Urban L. J. at 404-06 (cited in note 1) (discussing "economic flow control").

200. For a discussion of proposals of congressional preemption in the market of solid waste, see Petersen and Abramowitz, 22 Fordham Urban L. J. at 407-15 (cited in note 1) (discussing various potential congressional approaches); Weinberg, 25 Envir. L. at 64-72 (cited in note 2) (same); Meyers, 79 Georgetown L. J. at 585-89 (cited in note 2) (same); Engel, 73 N.C. L. Rev. at 1546-60 (cited in note 3) (discussing alternatives and proposing that Congress should authorize the formation of regional interstate arrangements).

created by *Carbone* and provide a new level of predictability for municipalities fearful of commerce clause challenges to their waste management strategies.

The confusion in *SSC Corp.* regarding *South-Central Timber*, however, proves that until the Supreme Court clarifies its interpretation of the market participant doctrine, lower courts should adhere to the principles of the classic cases of *Alexandria Scrap*, *White*, and *Reeves*. These principles simply require asking whether the government is acting in a participatory as opposed to a regulatory capacity. Economic impacts in other markets should be ignored during this phase of analysis.

In addition, once a state or locality is characterized as a market participant, its enjoyment of antitrust immunity should be either withdrawn or severely limited. This would further the goal of ensuring that state actors and private actors compete on the same level.

*David L. Johnson**

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