

Oklahoma Law Review

Volume 50 | Number 2

1-1-1997

Garbage in, Garbage Out: Court Confusion About the Dormant Commerce Clause

Stanley E. Cox

Follow this and additional works at: <https://digitalcommons.law.ou.edu/olr>



Part of the [Constitutional Law Commons](#)

Recommended Citation

Stanley E. Cox, *Garbage in, Garbage Out: Court Confusion About the Dormant Commerce Clause*, 50 OKLA. L. REV. 155 (1997),
<https://digitalcommons.law.ou.edu/olr/vol50/iss2/7>

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

OKLAHOMA LAW REVIEW

VOLUME 50

SUMMER, 1997

NUMBER 2

GARBAGE IN, GARBAGE OUT: COURT CONFUSION ABOUT THE DORMANT COMMERCE CLAUSE

STANLEY E. COX*

Table of Contents

I. Introduction: The Garbage Cases Demonstrate Disturbing Trends in Current Dormant Commerce Clause Case Law	156
A. Pushing Trash to the Forefront	156
B. More and More Garbage	158
II. Where the Court Has Dumped Us	164
A. <i>Philadelphia's</i> Two-Tiered Approach	164
B. <i>Fort Gratiot's</i> Fortification of Per Se Implications	167
C. Pushing Per Se Further in <i>Oregon Waste</i> and <i>Carbone</i>	175
III. Flowing Against the Stream: The Second and Third Circuits Unconvincingly Attempt to Recast the Court's Commerce Clause Messages	189
A. Dust and Din About Flow Control Being Constitutional	190
B. The Need to Preserve Legitimate Market Participation Exemption ...	201
IV. Pushing Per Se Presumptions Too Far	207
A. Why Regulatory Sticks and Stones Alone Should Be Counted as Breaking Commerce Clause Bones	208
B. Why We Should Not Recycle Substantive Economic Due Process Through the Dormant Commerce Clause	214
V. Conclusion	220

* Professor of Law, New England School of Law. A.B. Harvard College, 1974; M.A.T. Duke University, 1975; H.Dip. Trinity College, University of Dublin, 1978; J.D. University of Kentucky, 1987. Versions of this article were presented to a Harvard Environmental Law & Policy Interdisciplinary Research Seminar in March 1995, as part of a panel on "Waste and the Dormant Commerce Clause" at the Public Interest Environmental Law Conference, March 1996, Eugene, Oregon, and to a New England School of Law "Works in Progress" luncheon in April 1997. I thank all at those sessions who offered feedback. This article was supported by a New England School of Law James R. Lawton summer stipend, and I thank the Dean and the Board of Trustees of New England School of Law for their continuing encouragement and support of my scholarship. I thank Andrea DeVries, my research assistant, for her work associated with this piece.

I. Introduction: The Garbage Cases Demonstrate Disturbing Trends
in Current Dormant Commerce Clause Case Law

A. Pushing Trash to the Forefront

This article uses garbage and dormant Commerce Clause cases to explore larger points about dormant Commerce Clause jurisprudence. I focus on the garbage cases not just because that is where I first was mired in searches for dormant Commerce Clause truths,¹ but also because these cases are on the cutting edge of dormant Commerce Clause theory. In its first garbage case, *Philadelphia v. New Jersey*,² the United States Supreme Court began the trend toward pre-sorting dormant Commerce Clause cases into two distinct categories.³ If a regulation clearly discriminated against other states, it would be subject to virtual per se invalidity. If a regulation did not discriminate, it would be allowed to have incidental effects on interstate commerce. In more recent garbage decisions, the Court has insisted on labeling a regulation either discriminatory or nondiscriminatory before it engages in any further analysis.⁴ This emphasis on pre-sorting has led to increasingly unproductive wrangling about what label should be put on a regulation rather than inquiring about the benefits and harms of the regulation.

Some lower courts, in response to the Court's insistence that cases be preliminarily pigeon-holed, have attempted to redirect dormant Commerce Clause theory towards the protection of status quo economic rights. Such courts pre-sort into the discrimination stack all regulations which interfere with out-of-state business or which seem to have been passed because of animosity toward out-of-state business. These courts essentially are advocating, through the garbage cases, that the dormant Commerce Clause requires no significant economic interference with existing private interstate markets.⁵ Other courts, equally erroneously, have tried to escape having

1. My first involvement with waste and the dormant Commerce Clause was in 1989-90, when in private practice I represented citizen-group plaintiffs who opposed expansion of a Kentucky landfill designed to receive primarily out-of-state trash. During my work for the Office of Attorney General of Kentucky in 1990-92, I advised on the constitutionality of legislation proposed for the 1991 Special Session of the Kentucky Legislature; co-authored amicus briefs in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992), and *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992); authored an amicus brief before the Sixth Circuit in *National Solid Waste Mgmt. Ass'n v. Voinovich*, 763 F. Supp. 244 (S.D. Ohio 1991), *rev'd and remanded*, 959 F.2d 590 (6th Cir. 1992); co-authored the briefs in *Carpenter v. Kentucky*, 831 S.W.2d 188 (Ky. Ct. App. 1992); and issued numerous informal opinion letters and advice on waste issues. Since joining academia, I have provided limited pro-bono assistance to attorneys for Clarkstown in *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), to the State of Oregon and state amici in *Oregon Waste Sys., Inc. v. Oregon Dep't of Envtl. Quality*, 511 U.S. 93 (1994), to the State of Wisconsin on its petition for certiorari in *National Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652 (7th Cir. 1995), and to numerous other waste litigants on the state side. I also very occasionally have provided assistance to waste industry parties, sometimes for fee.

2. 437 U.S. 617 (1978) (holding that state ban on importing garbage violates dormant Commerce Clause in absence of any reason for treating waste differently based on origin).

3. See *infra* notes 22-30 and accompanying text.

4. See *infra* notes 31-116 and accompanying text.

5. See *infra* notes 181-250 and accompanying text.

their regulations labeled discriminatory per se, even though their factual situations are virtually indistinguishable from what the Court previously has pre-sorted into that pile. These courts try to claim that no preliminary label of discrimination can attach when there is the possibility that regulatory benefits will outweigh Commerce Clause harms.⁶

Why is there such lower court confusion? I believe that the Court's insistence on dichotomization inevitably has produced the confusion we now see among lower courts. By describing in this article the Court's development of and application of its either-or tests in the garbage context, and by here also describing lower courts' perversions of the Court's garbage precedents, I hope to cast doubt on the legitimacy of the Court's current dormant Commerce Clause methodology. My hope is that the Court would seriously consider returning to a meaningful balancing approach as the sole test for Commerce Clause disputes. But if this is not an idea the Court currently might embrace, I at least hope to invite correction of some of the worst excesses which a deterministic dichotomized test inevitably has produced. The garbage cases demonstrate that results produced by lower courts can be no better than the dormant Commerce Clause guidance which the Court provides. The garbage cases demonstrate both the lack of consistent underlying rationale in the Court's current dormant Commerce Clause methodology and the confusion inevitably resulting when lower courts try to apply this unsatisfying methodology.⁷

6. See *infra* notes 117-78 and accompanying text.

7. My goal in this article is therefore relatively modest. Although I have strong views on how dormant Commerce Clause analysis should proceed, enshrining my own methodology as the preferred alternative to the current dormant Commerce Clause confusion is not the primary goal of this piece. Instead, I primarily describe and criticize, in the hopes that even those who do not share my particular perspective on what should be dormant Commerce Clause methodology will at least be persuaded that lower court confusion is real, and that this confusion comes largely in response to Supreme Court insistence on dichotomization and pigeonholing. The garbage cases provide excellent examples of the confusion, since they show lower courts oppositely misconstruing Supreme Court precedent in their attempts to fall on the right side of the Court's deterministic categories of Commerce Clause scrutiny.

This is not to say that my views on how dormant Commerce Clause analysis should proceed do not get voiced herein. Unlike those who claim that the dormant Commerce Clause should be largely abandoned or subsumed within other constitutional protections, I believe the dormant Commerce Clause doctrine serves a useful function. *But see, e.g.,* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569; Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125. As a clause specifically asked to deal with economic matters, it ensures that there will be both national economic markets when these are needed as a matter of national policy, and also that there will be no economic discrimination against out-of-state businesses in favor of in-state economic actors, who are often able to exert lobbying pressure on their local law makers to pass laws in their favor.

Unlike those, however, who believe that the dormant Commerce Clause is designed to ensure economic efficiencies, I believe its purpose is to prevent state overreaching vis-à-vis other states or as against federal political interests. *But see, e.g.,* Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43 (1988); Daniel J. Gifford, *Federalism, Efficiency, the Commerce Clause, and the Sherman Act: Why We Should Follow a Consistent Free-Market Policy*, 44 EMORY L.J. 1227 (1995); William L. Kovacs & Anthony A. Anderson, *States as Market Participants in Solid Waste Disposal Services — Fair Competition or the Destruction of the Private Sector?* 18 ENVTL. L. 779

B. More and More Garbage

The number of garbage decisions alone is significant. Garbage in fact seems to have replaced milk or minnows as today's primary subject for dormant Commerce Clause dispute. Some eight years ago, when I first began seriously "talking trash," in a dormant Commerce Clause sense, the relevant precedents could be collected in one thin file folder. In the two years preceding this article's composition, the lower courts produced over forty significant decisions involving waste and commerce.⁸

(1988); Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555 (1994); Ferdinand P. Schoettle, *Commerce Clause Challenges to State Taxes*, 75 MINN. L. REV. 907 (1991); Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 MICH. L. REV. 895 (1992).

Only when the need is for unitary national markets, which situation is rare, does the clause ensure that the states do not infringe on federal values. The Court, in essence, declares that preemptive federal common law requires no state regulation different from what is authorized as prevailing practice in the marketplace. In the more normal situation, where each state is left free to regulate within its own sphere of influence differently from other states, the clause ensures that states do not use their sovereignty to infringe unduly upon the economic interests of outsiders who are citizens of co-equal sovereigns. Thus, I read the famous quote from *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 539 (1949) that "every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation," and that "every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any" as ensuring only access to markets in the selling state on the same terms for all comers. The prohibition is against discriminatory tariffs or against other measures which operate effectively as tariffs. Regulation for health and safety reasons is not prohibited. Nor does the dormant Commerce Clause guarantee access on the same terms the producer may have lobbied for and won in the state of production. To hold otherwise would encourage the worst sort of race to laxity and frustrate the sovereignty of a state which has a right evenhandedly to regulate products sold within it.

As to exactly how one should determine what constitutes impermissible favoritism, my preference is to ask whether there is direct differential economic effect which is not offset by some significant regulatory purpose. In short, I believe there is much to be said for returning to a unitary standard of dormant Commerce Clause scrutiny modeled after *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which inquires as fully as did that case into the reality of economic effects and the legitimacy of state purposes. Cf. Earl M. Maltz, *How Much Regulation Is Too Much — An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47 (1981); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); Robert A. Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885 (1985); Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CAL. L. REV. 1203 (1986); Winkfield F. Twyman, Jr., *Beyond Purpose: Addressing State Discrimination in Interstate Commerce*, 46 S.C. L. REV. 381 (1995); Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487 (1981).

8. See *Atlantic Coast Demolition v. Board of Chosen Freeholders*, 112 F.3d 652 (3d Cir. 1997); *Individuals for Responsible Gov't, Inc. v. Washoe County*, 110 F.3d 699 (9th Cir. 1997); *Gary D. Peake Excavating v. Town Board of Hancock*, 93 F.3d 68 (2d Cir. 1996); *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995); *Environmental Tech. Council v. Sierra Club*, 98 F.3d 774 (4th Cir. 1996); *Chambers Medical Tech. of S.C. v. Bryant*, 52 F.3d 1252 (4th Cir. 1995); *National Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652 (7th Cir. 1995); *Ben Oehrleins & Sons & Daughters v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997); *SDDS, Inc. v. South Dakota*, 47 F.3d 263 (8th Cir. 1995); *Kleenwell Biohazard Waste v. Nelson*, 48 F.3d 391 (9th Cir. 1995); *Condon*

This litigation has proliferated despite two United States Supreme Court waste and Commerce Clause decisions in 1992⁹ and another two in 1994.¹⁰ The players

v. Andino, Inc., 961 F. Supp. 323 (D. Me. 1997); Waste Mgmt. of Mich. v. Ingham County, 941 F. Supp. 656 (W.D. Mich. 1996); Ben Oehrleins, Inc. v. Hennepin County, Minn., 922 F. Supp. 1396 (D. Minn. 1996); Poor Richard's Inc. v. Ramsey County, Minn., 922 F. Supp. 1387 (D. Minn. 1996); Robinson Rubber Prods. Co. v. Hennepin County, No. 4-95-220, 1996 U.S. Dist. LEXIS 4365 (D. Minn. Mar. 29, 1996); Robinson Rubber Prods. Co. v. Hennepin Cty. Minn., 927 F. Supp. 343 (D. Minn. 1996); Zenith/Kremer Waste Sys. v. Western Lake Superior Sanitary Dist., No. 5-95-228, 1996 U.S. Dist. LEXIS 15921 (D. Minn. July 2, 1996); Atlantic Coast Demolition & Recycling v. Board of Chosen Freeholders, 931 F. Supp. 341 (D.N.J. 1996); Barker Brothers Waste, Inc. v. Dyer County Legislative Body, 923 F. Supp. 1042 (W. D. Tenn. 1996); Connecticut Carting Co. v. Town of East Lyme, 946 F. Supp. 152 (D. Conn. 1995); James Emory, Inc. v. Twiggs County, 883 F. Supp. 1546 (M.D. Ga. 1995); Bonollo Rubbish Removal, Inc. v. Town of Franklin, 886 F. Supp. 955 (D. Mass. 1995); National Solid Waste Mgmt. Ass'n v. Williams, 877 F. Supp. 1367, 1375-76 (D. Minn. 1995); Vince Refuse Serv. v. Clark County Solid Waste Mgmt. Dist., No. C-3-93-319, 1995 U.S. Dist. LEXIS 5008 (S.D. Ohio Mar. 7, 1995); Valero Terrestrial Corp. v. Callaghan, No. 5:93CIV189, 1995 U.S. Dist. LEXIS 17490 (N.D. W. Va. Sept. 28, 1995); Environmental Waste Reductions, Inc. v. Reheis, 887 F. Supp. 1534 (N.D. Ga. 1994); Pine Ridge Recycling, Inc. v. Butts Cty., 855 F. Supp. 1264; (M.D. Ga. 1994); Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County, Minn., No. 4-94-63, 1994 U.S. Dist. LEXIS 15786 (D. Minn. Nov. 1, 1994); Mid-American Waste Systems v. Fisher, No. C-2-94-493, 1994 U.S. Dist. LEXIS 20966 (S.D. Ohio May 31, 1994); Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntingdon Solid Waste Auth., 877 F. Supp. 935 (M.D. Pa. 1994); Northeast Sanitary Landfill, Inc. v. South Carolina Dept. of Health and Env. Control, 843 F. Supp. 100 (D.S.C. 1994); Chambers Medical Tech. v. Jarrett, 841 F. Supp. 1402 (D.S.C. 1994); *In re* R.T. Opendaker & Sons, No. 96-13857DAS, 1996 Bankr. LEXIS 660 (Bankr. E.D. Pa. June 11, 1996); Connecticut v. A. Secchiaroli & Sons, No. CI960461353, 1996 Conn. Super. LEXIS 2448 (Conn. Super. Ct. Sept. 18, 1996); Town of Guilford v. D.P.L. Refuse Serv., Inc., No. CV95-02505755, 1996 Conn. Super. LEXIS 1172 (Conn. Super. Ct. May 8, 1996); Citizens for Logical Alternatives & Responsible Env't, Inc. v. Clare County Bd. of Comm'rs, 536 N.W.2d 286 (Mich. App. 1995); Sanifill, Inc. vs. Kandiyohi County, Minn., 559 N.W.2d 211 (Minn. Ct. App. 1997); Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist., 558 N.W.2d 288 (Minn. Ct. App. 1997); *In re* Emergency Redirection of Solid Waste, 645 A.2d 144 (N.J. Ct. App. 1994); Empire Sanitary Landfill, Inc. v. Pennsylvania, 684 A. 2d 1047 (Pa. 1996); Smith v. Borough of East Stroudsburg, 694 A.2d 19 (Pa. Commw. Ct. 1997); Delaware County v. Raymond T. Opendaker & Sons, 652 A.2d 434 (Pa. Commw. Ct. 1994); All Cycle, Inc. v. Chittenden Solid Waste Dist., 670 A.2d 800 (Vt. 1995).

9. See *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992) (holding that a Michigan statute which allows local governments to reserve privately owned landfills for in-county use is facially discriminatory against interstate commerce and cannot survive heightened scrutiny, since less discriminatory alternatives exist for any health and safety concerns); see also *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992) (finding that tax placed at higher rate on out-of-state hazardous waste despite no alleged difference in harms caused by out-of-state waste and without attempts to justify tax as compensatory tax is facially discriminatory, held to strictest scrutiny, and therefore unconstitutional); *infra* notes 32, 33-50 and accompanying text.

10. See *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) (holding that flow control ordinance which deprives local waste generators of opportunity to participate in the wider competitive waste processing market is per se discriminatory and therefore subject to heightened scrutiny; under such scrutiny legitimate local purposes cannot justify the discrimination against interstate commerce, since less discriminatory alternatives for accomplishing health and safety or revenue purposes exist); see also *Oregon Waste Sys. v. Oregon Dept. of Envtl. Qual.*, 511 U.S. 93 (1994) (holding that tax on out-of-state waste set at amount exactly equal to amount of harm caused by the out-of-state waste, and which amount is presumed paid by in-state funds in regard to in-state waste, was unconstitutional because it could not satisfy substantially equivalent event requirement); *infra* notes 51-108 and accompanying text.

involved in the waste battles are not getting the Supreme Court's message, in large part because that message is not clear. But the waste cases do not just exemplify the Court's general dormant Commerce Clause confusion. They also provide cutting edge examples of combatants trying to refashion the Court's messages into a more pro-industry or pro-regulatory direction. With political and financial stakes on both sides of waste disputes very high, garbage cases repeatedly are litigated to the appellate level, becoming important precedents not just for waste situations, but for all of dormant Commerce Clause inquiry.¹¹ If there is to be further reshaping of dormant Commerce Clause doctrine, it may well take place in a future Court garbage case.

Unfortunately, current lower court precedents are neither consistent with each other, nor in line with the controlling Supreme Court pronouncements. They therefore are unlikely to provide a good blueprint for how the Court should apply future dormant Commerce Clause scrutiny. Instead, the lower court and Supreme Court garbage cases together highlight current tensions and disagreement about developments in dormant Commerce Clause case law. They involve regulators pretending the Court has not ruled strongly against them. They involve businessmen trying to twist Court precedent into ever more pro-business directions. They show the Court meanwhile increasingly using its *per se* test in a more mechanical and determinative way, without yet sufficiently justifying why presumptions should be set so strongly against state efforts which may have only incidental differential effects. In response to the Court's pronouncements and the continued waste litigation, lower courts have responded inconsistently. Some have attempted to avoid the thrust of the Court's recent messages. Others have twisted the Court's messages toward a neo-revival of economic due process rights. Both types of misreading of Supreme Court rationale receive equal criticism in this article. My goal is to identify where lower courts are misreading the controlling precedents, and thereby make clearer the confusion of the Court's decrees.¹²

11. The garbage litigation is likely to continue so long as there are inconsistent lower court interpretations of what the Supreme Court requires, and so long as parties believe they have strong incentive in particular litigated waste disputes to misconstrue Court precedents in the hope of winning localized, if only temporary victories. Additionally, when Congress rejected pleas early in 1996 to solve pressing flow control waste problems legislatively, the courts became the only forum for resolution of these important issues. See, e.g., Canan, *House Defeats Flow Control; Blow to Waste Bondholders*, THE BOND BUYER, Feb. 2, 1996, available in LEXIS, News Directory, Asapii File (briefly describing background for and reaction to House vote January 31, 1996, defeating the flow control provisions of H.R. 349). Ironically, significant decisions from the Second and Third Circuits resuscitated the moribund flow control which Congress was in the very process of *not* authorizing. The Supreme Court, however, let both appellate decisions stand. See *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995), *cert. denied sub nom. Tri-County Indus. v. Mercer County*, 116 S. Ct. 1265 (1996); *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 911 (1996). Because of this, hope inevitably will be renewed in some quarters that the significance of cases like *C&A Carbone* and *Oregon Waste Systems* has been overstated, and there is likely to be a renewed push by environmentalists and regulators fighting other waste battles to play close to or over the edges of the Supreme Court's dormant Commerce Clause rulings. See, e.g., *infra* note 17 (collecting flow control cases, including some from the Sixth Circuit, which follow the Second and Third Circuits' lead).

12. An additional possible reaction to unsavory Court dormant Commerce Clause rulings would be

First, although I am sympathetic to the impulses which stir some lower courts to claim that the dormant Commerce Clause cannot possibly require illogical and expensive government policy,¹³ I believe that the Court recently and unequivocally

legislative overruling. Since Court dormant Commerce Clause pronouncements are only made when Congress is silent, a clear congressional statement contrary to what the Court has ruled overrules the Courts' decisions. In the waste context, Congress several times in the last few years explicitly was urged to authorize flow control programs which otherwise would violate the Court's reading of the Commerce Clause's requirements. See, e.g., S. REP. NO. 104-534 (1995); H.R. REP. NO. 104-2323, at Sec. 201(B) (1995); see also, e.g., Landers & Parsons, *Flow Control Legislation Flounders While Interest in Ash Reuse Is Revitalized*, FLA. ENVTL. COMPLIANCE UPDATE, Mar. 1996 (summarizing flow control legislative history). These legislative efforts met with most recent defeat in early 1996. See *supra* note 11. Although flow control legislation is again before Congress in 1997, the prospects for its passage appear at least questionable if not dim. See, e.g., *N.J. Delegation Split Spells Trouble For Flow Control*, NAT'L JOURNAL'S CONGRESS DAILY, Mar. 19, 1997, available in LEXIS, Legis Directory, Cngdly File; cf., e.g., Michael Stanton, *Groups Pressure New Congress On Flow Control, Stadium Bill*, THE BOND BUYER, Feb. 28, 1997 (expressing somewhat more optimism).

13. My prior and continuing personal involvement in waste battles has been primarily on behalf of state or local regulators attempting to fight off, or at least ameliorate, the uninvited burdens of out-of-area or out-of-state trash. See *supra* note 1. Each of the four most recent Court precedents has been a defeat for such regulatory efforts. I remain convinced the Court's "free flow" waste and Commerce Clause decisions are bad environmental policy, since they encourage waste generators to dump onto others the externalized burdens of their generation, rather than deal themselves with the costs of their own waste generation. See Stanley E. Cox, *Burying Misconceptions About Trash and Commerce: Why It Is Time to Dump Philadelphia v. New Jersey*, 20 CAP. U. L. REV. 813 (1991) [hereinafter Cox, *Burying Misconceptions*]; cf. *Chemical Waste Mgmt. v. Hunt*, 504 U.S. 334, 350 (1992) (Rehnquist, C.J., dissenting) (indicating that Court "gets it exactly backwards" by penalizing those who try to address their waste problems in a balanced way by striking down their regulations, and allowing states who are not addressing their problems to export these problems to others). But with recent Court precedents unambiguously on the books, it is unavailing to argue outside of the law review arena that garbage should be considered a special case for dormant Commerce Clause analysis. For other commentators who have attacked the *Philadelphia* Court's logic or argued for exceptions from it, see, for example, Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra*, 71 OR. L. REV. 409 (1992); Anne Ziebarth, *Environmental Law: Solid Waste Transport and Disposal Across State Lines-The Commerce Clause Versus the Garbage Crisis*, 1990 ANN. SURV. AM. L. 365; Samuel R. Bloom, Note, *The Need for a New Dormant Commerce Clause Test: A Time to Discard Waste Systems Corp. v. County of Martin, Minn.*, 18 HAMLINE L. REV. 80 (1994); Susan Adams Brietzke, Note, *Hazardous Waste in Interstate Commerce: Minimizing the Problem After City of Philadelphia v. New Jersey*, 24 VAL. U. L. REV. 77 (1989); Christine M. Fixl, Comment, *Hazardous Waste and Partial Import Bans: An Environmentally Sound Exception to the Commerce Clause*, 3 VILL. ENVTL. L.J. 149 (1992); William J. Holmes, Note, *Garbage, the Police Power, and the Commerce Clause: City of Philadelphia v. New Jersey*, 8 CAP. U. L. REV. 613 (1979).

For other commentary not so hostile to *Philadelphia*, which has analyzed Commerce Clause doctrine by focusing on the garbage cases, see, for example, Michael D. Diederich, Jr., *Does Garbage Have Standing?: Democracy, Flow Control and a Principled Constitutional Approach to Municipal Solid Waste Management*, 11 PACE ENVTL. L. REV. 157 (1993); 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); Edward A. Fitzgerald, *The Waste War: Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 23 B.C. ENVTL. AFF. L. REV. 43 (1995); Edward A. Fitzgerald, *The Waste War: Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources and Chemical Waste Management, Inc. v. Hunt*, 13 STAN. ENVTL. L.J. 78 (1994); Martin E. Gold, *Solid Waste Management and the Constitution's Commerce Clause*, 25 URB. LAW. 21 (1993); Bradford C. Mank, *Out-of-State Trash: Solid Waste and the Dormant Commerce Clause*, 38 J. URB. & CONTEMP.

has enshrined fairly mechanical Commerce Clause values as a higher constitutional good. This enshrining has occurred despite clearly deleterious effects on social policy. So far as sound policy is concerned, the illogic of the Court's holdings is especially evident in the waste management context. The garbage cases therefore provide an excellent example of how the Court's rigid insistence on pigeon-holing can trump more meaningful inquiry into dormant Commerce Clause values. Nevertheless, given the Court's increasingly mechanical approach, renewed or repeated attempts in further waste litigation to subvert the Court's recent emphases may backfire in ultimately harsher defeat for states' abilities to act, not just in regard to garbage, but in all contexts. Three waste decisions from the Second¹⁴ and Third¹⁵ Circuits therefore receive special attention in this article as examples of such attempts to avoid what the Court has decreed.¹⁶ These recent Second and Third Circuit opinions are clearly inconsistent with recent Supreme Court precedent.¹⁷ Since more is at

L. 25 (1990); C.M.A. McCauliff, *The Environment Held in Trust for Future Generations or the Dormant Commerce Clause Held Hostage to the Invisible Hand of the Market?*, 40 VILL. L. REV. 645 (1995); Clifford S. Russell, *Economic Incentives in the Management of Hazardous Wastes*, 13 COLUM. J. ENVTL. L. 257 (1988); Michael R. Harpring, Comment, *Out Like Yesterday's Garbage: Municipal Solid Waste and the Need for Congressional Action*, 40 CATH. U. L. REV. 851 (1991); Alice Jean Mansell, Note, *North Dakota Enters the Dumping Ground Wars: A Case Study for Incentive-Based Regulations*, 69 N.D. L. REV. 575 (1993); Jonathan Phillip Meyers, Note, *Confronting the Garbage Crisis: Increased Federal Involvement as a Means of Addressing Municipal Solid Waste Disposal*, 79 GEO. L.J. 567 (1991); Erin A. Walter, Note, *The Supreme Court Goes Dormant When Desperate Times Call for Desperate Measures: Looking to the European Union for a Lesson in Environmental Protection*, 65 FORDHAM L. REV. 1161 (1996).

14. See *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995).

15. See *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995), cert. denied sub nom. *Tri-County Indus. v. Mercer County*, 116 S. Ct. 1265 (1996).

16. See *infra* notes 117-78 and accompanying text.

17. Such reasoning may temporarily carry the day for Philadelphia, and perhaps for New Jersey. See, e.g., *New Jersey Officials Hopeful Flow Control Can Continue*, SOLID WASTE REP., Mar. 7, 1996, available in LEXIS, Market Directory, Iacnews File (quoting New Jersey waste regulator as relying on Court's denial of certiorari in *Smithtown* as a green light for flow control via contractual arrangements). But see *infra* notes 144, 153, 159 (updating status of current challenges to New Jersey flow control arrangements). Such reasoning also has been followed by two lower courts in the Sixth Circuit. See *Waste Mgmt. of Mich. v. Ingham County*, 941 F. Supp. 656 (W.D. Mich. 1996); *Barker Brothers Waste, Inc. v. Dyer County Legislative Body*, 923 F. Supp. 1042 (W. D. Tenn. 1996); see also *Vince Refuse Serv. v. Clark County Solid Waste Mgmt. Dist.*, No. C-3-93-319, 1995 U.S. Dist. LEXIS 5008 (S.D. Ohio Mar. 7, 1995) (upholding flow control ordinance which requires generator either to deliver waste to designated county facility or to ship waste out-of-state); *Citizens for Logical Alternatives & Responsible Env't, Inc. v. Clare County Bd. of Comm'rs*, 536 N.W.2d 286 (Mich. App. 1995) (allowing some intrastate flow control). But see *Mid-American Waste Sys. v. Fisher*, No. C-2-94-493, 1994 U.S. Dist. LEXIS 20966 (S. D. Ohio May 31, 1994) (citing *C&A Carbone*, court grants TRO on enforcement of flow control ordinance involving county-owned waste to energy facility). Cf. *Ben Oehrleins & Sons & Daughters v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997) (declaring flow control unconstitutional for waste headed for out-of-state but constitutional as to waste remaining in-state).

Nevertheless, arguments such as promoted in the recent Second and Third Circuit opinions have *not* been persuasive for other courts. See generally *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County, Minn.*, 922 F. Supp. 1396 (D. Minn. 1996); *Poor Richard's Inc. v. Ramsey County*, 922 F. Supp. 1387 (D. Minn. 1996); *Robinson Rubber Prods. Co. v. Hennepin County, Minn.*, 927 F. Supp. 343 (D.

stake than just waste regulations, the erroneous arguments of these courts need to be refuted and placed in the larger context of dormant Commerce Clause case law. This is necessary to preserve opportunities for state regulation and market participation both within and outside of the waste context that have not yet been foreclosed by the Court, and which seem in line with its prior pronouncements.

Not all courts, however, are misconstruing Court precedent in environmentally friendly fashion. Backlash against waste regulations which are transparently unconstitutional under the Court's current precedents often has resulted in some members of the judiciary attempting to usher in a neo-revival of substantive economic due process through the dormant Commerce Clause. This is the truly frightening possibility raised by some recent garbage cases. These garbage cases appear to be in the vanguard of the movement to rewrite dormant commerce jurisprudence. Accordingly, I spend a significant amount of time in this article explaining why these recent pro-business lower court Commerce Clause and trash rulings are inconsistent with fundamental dormant Commerce Clause doctrine.¹⁸ The illogic of these decisions should be corrected by the Court, if and when state regulators stop making unconstitutional arguments, and instead stick within boundaries the Court still has in place to protect state action from dormant Commerce Clause attack.

My focus in this article upon recent garbage cases, in short, should not mask the significance of these waste wars for dormant Commerce Clause jurisprudence more generally. What is at issue in these quintessential dormant Commerce Clause dramas is whether states may act to protect or benefit their citizens, or whether, absent congressional intervention, free market morality is all that is constitutionally permissible. Many important arguments about whether the dormant Commerce Clause prevents states from addressing harms caused or problems unaddressed by interstate business arise in the waste cases. The Court itself has gotten dormant Commerce Clause arguments partially off track by unnecessarily emphasizing, in its

Minn. 1996); *Zenith/Kremer Waste Sys. v. Western Lake Superior Sanitary Dist.*, No. 5-95-228, 1996 U.S. Dist. LEXIS 15921 (D. Minn. July 2, 1996); *Connecticut Carting Co. v. Town of East Lyme*, 946 F. Supp. 152 (D. Conn. 1995); *Environmental Waste Reductions, Inc. v. Reheis*, 887 F. Supp. 1534 (N.D. Ga. 1994); *Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntingdon Solid Waste Auth.*, 877 F. Supp. 935 (M.D. Pa. 1994); *Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth.*, 814 F. Supp. 1566 (M.D. Ala. 1993); *Container Corp. of Carolina v. Mecklenberg County*, No. 92cv-154-MU (W.D.N.C. June 19, 1992); *Sanifill, Inc. vs. Kandiyohi County*, 559 N.W.2d 211 (Minn. Ct. App. 1997), 1997 Minn. App. LEXIS 178; *Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist.*, 558 N.W.2d 288 (Minn. Ct. App. 1997); *Connecticut v. A. Secchiaroli & Sons*, No. C1960461353, 1996 Conn. Super. LEXIS 2448 (Conn. Super. Ct. Sept. 18, 1996); *Town of Guilford v. D.P.L. Refuse Service, Inc.*, No. CV95-02505755, 1996 Conn. Super. LEXIS 1172 (Conn. Super. Ct. May 8, 1996); *Empire Sanitary Landfill, Inc. v. Pennsylvania*, 684 A. 2d 1047 (Pa. Commw. Ct. 1996); *In re Emergency Redirection of Solid Waste*, 645 A.2d 144 (N.J. Super. Ct. App. Div. 1994); *Empire Sanitary Landfill, Inc. v. Comm.* 684 A.2d 1047 (Pa. 1996); *Delaware County v. Raymond T. Opendaker & Sons, Inc.*, 652 A.2d 434 (Pa. Commw. Ct. 1994); cf. *Bonollo Rubbish Removal, Inc. v. Town of Franklin*, 886 F. Supp. 955 (D. Mass. 1995) (addressing issues in addition to unconstitutionality of flow control ordinance); *All Cycle, Inc. v. Chittenden Solid Waste District*, 670 A.2d 800 (Vt. 1995) (similar to *Bonollo*). It is my prediction that if the Court returns to the issue, it will reject the Second and Third Circuit rationales.

18. See *infra* notes 181-250 and accompanying text.

waste cases, the need to decide what Commerce Clause test should be applied, rather than more properly inquiring into whether an activity is truly a threat to the antiprotectionist goals which the Commerce Clause is designed to promote. Concomitantly, the Court has been too eager to find discrimination, triggering its per se test, on waste facts that are at least ambiguous.

Nevertheless, despite troubling tendencies in the Court's recent trash pronouncements, those precedents do not yet recycle economic substantive due process through the dormant Commerce Clause. My hope in this article is to improve future dormant Commerce Clause analysis by focusing on three things. I wish to explore the distortions of Court precedent by pro-environment regulators and courts. I also wish to examine contrary distortions made by waste industry advocates and pro-business courts. Throughout the article, I wish to explain how the Court's attempted simplifications in the waste context have led to confusion in dormant Commerce Clause jurisprudence.

II. *Where the Court Has Dumped Us*

To demonstrate that both waste regulators and waste profiteers are misconstruing the Court's Commerce Clause holdings, one must first describe what the Court has decreed about waste under the dormant Commerce Clause.¹⁹ This is no easy task, given inconsistent tendencies in several portions of Court dormant Commerce Clause doctrine.²⁰ Important themes nevertheless emerge.²¹ The Court's main theme in its waste decisions is that states may not use the real harms associated with waste disposal as an excuse to favor insiders over outsiders when apportioning the costs of waste disposal, at least where private markets are involved. Even when the state does not deliberately intend to discriminate against out-of-state interests, if differential effects are real, or can be clearly implied from the way a statute or ordinance is drafted, the Court will presume that state action is unconstitutional. The Court increasingly has equated any amount of differential effect with impermissible discrimination. Once such "discrimination" is found, it is virtually impossible for the state to justify the differential treatment.

19. Although the text of the Constitution speaks explicitly only of granting Congress power "to regulate commerce," that document long has been understood also to prohibit the states from regulating so as improperly to infringe on interstate commercial interests. Defining what sort of situations constitute improper state interference is what the dormant Commerce Clause case law is about.

20. Professor T.R. Powell's aphorism regarding the inconsistencies in the Court's dormant Commerce Clause jurisprudence remains pertinent. In his mock Restatement of Constitutional Law, Powell suggested that the Court's decisions in dormant Commerce Clause cases should be restated along the following lines: "Congress has the power to regulate interstate commerce. The states have the power to regulate interstate commerce too, but not too much. Comment: How much is too much is beyond the scope of this Restatement." Quoted in Thomas M. Lockney, *Probable Cause for Nighttime, No-Knock Drug Searches: The Illusion of Judicial Control in North Dakota*, 69 N.D. L. REV. 613, 625 (1993).

21. See also Stanley E. Cox, *What May States Do About Out-of-State Waste in Light of Recent Supreme Court Decisions Applying the Dormant Commerce Clause? Kentucky as Case Study in the Waste Wars*, 83 KY. L.J. 551, 556-58, 564-601 (1994-95) [hereinafter Cox, *What May States Do?*].

A. Philadelphia's Two-Tiered Approach

The move toward determinative heightened scrutiny began in *Philadelphia v. New Jersey*,²² the Court's seminal waste and dormant Commerce Clause case. In *Philadelphia*, the Court rejected New Jersey arguments that waste is like quarantined goods which a state may ban at its borders. Instead, the Court focused on the differential treatment given to in-state versus out-of-state generated waste. Since New Jersey did not treat in-state generated waste like a normally quarantined item, but instead let it leave the state or go to any number of properly permitted facilities within the state, out-of-state generated waste had to be allowed similar access to private waste processing facilities. The reality of New Jersey's waste ban seemed to the Court designed to protect only from the harms of *out-of-state* waste, rather than against the harms of waste per se. In-state waste was alleged to be no less harmful than out-of-state waste, but the in-state waste was not penalized when it tried to go into a New Jersey landfill. If the state was unwilling to fully internalize, via penalty placed on in-state products, the full costs and burdens of in-state generated waste, any regulatory burdens which applied only to out-of-state waste conferred a costless market advantage to in-state generators.²³ New Jersey was reserving privately owned landfill space for New Jersey trash, and denying access to out-of-state generators who desired access (and who were willing to pay for that access at market rates) to that same space. New Jersey could not by fiat hoard a privately owned commercial resource — landfill space — for its own citizens' benefit.

As a shortcut to evaluating the propriety of a regulation, however, the *Philadelphia* Court also enshrined into dormant Commerce Clause jurisprudence two different tests by which state regulatory efforts should be measured. Oversimplifying its prior case law, the Court distinguished between situations where a regulation would be presumed invalid from situations where it would be presumed valid.

The opinions of the Court through the years have reflected an alertness to the evils of "economic isolation" and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be

22. 437 U.S. 617 (1978) (holding that state ban on importing garbage violates dormant Commerce Clause in absence of any reason for treating waste differently based on origin).

23. The state alternatively might have been able directly and fully to subsidize some or all of the burdens and costs associated with in-state waste generation without violating the dormant Commerce Clause. See *infra* notes 54-56, 134-38, and accompanying text and *infra* note 74 (discussing possibility of subsidies in relation to limited flow control legislation). As will become clear through text, under the Court's current tests, only two ways of addressing externalities imposed by interstate business on the local population, without violating the Commerce Clause, are possible. First, the state may insist that all those who similarly burden the population internalize the costs associated with their business activities. If this approach is taken, the regulation requiring internalization must apply evenhandedly to insiders and outsiders, thereby leaving outsiders no more competitively disadvantaged by the regulation than insiders. Alternatively, the state may directly ameliorate the harms imposed on its citizens by compensating them or subsidizing their efforts to ameliorate the harms imposed by interstate business. If this approach is taken, the resources put in the hands of the insiders must not come disproportionately from outsiders who have caused regulatory burdens, when both insiders and outsiders are contributing to those burdens.

unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach, the general contours of which were outlined in *Pike v. Bruce Church*²⁴

Thus was launched *Pike* versus per se.

Since this issue of which test will be used has assumed determinative significance in more recent Commerce Clause case law, it is worth emphasizing that although the *Philadelphia* Court certainly used the discrimination per se language, it did not place such emphasis upon the need to first pigeonhole as have more recent decisions. The *Philadelphia* Court described the crucial inquiry before it as being to determine whether the legislation before it was "basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."²⁵ Such an inquiry finds out what really is going on rather than rest on labels of differential treatment. Were differential treatment alone the trigger for invalidity, the *Philadelphia* Court should have stopped its analysis once it had identified the fact of differential treatment. It did not. The *Philadelphia* Court instead reasoned that New Jersey's waste ban was doomed for several reasons. First, the state's claimed benefits were derived *solely* by discriminating against outsiders.²⁶ Additionally, the same types of alleged harms were not treated as such when they came from in-state waste.²⁷ Finally, New Jersey's ban was, in the Court's view, bad policy for a nation with shared commercial waste disposal problems.²⁸ In short, the *Philadelphia* Court engaged in real analysis to reach its conclusion of protectionism. It did not

24. *Philadelphia*, 437 U.S. at 623-24. Further elaborating upon what is required for the *Pike* test to be satisfied, the Court quoted from *Pike*:

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

Id. at 624 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

25. *Id.* at 624. Emphasizing that New Jersey's waste ban completely isolated New Jersey's private disposal facilities from the larger waste market, without any allegation that the waste desiring to come to these facilities was in any way different from New Jersey waste, the Court found this effect of economic protectionism could not be offset by any "goods" the legislation accomplished for New Jersey citizens, since all such benefits were accomplished solely at the expense of outsiders. *Id.* at 626-29.

26. *See id.* at 628 ("On its face, it imposes on out-of-state commercial interests *the full burden* of conserving the State's remaining landfill space.") (emphasis added).

27. *See id.* at 628-29.

28. *See id.* at 629.

substitute the label of differential treatment for determining whether there was any real evil to the regulation.

A *per se* test that needs thus to be elaborated on, when applied to particular facts, is not so much a prospective test of unconstitutionality as it is a retrospective summation of result. "We are declaring your statute unconstitutional because you impermissibly discriminate against interstate commerce — here's how your statute impermissibly discriminates" has a very different feel from a Court pronouncement of "We are declaring your statute unconstitutional because it seems to affect insiders and outsiders differently — this differential treatment in and of itself constitutes impermissible discrimination — we do not need to explain further." The *Philadelphia* Court engaged in the former approach. Nevertheless, the *Philadelphia* Court's "virtual *per se* rule of invalidity" language had a talismanic lure to it which unfortunately proved irresistible to later panels.²⁹ The *Philadelphia* Court is to be blamed for inviting this determinative oversimplification into dormant Commerce Clause jurisprudence.³⁰ Although it would be fourteen years before the Court would again address waste issues, when it did so, it would, in at least one of those decisions, employ *Philadelphia's* two-tiered approach in an unhelpfully simplifying manner.

B. Fort Gratiot's Fortification of Per Se Implications

In 1992, the Supreme Court issued decisions in two companion garbage cases. Like *Philadelphia*, the Court's twin waste decisions primarily rejected state arguments that the need to facilitate state waste planning requires a loosening of dormant Commerce Clause case law constraints. *Chemical Waste Management v. Hunt*³¹ declared unconstitutional a hazardous waste fee imposed only on out-of-

29. The *Philadelphia* Court additionally oversimplified the factual situation before it. By likening the barrier to waste importation as similar to a ban on goods coming into a state, the Court gave too short shrift to New Jersey's quarantine or in the nature of quarantine arguments. If the problem with solid waste is that it must be buried or otherwise disposed of somewhere, then a requirement that all waste generated within New Jersey must be safely buried in a properly maintained landfill is rather like a quarantine requirement. The harmful item is being destroyed. Additionally, however, if the waste, once buried, is still not considered safe, as is true for solid waste, since most of its potential for health and safety harm continues or arises after disposal, then a watchful state eye kept on the disposal sites where its waste has ended up continues to resemble a quarantine. That the state thus quarantines its own waste by allowing it to go into disposal sites hardly means that it wishes to accept more such quarantined items that would increase harm to its own population. The *Philadelphia* Court implicitly rejected these arguments.

30. On other waste issues, the *Philadelphia* Court left many things open. Unaddressed were possibilities of: (1) market participation ("We express no opinion about New Jersey's power . . . to restrict to state residents access to state-owned resources."); (2) evenhanded regulation which harmed out-of-state commerce ("by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected") (emphasis in original); or (3) even permissible *discrimination* based on real differences in dangers posed, if any such differences could be proved to exist ("unless there is some reason, apart from their origin, to treat them differently") See *id.* at 626-27 & n.6.

31. 504 U.S. 334 (1992).

state generated waste.³² The case thus reaffirmed, in a situation where there was no doubt about the severity of the burdens that were being imposed by the out-of-state waste (because it was *hazardous* waste), that *Philadelphia* meant what it said about not treating waste differently based on where it was generated.³³ If Alabama allowed its in-state generated hazardous waste to travel freely on its highways and go to a permitted facility in Alabama, then out-of-state generated hazardous waste must be allowed access to the private Alabama waste handling market on the same terms. This was confirmation of *Philadelphia's* message, and confirmation that there would be no departure from it.

The message of *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*³⁴ was even more disheartening to most state waste planners. More importantly for larger dormant Commerce Clause jurisprudence, however, the *Fort Gratiot* Court began to push the two-tiered invitation of *Philadelphia* in more mechanical and outcome determinative directions. At issue in *Fort Gratiot* was whether there could be a reasonable solution to NIMBY³⁵ siting problems. Since

32. See *id.* at 346.

33. The Alabama Supreme Court basically dared the United States Supreme Court to declare hazardous waste protected commerce. See *Hunt v. Chemical Waste Mgmt.*, 584 So. 2d 1367, 1387, 1390-91 (Ala. 1991) (challenging Supreme Court to so declare). The Court promptly complied, by reversing the Alabama decision.

34. 504 U.S. 353 (1992).

35. The acronym stands for "Not in my backyard," and expresses strong local will that problems proposed to be thrust on a local community should be borne by someone else. NIMBY's are often criticized as being parochial or selfish for wishing to thrust their burdens on others. See, e.g., Orlando E. Delogu, "NIMBY" Is a National Environmental Problem, 35 S.D. L. Rev. 198 (1990); cf. Daniel Mazmanian & David Morell, *The "NIMBY" Syndrome: Facility Siting and the Failure of Democratic Discourse*, in ENVIRONMENTAL POLICY IN THE 1990'S, at 125 (Norman J. Vig & Michael E. Kraft eds., 1990). Nevertheless, as I elsewhere have argued, NIMBYism is arguably rational, and should not be condemned so much as recognized for its insights about the nature of the externalities created by current facility siting processes. See Cox, *Burying Misconceptions*, *supra* note 13, at 823-25. See generally MICHAEL B. GERRARD, WHOSE BACKYARD, WHOSE RISK: FEAR AND FAIRNESS IN TOXIC AND NUCLEAR WASTE SITING (1994); BARRY G. RABE, BEYOND THE NIMBY SYNDROME: THE POLITICS OF HAZARDOUS WASTE FACILITY SITING IN THE UNITED STATES AND CANADA (1994); Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495 (1994); Barry G. Rabe et al, *NIMBY and Maybe: Conflict and Cooperation in the Siting of Low-Level Radioactive Waste Disposal Facilities in the United States and Canada*, 24 ENVTL. L. 68 (1994). First, to the extent that local opponents desire *no one* to bear the burdens others are attempting to thrust upon them, there is as much altruism as selfishness involved, or at least the argument primarily is about whether the *type* of burdens attempted should be imposed, rather than about who should bear them. The phrase NIABY ("Not in anyone's backyard") has sometimes been used to describe such advocates. See Sarah Crim, *The NIMBY Syndrome in the 1990's: Where Do You Go After Getting to 'No'?*, 21 Env't Rep. (BNA) 132, 133 (May 4, 1990). In the local waste disposal context particularly, it may be sound policy to advocate less land disposal in favor of recycling, less waste generation, and alternative treatment methods. See, e.g., 40 C.F.R. § 256.31(e) (1991) (emphasizing that land disposal is *least* preferred RCRA method of dealing with waste). Second, to the extent that so-called "NIMBY's" are being asked *disproportionately* to bear burdens created or caused primarily by others, it seems reasonable to expect them to complain. The real "NIMBY's" are those who did not bear their own burdens, but are instead attempting to thrust them upon a different local community. In the modern waste disposal context it is *because* waste is primarily coming from outsiders that burdens seem especially unfair to those being asked to bear them. Michigan's statute was an attempt

the Michigan statute involved was being challenged on its face,³⁶ Michigan properly argued before the Court that its law should be viewed as concerned with *creating* landfill space in the face of local opposition to any disposal facilities — the classic NIMBY problem.

Michigan was attacking the selfish kind of NIMBYism, the kind which opposes any disposal in a local area. To combat such NIMBYism, the Michigan legislation gave local waste planning boards power to override local zoning or other ordinances, and thereby force a community to site an unpopular disposal facility, if the local waste planning board found it necessary or desirable for effective local waste planning. But the Michigan statute balanced this loss of local control and imposition of local burdens by also giving the local community the power to exclude burdens that it didn't create. The local community could exclude out-of-area trash from any facilities so sited. This policy struck a reasonable balance for ensuring that local communities would accept their own waste disposal burdens without becoming dumping grounds for others' burdens. The Supreme Court, however, declared the Michigan statute unconstitutional.

In some respects, the Court's *Fort Gratiot* decision was consistent with prior Commerce Clause reasoning. When Michigan contended that there could be no *significant* discrimination against interstate commerce because not all Michigan counties excluded out-of-area waste, the Court correctly countered that real discrimination, however small, cannot be ignored.³⁷ In response to Michigan's claims that discrimination against out-of-area waste (including therefore discrimination against other *Michigan* waste) was not discrimination against *interstate* waste, the Court correctly opined that discrimination by a state's sub-units, acting in concert, can effectively accomplish what would clearly be unconstitutional if done by the state directly.³⁸ These were noncontroversial reaffirmations of

to promote local siting over truly selfish NIMBY opposition, by giving the local community the right to condition the siting on ability to exclude burdens it did not create.

36. Since this was so, if any reasonable set of facts could support the statute, the statute would have to be upheld.

37. See *Fort Gratiot*, 504 U.S. at 361-63. The Court has addressed this point in other fact situations. See, e.g., *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) (holding that Oklahoma requirement that coal burning utilities in Oklahoma use 10% Oklahoma-mined coal in their operations discriminates per se against interstate commerce, and cannot be successfully defended under heightened scrutiny test, even though impact on overall coal market is small); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 276-77 (1988) (rejecting, in context of tax credit for Ohio produced ethanol, argument that amount of discrimination against out-of-state commerce should be offset against purported beneficial environmental effects or purpose); cf., e.g., *Maryland v. Louisiana*, 451 U.S. 725, 760 (1981) (indicating no need to determine amount of discrimination before finding discrimination invalid).

38. See *Fort Gratiot*, 504 U.S. at 361-63. As support for this proposition, the Court cited and analyzed *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (city requirement that all milk be pasteurized within five miles from the city center held to discriminate against interstate commerce, even though other in-state interests similarly adversely affected) and *Brimmer v. Rebman*, 138 U.S. 78 (1891) (imposition of special inspection fees on meat sold more than 100 miles from place of slaughter held to discriminate against interstate commerce). Arguably, the situation in *Fort Gratiot* was distinguishable from either case. Milk pasteurizers in Madison (*Dean Milk*), and slaughterhouses in Virginia (*Rebman*), by insisting on a geographical limit for sale, were ensuring themselves a steady customer base for their

principles from previously well-established case law.

Fort Gratiot modified dormant Commerce Clause jurisprudence, however, by increasing the need to decide which test should be used, at the expense of meaningfully inquiring into how much burden is imposed on interstate commerce. Thus, the Court viewed Michigan's point about the relatively small amount of burden on the interstate waste industry as irrelevant to the balance for Commerce Clause purposes. In the Court's view, if the county was discriminating at all, no weighing of benefits and burdens needed to be conducted. Michigan's position was that its clearly legitimate local purpose — the encouragement of responsible waste disposal — should be weighed against whatever minimal harms were imposed on interstate commerce. Such a deferential balancing would be permissible under the *Pike* test, a test that Michigan argued was appropriate when discrimination is incidental to legitimate local regulation. The Court, however, found the *Pike* test inapplicable where differential impact, however small or unintended, on out-of-state business is clear.

The problem with the Court's insistence that it evaluate either under a deferential *Pike* or a presumptively unconstitutional per se test is that it is not always clear which test should apply, yet the test becomes nearly determinative of the result. If the *Pike* test is used, the presumption will be that the statute should stand, until and unless the opponent can demonstrate that alternatives which burden commerce less can still accomplish the state's goals. Under the per se test, however, the state must demonstrate that there are no other alternatives available which can accomplish the state's legitimate goals. The inevitable result is that advocates in waste battles, as in other Commerce Clause controversies, spend most of their energy fighting over which test should apply, because the Court has hinged almost everything on that categorization.

In *Fort Gratiot*, Michigan's legislation did not discriminate on its face against out-of-state interests. The petitioner, Fort Gratiot Sanitary Landfill, was making a facial rather than an "as applied" challenge. Therefore, the landfill was offering the Court no evidence as to whether Michigan counties' ability to exclude out-of-area waste would lead to less or more commercial land filling. Recall that Michigan did *not* concede that its regulation was discriminatory either in purpose or effect against interstate commerce. The state instead contended that its regulation was motivated

services. A requirement prohibiting waste from entering the area (*Fort Gratiot*) instead *decreases* the amount of business that the local landfill will be able to process. Additionally, in the milk and meat situations, perhaps local areas, if assured that there would be no out-of-state competition, might prefer a small but guaranteed slice of the pie to the possibility that open access would allow out-of-staters to completely dominate the in-state market. In the garbage situation, however, to "hoard" landfill resources at a state-wide level, via county bans, would require that more landfills be created in the other in-state localities deprived of access to the county landfill space "hoarded" by the particular Michigan county involved in *Fort Gratiot*. Whereas, in *Philadelphia*, the entire state (New Jersey) theoretically could send all of its garbage to one unfortunate county within the state (since the New Jersey ban was state-wide), in *Fort Gratiot*, a county ban on waste would only completely exclude out-of-state waste if *all* Michigan counties create landfills and if *all* Michigan counties are willing to ban all out-of-county trash. The *Fort Gratiot* Court apparently considered these differences unimportant to the Commerce Clause inquiry.

by legitimate environmental concerns, and that the legislation affected in-state interests as severely as out-of-state concerns. Unlike the charades of legitimate local purpose, which the Court unmasked as economic protectionism in cases like *Hunt v. Washington State Apple Advertising Commission*,³⁹ *Dean Milk Co. v. City of Madison*,⁴⁰ or even in *Philadelphia*,⁴¹ Michigan was potentially capable of showing that its legislation neither displaced nor severely harmed the interstate waste market.⁴² Nevertheless, by *labeling* the legislation discriminatory, the Court effectively short-circuited any further inquiry into what the legislation actually accomplished. Once the legislation was "found" (because of its authorization of differential treatment) to discriminate, it did not matter whether its actual effects harmed or benefitted the out-of-state waste market.

Such an approach seems potentially wrong-headed as to why there should be a virtual *per se* rule of unconstitutionality. The purpose of dormant Commerce Clause scrutiny should not be primarily to prevent states from *declaring* improper things, nor to preserve a formality of evenhandedness at all costs. It would seem rather that

39. 432 U.S. 333 (1977). In *Hunt*, North Carolina prohibited any grade markings being placed on apples other than USDA grades. The purported legitimate local purpose was to reduce consumer confusion. But the only apples which apparently had grade markings other than USDA were Washington apples, and the grade markings used by Washington seemed by any objective standard unlikely to create consumer confusion. Accordingly, the Court found no legitimate local purpose being achieved in light of the discriminatory effect demonstrated. *See id.* at 351-54. The real reason for the North Carolina regulation apparently was to increase marketing costs for out-of-state competitors, thereby benefitting North Carolina apple growers. *See id.* at 351-52.

40. 340 U.S. 349 (1951). *Dean Milk* involved the city of Madison, Wisconsin's attempt to protect local milk processors from out-of-state dairy competition. The city passed an ordinance requiring that all milk sold for human consumption in Madison be pasteurized and bottled within five miles from the center of the city. Since the ordinance applied to *all* milk regardless of point of origin, it was technically facially neutral. The Court, however, correctly had no trouble discerning through the rhetoric of public health protection that the real effect and purpose of the ordinance was economic protection for local businesses. *See id.* at 354. The possibility of fairly easily implementing less discriminatory alternatives, such as charging for inspection costs to insure milk quality, convinced the Court that the mileage limitations were unrelated to the purported legitimate local benefit and instead only served the purpose of keeping competitors away from milk which local businesses desired to process. *See id.* at 354-56.

41. *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *see supra* notes 22-30 and accompanying text. To the extent New Jersey, in the *Philadelphia* case, was depriving extant landfills of the ability to contract for already permitted landfill space with the highest bidder, the *Philadelphia* Court may properly have been smoking out economic protectionist motivations in the state regulation.

42. By encouraging the siting of landfills in Michigan communities which otherwise would not allow them to come into being, and thereby taking competitive pricing pressure off the general waste market because of this increased capacity, it could be argued that Michigan's regulations actually increased the amount of disposal business that would be conducted overall (by allowing more landfilling to go on in Michigan than otherwise would). At the same time it could also credibly be argued that the economic burden on waste generators outside Michigan was *decreased* (by easing the supply side pressure on prices because of a limited number of other extant disposal sites). Since the challenge to Michigan's regulatory system was facial, one must imagine such factual scenarios for purposes of arguing the merits of the litigation. The Court insisted, however, that impermissible economic discrimination was occurring, yet thought it unnecessary to take any evidence on this issue. *See Fort Gratiot*, 504 U.S. at 371 (Rehnquist, C.J., dissenting) (criticizing the majority for foreclosing the state's opportunity "to present evidence on the economic, environmental, and other effects of its legislation").

the reason for a short-cut test, with short cuts based on reasonably clear intent or strongly differential impact, is that improper intent or strongly disproportionate impact usually results in impermissible effect.⁴³ Without probability of constitutionally suspect economic harm, there should be no constitutional foul. Expanding the *per se* test to include more and more gray area situations means that the perceived likelihood of differential treatment, regardless of how small or why motivated, becomes a substitute for inquiry about impermissible effects.

I have no quarrel with the Court placing a presumption against the state in suspected differential harm situations where it would be difficult to determine exactly what the state legislation causes or accomplishes. A presumption of unconstitutionality would break the tie where exact effects are unknown or unknowable. But in situations where the state offers to *prove* that its legislation causes no appreciable harm, locking the state into virtual *per se* invalidity seems unduly restrictive. The current version of the *per se* test nevertheless raises a nearly *irrebuttable* presumption of invalidity. Only if the state can show that there are *no* alternative ways of accomplishing the legitimate state purpose will the differential treatment be allowed to stand. The state is thus foreclosed from presenting any evidence that its legitimate purposes are more effectively or less expensively accomplished via the differential treatment, and that the differential treatment is therefore a necessary side effect of focusing upon the best way to accomplish a legitimate regulatory purpose.⁴⁴ Differential treatment, regardless of how unintended, and regardless of how necessary and unavoidable a side effect in connection with accomplishing important state goals, becomes the evil which must be eradicated under the dormant Commerce Clause.

In the *Fort Gratiot* case, labeling Michigan's regulatory efforts discriminatory on their face perhaps meant only that the Court was unwilling to explore how much economic harm would be caused by Michigan's legislation, and that, at the same time, the Court was convinced that the legislation would result in an unacceptable level of such harm. It would have been better to say this explicitly than to foreclose the state, via an overbroad and absolutely determinative test, from attempting in other situations to regulate differentially where such regulation might be more warranted.

Besides expanding and more mechanically applying the *per se* test, the *Fort Gratiot* Court concomitantly reshaped the Court's virtual representation doctrine so that it would not apply to differential treatment situations.⁴⁵ This essentially

43. Even strong proponents of viewing the Court's dormant Commerce Clause jurisprudence as designed to strike regulations for discriminatory intent do not argue to the contrary. See, e.g., Smith, *supra* note 7, at 1239-52. To borrow Professor Smith's borrowed imagery, while it may be true that even a dumb dog can distinguish being kicked with malice from being accidentally stepped on, there is no constitutional harm in *not* kicking the canine but instead merely calling it a mangy mutt as you pass it by. Cf. *id.* at 1251.

44. See, e.g., *Oregon Waste Sys., Inc. v. Oregon Dep't of Env'tl. Quality*, 511 U.S. 93, 100-02 (1994). This is wrong-headed, because it ends up inviting courts to play games with the definition of differential treatment rather than assess the extent of the evil of differential treatment.

45. See *Fort Gratiot Sanitary Landfill v. Michigan Dept. of Natural Resources*, 504 U.S. 353, 370

terminated that doctrine's effectiveness as a potential counter to Commerce Clause attacks. Under the virtual representation rationale, the presence of in-state interests which are significantly harmed by a state's regulation could indicate two things, either of which might defuse Commerce Clause skepticism about the propriety of state regulation.⁴⁶ First, the presence of the significantly harmed insiders might confirm that the primary purpose of the state regulation is to legitimately regulate rather than advantage insiders at the expense of outsiders. For example, if there are significant in-state interests that wish to drive wide trucks on the state's highways, prohibiting such driving is a true "cost" borne by insiders. Presumably such costs are not undertaken except when the need to regulate is more pressing than letting insiders do what they otherwise would want.⁴⁷ A second way to emphasize this point is to view the significantly harmed insiders as proxy for out-of-state interests similarly adversely affected. Insiders who wish to drive wide trucks would be thought to make the same arguments that outsiders would make. Thus, the outsiders' interests are virtually represented by the harmed insiders.

In *Fort Gratiot*, however, the Court insisted that any differential effect could not be counterbalanced by similar harm inflicted on insiders. The fact that Detroit residents would be deprived of Fort Gratiot's sanitary services was no answer to the reality that Chicago waste also could not make its way to that Michigan landfill. By rejecting Michigan's claim that virtual representation applies in differential treatment situations, the *Fort Gratiot* Court relegated the virtual representation doctrine to the sidelines of dormant Commerce Clause jurisprudence. Instead of serving to counter discrimination arguments, virtual representation, after *Fort Gratiot*, serves only to confirm the legitimacy of evenhanded regulation.⁴⁸

This is not to say that virtual representation arguments should automatically and effectively counter Commerce Clause discrimination arguments. Commentators who have attacked virtual representation rationale correctly have emphasized that the combination of in-state interests both harmed and benefitted by a state regulation

(1992) (Rehnquist, C.J., dissenting) (raising arguments of virtual representation that majority, by ignoring, rejected).

46. See generally, e.g., Russell Korobkin, *The Local Politics of Acid Rain: Public Versus Private Decisionmaking and the Dormant Commerce Clause in a New Era of Environmental Law*, 75 B.U. L. REV. 689 (1995) (proposing more use of virtual representation doctrine to overcome Commerce Clause objections); cf. Eule, *supra* note 7 (emphasizing that Commerce Clause should only strike down undemocratic actions which disproportionately burden outsiders); Tushnet, *supra* note 7 (advocating a version of virtual representation in which Commerce Clause burdens should only be found unconstitutional when imposed on those not represented in the legislature).

47. See, e.g., *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177 (1938) (using insiders-harmed argument partially to justify restrictions on truck width and weight).

48. On other issues, *Fort Gratiot* reaffirmed messages from *Philadelphia*. The Court described the case as raising "a rather narrow issue" dealing with nonhazardous waste, and not foreclosing market exemption arguments on different facts. See *Fort Gratiot*, 504 U.S. at 358. The Court repeated *Philadelphia* language about the possibilities for discriminatory regulations being upheld if real differences could be shown in waste based on geographic origin. See *id.* at 366-67. Additionally, in the companion *Chemical Waste Management* case, the Court continued to endorse the idea that evenhanded methods of regulation would be upheld, even if these might impose significant burdens on interstate commerce. See *Chemical Waste Mgmt. v. Hunt*, 504 U.S. 334, 344-46 (1992).

can never completely represent the interests of outsiders solely harmed by the regulation.⁴⁹ If in-state harms are tolerated at least partly because the trade-off for benefits is being borne at least partly, or maybe even primarily, by out-of-staters, there is no virtual representation so far as the *amount* of harm is concerned. Virtual representation arguments proceed, however, on the assumption that it is not the amount of harm with which dormant Commerce Clause scrutiny primarily should be concerned. The emphasis instead is on state sovereignty, the belief being that a state should not be penalized for side effects of its regulation on outsiders, so long as the adverse effect on insiders is clear. This makes sense if the dormant Commerce Clause is meant to serve primarily as a check on the rationality and intent of the rule-maker. If the sovereign state intended no harm to outsiders, and if its regulatory impetus was genuine, the regulation should stand under a virtual representation rationale. A dormant Commerce Clause jurisprudence which puts virtual representation reasoning at its center focuses on the legitimacy of state regulation from the insider's perspective.

The Court in the last twenty years, however, increasingly has focused its dormant Commerce Clause attention away from the rationality or intent of a state regulation, and instead has concentrated on the regulation's effects, intended or otherwise, on outside interests. The development in *Armco, Inc. v. Hardesty*⁵⁰ and its progeny of internal and external consistency tests is one manifestation of this shift to effects and away from the legitimacy of intentions. Refusal in the courts to embrace virtual representation doctrine might also be consistent with this trend.

One need not disagree with this move toward effects-based tests to nevertheless argue that virtual representation doctrine still might serve *some* role in countering discrimination arguments. Granted, the virtual representation doctrine should not protect a regulation from further meaningful scrutiny. But shouldn't the fact that insiders do indeed suffer effects similar to what is felt by outsiders count for something in the dormant Commerce Clause balance? This holds true only if

49. See, e.g., Winkfield F. Twyman, Jr., *Losing Face but Gaining Power: State Taxation of Interstate Commerce*, 16 VA. TAX L. REV. 347, 388-410 (1997) [hereinafter Twyman, *State Taxation*].

50. 467 U.S. 638 (1984). The Court held that an exemption from a wholesaling tax imposed on in-state manufacturers who both manufacture and sell in-state discriminates against out-of-state wholesalers who sell in-state, regardless of the fact that the manufacturing tax is higher than the wholesaling tax and regardless of lack of proof that an out-of-state wholesaler bears a total tax burden higher than the in-state manufacturer/wholesaler. See *id.* at 642-46. The Court instead applied an internal consistency test under which a hypothetical situation is imagined of all states adopting similar taxing schemes: if multiple tax burdens against out-of-state interests would occur, the tax is discriminatory. See *id.* The internal consistency test was criticized at the time of its development and continues to have serious academic detractors. See generally, e.g., PHILIP HARTMAN, FEDERAL LIMITS ON STATE AND LOCAL TAXATION § 2:19 (Supp. 1985); Fitzgerald, *supra* note 13; C. James Judson & Susan G. Duffy, *An Opportunity Missed: Armco, Inc. v. Hardesty, A Retreat from Economic Reality in Analysis of State Taxes*, 87 W. VA. L. REV. 723 (1985); Robert G. Lathrop, *Armco — A Narrow and Puzzling Test for Discriminatory State Taxes Under the Commerce Clause*, 63 TAXES 551 (1985); cf. Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138 (1983) (arguing that fair apportionment would be a more coherent and predictable way to address multiple burden problems).

dormant Commerce Clause analysis actually is always conducted as some sort of balancing of interests and effects. Under a balancing approach, significant evidence of virtual representation could weigh against fairly minimal effect on outsiders. But the *Fort Gratiot* Court rejected balancing in any situation where differential treatment of out-of-staters is authorized. By completely rejecting virtual representation arguments in differential treatment situations, the *Fort Gratiot* Court removed the doctrine from the very place its adherents feel use of the rationale would be most justified. If effects felt on outsiders cannot be countered by looking to the significance of effects on insiders, the guts of virtual representation have been removed. The theme of illegitimacy of differential treatment completely triumphs over asking why there is differential treatment or asking how much differential treatment is occurring.

C. Pushing Per Se Further in *Oregon Waste and Carbone*

Illegitimacy of differential treatment was more explicitly the Court's dominant theme two years later in *Oregon Waste Systems v. Oregon Department of Environmental Quality*,⁵¹ a case which narrowed, if it did not eliminate, possibilities for Commerce Clause exemption via the compensatory fee doctrine. To appreciate what is foreclosed by this decision, it is important to emphasize how little the state of Oregon was requesting, as compared to previous Court garbage decisions. Oregon was not banning waste either at its borders or at county borders, as in *Philadelphia* or *Fort Gratiot*. Nor was Oregon attempting to collect money solely from outsiders, while letting in-state waste go free, as in *Chemical Waste*. Instead, Oregon wished merely to collect for the actual harms caused to Oregon by the disposal of out-of-state waste in Oregon. Dollar for dollar, if Oregon had already dedicated funds in regard to burdens associated with in-state generated waste, Oregon asked that out-of-state waste pay to Oregon the same amounts when that waste came to rest at an Oregon landfill, since that out-of-state waste thereby started to impose burdens on Oregon. The Court ruled Oregon's dollar for dollar equalization scheme discriminatory per se and hence unconstitutional.

Key to the Court's analysis was that out-of-state waste received differential treatment at the landfill gate. Out-of-state waste paid a special add-on tipping fee; in-state waste did not. Oregon's best argument to justify its fee was that the state could not tax out-of-state *citizens*. Only their *waste* could be taxed when it came from out-of-state. Oregon's tax on out-of-state waste thus effectively was on a different type of waste — the kind generated by noncitizens farther up the waste chain.⁵² In regard to that out-of-state waste, Oregon wished to collect what it had already dedicated from general revenues to addressing waste problems caused by in-state waste. Those in-state revenues, the state credibly could argue, should be counted as coming from in-state generators, since all Oregonians would be

51. 511 U.S. 93 (1994).

52. I previously have argued for Commerce Clause leeway regarding differential state regulation when the state cannot easily regulate the entire waste stream. See Cox, *Burying Misconceptions*, *supra* note 13, at 827-29.

presumed to produce some in-state waste. All Oregonian generators had thus collectively voted to spend their state's money to address the harms of their in-state generated waste. Despite these arguments, the Court applied heightened scrutiny, and refused to allow Oregon to count its overall revenue program for in-state generated waste against the fee charged to out-of-state waste disposed of in Oregon. The Court instead insisted that only monies collected in regard to a particular in-state waste could be offset against fees charged to out-of-state waste.⁵³

By focusing solely on waste at the tipping gate, the Court required that Oregon restructure its taxing and revenue system if it wished to subsidize in-state generated waste. The implications of this ruling are potentially far-reaching regarding state budgeting and policy making. After *Oregon Waste*, and after *West Lynn Creamery, Inc. v. Healy*,⁵⁴ a non-waste case decided the same term,⁵⁵ it is clear that states must craft all tax and revenue measures very carefully to avoid unconstitutionality. If dedicated funds are created that come partly from funds contributed by outsiders but which solely benefit insiders, Commerce Clause attacks are possible.⁵⁶ The *Oregon Waste* Court's emphasis on the need for absolutely evenhanded taxing schemes has already been confirmed in a relatively noncontroversial differential taxing case decided in February 1996,⁵⁷ and extended in a more controversial

53. See, e.g., *Oregon Waste Sys.*, 511 U.S. at 99, 104, 108.

54. 512 U.S. 186 (1994) (holding that a milk assessment assessed evenhandedly upon all milk sold for the first time in Massachusetts nevertheless violates the dormant Commerce Clause, when the entire assessment scheme reveals that the amount of assessment is tied to the expected amount of product received from out-of-state, and when all revenue raised from the assessment is targeted solely to subsidize in-state milk producers).

55. The *West Lynn* case receives additional treatment later in this article. See *infra* notes 134-38 and accompanying text.

56. This was the situation in *West Lynn*. The milk assessment in that case went only to in-state dairy farmers but was collected on *all* milk sold or processed in Massachusetts. Furthermore, the amount of the assessment was calculated based on the expected proportion of milk that would be produced out-of-state. The assessment then went directly to the Massachusetts dairy farmers rather than into general revenues. The *West Lynn* Court reasoned that such an assessment was not a general revenue tax, which could be collected disproportionately from outsiders without violating the Commerce Clause. Since these milk assessment funds instead never went into general revenues, they were never available for other purposes than to prop up Massachusetts dairy farmers. The funds could also therefore not properly be considered a subsidy. According to the *West Lynn* Court's reasoning, since the revenues never went into the general fund and thus were never raised for the benefit of the general populace, the assessment was impermissibly targeted against outsiders for the benefit of insiders.

In order for a subsidy to pass dormant Commerce Clause scrutiny post-*West Lynn*, the funds used for the benefit of insiders must not be linked to funds collected from outsiders of a similar type and then passed through back to the insiders. In the context of garbage subsidies to insiders to help reduce their costs of waste disposal, or for the local government to ensure that locally generated waste goes where the government wishes it to, I have explored these points in greater detail elsewhere. See Cox, *What May States Do?*, *supra* note 21, at 586-90. Cf. *infra* notes 134-38 and accompanying text (discussing fees collected from local generators which the government then tries to target for flow control purposes).

57. See *Fulton Corp. v. Faulkner*, 116 S. Ct. 848 (1996) (confirming *Oregon Waste's* curtailment of expansive interpretations of the compensatory tax doctrine by holding intangibles tax which exempts in-state corporations unconstitutional); cf. *General Motors Corp. v. Tracy*, 117 S. Ct. 811 (1997) (holding that regulated monopolist utilities which provide bundled natural gas to consumers via direct pipes to their homes may receive different tax treatment regarding the natural gas thus sold than out-of-state spot

property tax case decided by the Court in May 1997.⁵⁸ The current Court's message is that tax exemption and fund distribution situations are as suspect as other dormant Commerce Clause situations.

The Court thus used *Oregon Waste* both to restrict rather than expand its compensatory fee doctrine, and also to link tax and regulatory dormant Commerce Clause case law. Under the compensatory fee doctrine, a state may charge out-of-state items a fee that merely compensates for fees already assessed against the same kind of in-state goods. The classic example of a compensatory fee is a use tax placed against goods purchased out-of-state and brought back into the state. If such goods would have been assessed a sales tax had they been purchased in-state, the Court has allowed a use tax to be placed on the goods equal to the amount of the sales tax otherwise avoided.⁵⁹ *Oregon Waste* emphasized that such use taxes were the *only* compensatory taxes that the Court has upheld in recent years, and that the Court opposes expanding categories subject to compensatory tax justification.⁶⁰ Furthermore, the Court, in a somewhat inaccurate characterization of prior case law, announced that

providers of natural gas who sell natural gas to in-state consumers).

58. See *Camps Newfound/Owatonna v. Town of Harrison*, 117 S. Ct. 1590 (1997). The issue in this case was whether a Maine property tax deduction, limited to charitable organizations which serve primarily Maine residents, violates the dormant Commerce Clause. See *id.* at 1593-94. The Court, applying heightened scrutiny, held that failure to give the same tax break to camps which serve out-of-staters as given to camps serving in-staters discriminates against interstate commerce. See *id.* at 1596-1608. In line with the analysis of recent garbage precedents in text, the *Camps* Court emphasized that once discrimination is found to exist, the issue is not *how much* detrimental effect on interstate commerce will be tolerated, but rather whether the tax can be justified as the only way to accomplish a legitimate local purpose. See *id.* at 1601 & nn.15-16, 1602.

The Court also rejected town arguments that the tax break was the equivalent of market participation or subsidy. See *id.* at 1604-07. The town, according to the Court, was not purchasing needed social services by granting a tax break. See *id.* at 1607. To so rule, the Court feared, would dangerously expand market participation exemption possibilities. See *id.* Although full consideration of the *Camps* Court's constitutional line drawing between regulatory tax measures on the one hand and potentially exempt market subsidies/market participation on the other is beyond the scope of this article, the *Camps* Court's approach of limiting rather than expanding loopholes is in line with the points made in text. For more on the dangers of running counter to Court skepticism about expanding market participation exemption, see *infra* notes 119-80 (criticizing Second and Third Circuit flow control decisions which misapply market participation exemption).

59. See, e.g., *Henneford v. Silas Mason Co.*, 300 U.S. 577, 583-87 (1937). See generally Walter Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 TAX LAW. 405 (1986).

60. See *Oregon Waste Sys. v. Oregon Dep't of Env'tl. Quality*, 511 U.S. 93, 105 (1994). It is worth asking why even the use/sales tax situation satisfies dormant Commerce Clause scrutiny under a per se discrimination standard. The use tax is aimed only at goods which were purchased out-of-state and seems designed to dissuade consumers from seeking a competitive advantage by buying from out-of-state businesses. The consumer's state should not have power to tax out-of-state business activity absent purposeful connection by the seller with the taxing state. Nevertheless, continuing to uphold the compensatory tax exception in use tax situations is justified, even under a per se presumption against its constitutionality, under the rationale that the tax is on sales to the forum state, the reality being that the goods were sold to be used there. Cf. 2 JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, *STATE TAXATION* 16-18 (1992) (discussing use tax situations more generally).

Though our cases sometimes discuss the concept of the compensatory tax as if it were a doctrine unto itself, it is merely a specific way of justifying a facially discriminatory tax as achieving a legitimate local purpose that cannot be achieved through nondiscriminatory means.⁶¹

The Court thus reinterpreted the compensatory fee doctrine as a special and unique case where heightened scrutiny might be satisfied. The Court thereby extended the trend begun in *Armco, Inc. v. Hardesty*⁶² of holding taxing statutes to the same presumptions of unconstitutionality as regulatory measures, when there is evidence of differential impact.

Evaluating tax and regulatory cases under a single dormant Commerce Clause standard may well be desirable, but it is not the way most commentators and courts have approached these problems.⁶³ It was thus inaccurate of the *Oregon Waste* Court to characterize prior case law as having always applied a single standard for both tax and regulation cases. More importantly, however, the recharacterization in *Oregon Waste* moves only in the direction of restricting state ability to act. The standard around which *Oregon Waste* unifies dormant Commerce Clause analysis is a standard that focuses on effects more than intentions, and which penalizes a state for differential unintended effects, regardless of how small they are or how much good is otherwise accomplished.⁶⁴ Perhaps these messages were not unanticipated, but before *Oregon Waste*, they had not been so unambiguously stated.

The *Oregon Waste* Court made similar inroads, through dicta, on use of the user fee doctrine to justify differential assessments. The user fee doctrine allows states to charge out-of-state entities reasonable amounts for services the state provides to outsiders and for which in-staters have already paid via general tax or other revenues. In *Oregon Waste*, the Court rejected Oregon's attempts to apply user fee case law to justify its tax on out-of-state waste generators, emphasizing that the potentially more lenient justifications present in user fee case law would be

61. *Oregon Waste*, 511 U.S. at 102. This was certainly an inaccurate characterization so far as older compensatory tax cases are concerned. See, e.g., Philip M. Tatarowicz and Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879, 909 (1986) (emphasizing that older Court decisions allow different types of taxes to be considered complementary).

62. 467 U.S. 638 (1984); see also *supra* note 50.

63. See, e.g., Twyman, *State Taxation*, *supra* note 49, at 400-04 and sources there cited (indicating that the tax and regulatory lines of cases have not been driven by the same constitutional concerns).

64. As the majority emphasized: "As we use the term here, 'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually per se invalid." *Oregon Waste*, 511 U.S. at 99 (citations omitted). The Court also stated: "Our cases require that justifications for discriminatory restrictions on commerce pass the 'strictest scrutiny.' The State's burden of justification is so heavy that 'facial discrimination by itself may be a fatal defect.'" *Id.* at 115 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979)).

The *Oregon Waste* dissent argued that a fourteen cents' per week effect on interstate commerce was so minimal that the legitimacy of Oregon's purpose should clearly outweigh this effect. See *Oregon Waste*, 511 U.S. at 115 (Rehnquist, C.J., dissenting). This argument fell on deaf majority ears. See *id.* at 100 n.4.

henceforward inapplicable in compensatory fee cases.⁶⁵ The *Oregon Waste* Court additionally limited user fee logic to state-owned facilities,⁶⁶ apparently linking the doctrine to the deferential treatment given states under the market participant exemption.⁶⁷ This in itself would be an important but perhaps not illogical restructuring of user fee doctrine,⁶⁸ but the Court went further onto questionable ground. As Justice Rehnquist protested in dissent,⁶⁹ the majority indicated in ill-advised dicta that even user fees associated with state-owned facilities could not "discriminate" against interstate commerce.⁷⁰ If discrimination in future user fee cases is defined to be merely differential effect, as it was so defined in *Oregon Waste*,⁷¹ user fees will be subject to much more searching scrutiny than has formerly been the case.⁷²

65. *See id.* at 102 n.6.

66. *See id.* The Court arguably incorrectly characterized the fees Oregon charged. In *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), for example, the Court more properly identified user fee logic with "state-owned or state-provided . . . services" (emphasis added). *Id.* at 621. Justice Thomas, in his footnote for the Court in *Oregon Waste*, however, argued that because Oregon did not own the landfills into which waste was headed, this prohibited Oregon from charging user fees. *See Oregon Waste*, 511 U.S. at 103 n.6. This ignores the fact that state inspectors, state clean up efforts, and other state services would be necessitated by the presence of a privately owned landfill, and that the cost of such "state provided services" might be proportionally related to the volumes of waste the landfill accepts.

67. *See infra* notes 161-80 and accompanying text for more discussion of the market participant exemption.

68. A rationale for linking user fee logic to market participation logic would be that the state's fees for services provided are for services which the state is not required to provide, and which therefore it can sell to its customers at differential rates, preferring one set of customers over another.

69. *See Oregon Waste*, 511 U.S. at 114 (Rehnquist, C.J., dissenting).

70. *See id.* at 102 n.6.

71. *See id.* at 99.

72. Even in the same term in which *Oregon Waste* was decided, the Court did not so apply the doctrine. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994). In *Northwest Airlines*, the Court held that Grand Rapids airport user fees imposed at a different rate on national airlines than on general aviation traffic did not discriminate against interstate commerce where fees seemed roughly to approximate the cost of actual use of the facility. *See id.* at 372-74. The fact that a surplus was generated was held *not* to invalidate consideration of the fees as user fees rather than purely revenue raising measures. *See id.* at 371-72. For more detailed background on the airport rate-setting issues raised by *Northwest Airlines*, see, e.g., Rise J. Peters, Comment, *Northwest Airlines v. County of Kent, Michigan: More Than You Ever Wanted to Know About Airport Ratesetting, Part One (Pricing in the Courts)*, 22 *Transp. L.J.* 291 (1994).

A requirement of no differential impact in state user fee situations would be a significant departure from previous precedent. Hopefully the dicta in *Oregon Waste* about lack of discrimination means no more than that the state may not charge differentially to similarly situated persons for services which the state *requires* that all persons, in-staters or out-of-staters, must subscribe to in order to meet state health and safety requirements. For *optional* services, which the state has no duty to provide to out-of-staters, but which the state wishes to subsidize by funding, the state should be able to favor its own in receipt of (including differential pricing for access to) those services. Even when the state requires all who operate within its regulatory ambit to pay for state services via a user fee (e.g., for inspection costs associated with health and safety concerns), the inquiry should not be, as apparently is the case in costless regulatory situations or in revenue raising tax assessments, whether there is indirect differential effect on out-of-state competitors. Rather, as in *Northwest Airlines*, the inquiry should be, at least so long

There is tension between the *Oregon Waste* Court's hasty dicta regarding discriminatory user fees and the normal market participant exemption granted when a state uses its own funds to address perceived needs or to benefit its own. However this tension is eventually resolved, it is clear that the *Oregon Waste* Court expanded categories where the per se test will be applied, and closed off potential loopholes in the compensatory fee doctrine. *Oregon Waste* is a significant opinion, not so much for how it prevents state waste planners from capturing through fees the burdens imposed by out-of-state waste coming into a state's borders, but more for its indication of the Court's increasingly hostile stance toward situations of differential treatment. Tax measures which take into account the place from where persons are benefitted or taxed will almost always be declared unconstitutional under *Oregon Waste's* logic. So will measures which, even inadvertently, impose differential burdens on out-of-state businesses. For the increasing number of factual situations thus brought within per se scrutiny, *Oregon Waste* further makes clear that not even actual reimbursement to the state for services provided can counter the presumption of unconstitutionality required to be imposed under *Oregon Waste's* logic for any differential treatment found to exist.⁷³ The per se test thus swallows more and more factual situations where policies and effects are ambiguous so far as the health of the nation or its citizens is concerned. Although *Oregon Waste* should not prevent states from very carefully subsidizing their waste planning, disposal projects, or other activities,⁷⁴ the *Oregon Waste* decision, together with the other 1994 waste decision, *C&A Carbone*, to be discussed next, demonstrates the Court's tightening rather than loosening of Commerce Clause restrictions, primarily through increasingly rigid application of the per se test.

C&A Carbone is arguably one of the most significant dormant Commerce Clause waste decisions of the 1990s. Environmentally, it invalidated a form of waste management — monopoly flow control — which a majority of states had authorized or adopted,⁷⁵ which Congress had assumed was permissible behavior,⁷⁶ and which

as the collected funds do not go into some specialized fisc designed solely to benefit insiders as in *West Lynn Creamery*, merely whether the charged assessment reasonably approximates the state expenses in providing the required service. For more discussion of user fee logic post-*Oregon Waste*, see Dan T. Coenen, *State User Fees and the Dormant Commerce Clause*, 50 VAND. L. REV. 795 (1997).

73. It is possible to attempt to limit the *Oregon Waste* per se presumptions and logic to situations of facially differential treatment, since that was the situation before the *Oregon Waste* Court. Similar attempts, however, by Justice O'Connor, to limit the internal consistency requirement to situations of facial discrimination were not endorsed by a majority of the Court. See *American Trucking Ass'ns, v. Scheiner*, 483 U.S. 266, 302-03 (1987) (O'Connor, J., dissenting) (arguing against majority holding that flat tax on trucks involved in interstate commerce, although facially neutral, discriminates against interstate commerce because its effect is to disproportionately burden out-of-state interests, and suggesting that internal consistency apply only to facial discrimination situations).

74. In the context of waste subsidies, I have explained elsewhere how this should be done. See Cox, *What May States Do?*, *supra* note 21, at 586-90. The main requirement for insuring the constitutionality of a subsidy is that the funds collected to subsidize not be obtained from the competitors of those in-state business or economic interests being subsidized.

75. See, e.g., Eric S. Petersen & David N. Abramowitz, *Municipal Solid Waste Flow Control in the Post-Carbone World*, 22 FORDHAM URB. L.J. 361, 364 n.19 (1995) (listing 27 statutes that explicitly authorized flow control); cf. *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383, 406 n.1 (1994)

the Court itself had addressed favorably under other clauses of the Constitution at the height of the *Lochner* era.⁷⁷ Although a majority of the Court joined Justice Kennedy's opinion, both Justice O'Connor, concurring, and Justice Souter, (joined by Chief Justice Rehnquist and Justice Blackmun), in dissent, perceived the *Carbone* Court to be significantly expanding or misinterpreting prior dormant Commerce Clause logic and holdings. The case is therefore significant both for what it has to say on the merits of important waste issues, but more importantly for its debate among the Justices regarding how dormant Commerce Clause analysis should be conducted.

The *Carbone* facts involved a fairly typical flow control ordinance and the background situation which had led to adoption of that ordinance.⁷⁸ To bring the local community into compliance with federal RCRA requirements, the state environmental agency had forced the Town of Clarkstown to close its town dump and look for more environmentally sound ways to ensure proper disposal of its citizens' waste. The town's solution was to promote construction of a local transfer station. Rather than build this facility with public dollars or float a bond issue for such construction,⁷⁹ the town made a deal with the proposed builder and operator

(O'Connor, J., concurring) (citing 21 statutes); Petitioner's Brief at 14 n.8, *C&A Carbone* (No. 92-1402) (listing 22 statutes). Nearly all such listings of statutes do *not* include general "home rule" provisions under which many municipalities also would have authority to implement flow control in furtherance of health and safety goals. *See, e.g.*, 79 Ky. Op. Att'y Gen. 84 (1979).

76. Prior to *Carbone's* rejection of this point, there was belief in some quarters that Congress had not only expected, but already *authorized* some measure of state flow control. *See, e.g.*, *C&A Carbone*, 511 U.S. at 407-10 (O'Connor, concurring) (describing RCRA provisions which were alleged to authorize flow control and conceding that "Congress expected local governments to implement some form of flow control," but finding that congressional indications were not so specific and unambiguous to constitute affirmative authorization for state discrimination against interstate commerce). Congress clearly has power to authorize measures which otherwise would constitute interstate discrimination under the dormant Commerce Clause, since state Commerce Clause violations only occur in situations where Congress has not specifically spoken. *See, e.g., id.* at 409-10. Congress, however, must speak very explicitly before an affirmative authorization of what would otherwise be unconstitutional will be found. *See, e.g., id.* For pre-*C&A Carbone* commentary expressing doubt about the constitutionality of flow control measures, compare Ann R. Mesnikoff, Note, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home*, 76 MINN. L. REV. 1219 (1992) (indicating that flow control is beneficial and that Congress should explicitly authorize it) with Sidney M. Wolf, *The Solid Waste Crisis: Flow Control and the Commerce Clause*, 39 S.D. L. REV. 529 (1994) (evaluating flow control solely on basis of consistency with prior Court precedent and concluding that it is unconstitutional).

77. *See California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905) (flow control of garbage to favored franchise upheld against takings and contract clause challenge); *Gardner v. Michigan*, 199 U.S. 325 (1905) (similar flow control measure upheld against substantive due process challenge).

78. *See C&A Carbone*, 511 U.S. at 386-87 (describing the case's background facts); *id.* at 412-13 (Souter, J., dissenting) (also describing the facts of the case).

79. Many flow control ordinances are used to support publicly owned facilities. As explained in text, the factual differences between Clarkstown's form of flow control and other flow control regimes seemed *not* to play any role in the Court's analysis. It was no accident, for example that the National Association of Bond Lawyers, a group primarily concerned about the bond ratings involved in publicly financed facilities supported by flow control arrangements, was seen as an important amicus in the case, and that their arguments were seen as going to the merits of the controversy before the Court. *See id.* at 407-10

of the transfer facility. Its citizens would directly and proportionally finance the facility through tipping fees set at above market rates. Clarkstown guaranteed that if enough trash did not come to the facility during the five year contract period, the town would still pay the higher fees for which the contractor had bid.⁸⁰ Clarkstown would not be out this money so long as all trash generated by the township ended up at the facility, since the expected volume of such trash had been used to set the fees in the contract with the builder/operator. The above market rate tipping fees presumably would be passed on to town customers by transporters forced to use the proposed transfer facility. Clarkstown's flow control ordinance, which prohibited trash generated in Clarkstown from being transported anywhere else, under threat of criminal penalty, would ensure that all Clarkstown waste haulers used the proposed facility. This, if you will, was an example of "mutual coercion mutually agreed upon."⁸¹ The policies behind Clarkstown's flow control package were simple: Clarkstown would solve its environmental problems via a temporarily privately owned facility; the facility would be constructed because flow control and contract guarantees made the deal reasonably attractive to the private sector; and at the end of the financing period, Clarkstown would own a facility that it could either lease or operate as a market participant.

Clarkstown's motivations for its flow control arrangement were clearly a mixture of environmental and financial, with the financial perhaps dominating. It would be a mistake, however, to hope that a more environmentally motivated flow control ordinance would have fared better under the *C&A Carbone* Court's dormant Commerce Clause scrutiny. Although the *C&A Carbone* Court certainly noted and commented upon the particular financial protection aspects of Clarkstown's arrangement,⁸² the reasoning of the case was not driven by these facts. The *C&A Carbone* Justices evaluated flow control more generically. Justice Souter provided significant non-economic rationales for flow control in his dissent.⁸³ Justice O'Connor emphasized that all forms of flow control, by their nature, evenhandedly discriminate, and therefore should not be subjected to heightened scrutiny.⁸⁴ The

(O'Connor, J., concurring). Nor was it any misreading of the implications of the *C&A Carbone* case that soon following it, the bond ratings for such facilities were seriously reevaluated. See, e.g., Martha M. Canan, *Voters Approve GO Issue in Wake of Carbone Ruling*, THE BOND BUYER, November 10, 1994; Karen Pierog, *Two Ohio Waste Incinerators Close, Partly Due to May High Court Ruling*, THE BOND BUYER, November 9, 1994; Martha M. Canan, *Standard & Poor's Says Flow Control Bill's Death Probably Won't Affect Bond Ratings*, THE BOND BUYER, October 12, 1994 (emphasizing that the reevaluation occurred after the *C&A Carbone* decision and under the assumption that there would be no congressional "fix").

80. This is known as a "put or pay" agreement, since the government entity must either "put" the amount of trash contracted for with the facility, thereby generating its revenue, or "pay" the facility for any shortfall in volumes and concomitant disposal fees.

81. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1243-48 (1968).

82. See *C&A Carbone*, 511 U.S. at 394-95.

83. See *id.* at 419-21, 428-29 (Souter, J., dissenting). For more elaborate explanation of some of the potential benefits of flow control, see, e.g., Petersen & Abramowitz, *supra* note 75, and Mesnikoff, *supra* note 76.

84. See *C&A Carbone*, 511 U.S. at 401-05 (O'Connor, J., concurring).

majority emphasized that the denial of competition inherent in flow control requires heightened scrutiny, presumably regardless of whether the negotiations leading to a particular flow control monopoly are "cozy" or conducted at arms length.⁸⁵

The main debate among the *C&A Carbone* justices thus centered on whether flow control in general, not as exhibited by Clarkstown's particular factual scenario,⁸⁶ was constitutionally permissible. For the majority, the key objection to flow control is that it "prevents everyone except the favored local operator from performing the initial [waste] processing step" and "thus deprives out-of-state businesses of access to a local market."⁸⁷ Viewing flow control as just "one more instance of local processing requirements that we long have held invalid,"⁸⁸ the majority dismissed claims that, because Clarkstown's flow control ordinance foreclosed both local as well as out-of-state processors from competing with the flow control monopolist, it should be viewed as nondiscriminatory. For the majority, this prohibition on all competition merely exacerbated the constitutional harm.⁸⁹ According to the majority, flow control, because it was *monopoly* flow control, by its very nature discriminated facially against interstate commerce.⁹⁰

85. *See id.* at 389-93.

86. In fact, a fair argument can be made that the justices ignored important facts which argue that certiorari may have been improvidently granted. *See Cox, What May States Do?*, *supra* note 21, at 596 (discussing Carbone's shift in emphasis during briefing to the out-of-state origin of the trash it wished to process instead of the illegality of flow control *per se*). When I was advising the attorneys for Clarkstown on possible responses to Carbone's reply brief, the possibility of asking to dismiss because certiorari had been improvidently granted was discussed, with counsel for Clarkstown electing instead to file a sur-reply brief drawing attention to Carbone's change of tactics.

87. *C&A Carbone*, 511 U.S. at 389.

88. *Id.* at 391.

89. Comparing to previous cases where the Court had found unconstitutional discrimination, the *Carbone* majority remarked:

The only conceivable distinction from the cases cited above is that the flow control ordinance favors a single local proprietor. But this difference just makes the protectionist effect of the ordinance more acute. In *Dean Milk*, the local processing requirement at least permitted pasteurizers within five miles of the city to compete. An out-of-state pasteurizer who wanted access to that market might have built a pasteurizing facility within the radius. The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside.

Id. at 392.

90. *See id.* at 390-93. The majority also introduced via dicta the possibility that a state might be without regulatory power over its citizens who wish to take advantage of other states' more lax disposal practices. Responding to arguments that flow control might serve the useful purpose of ensuring that trash generated in Clarkstown would end up only at truly safe disposal facilities, the *C&A Carbone* Court rejected such arguments as "extend[ing] the town's police power beyond its jurisdictional bounds." *Id.* at 393. To the extent that Clarkstown's health and safety justifications masked a more economic protectionist purpose, the Court may have been right to expose the nature of what was really going on. *See, e.g., id.* at 392-94. If the dicta were pushed outside of economic protectionist contexts, however, serious regulatory problems might result. For example, under CERCLA, a municipality that arranges for disposal of locally generated waste can be held jointly and severally liable for resulting Superfund cleanup costs at sites where that waste ends up. *See, e.g., B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192 (2d Cir. 1992). A governmental entity that cannot regulate disposal arrangements it has promoted would be caught in a catch-22 situation. It is obligated under RCRA and many state plans to arrange for disposal of trash

It was here that Justice O'Connor parted company with the majority's logic. She saw prior local processing cases as standing for the more modest proposition that it is constitutionally impermissible for a community to favor in-town processors *as a group* against out-of-area processors. Because a "garbage sorting monopoly is achieved at the expense of *all* competitors, be they local or non-local,"⁹¹ Justice O'Connor viewed flow control as "'discriminat[ing]' evenhandedly," and therefore *not* subject to the virtual per se rule of invalidity.⁹² The *local* commercial waste processing community foreclosed by monopoly of business could be expected to complain of and feel the effects of Clarkstown's flow control ordinance as much as out-of-state interests. This demonstrated to Justice O'Connor, in line with previous Court virtual representation cases,⁹³ that there was no discrimination against out-of-state commerce.⁹⁴ Admitting that there is "no clear line"⁹⁵ separating the categories of discrimination in which heightened scrutiny is required from those where the local regulation is given more benefit of the doubt, Justice O'Connor nevertheless found it important not to expand the categories of per se invalidity to situations such as Clarkstown's, which involved clear harm to in-state interests and no preference for in-staters as a group as against outsiders.⁹⁶

Justice Souter even more pointedly disagreed with the majority's use of the dormant Commerce Clause to strike down monopoly arrangements which a town has undertaken in its capacity as municipal service-provider, rather than as protector of local businesses from price competition. Without explicitly so stating, he apparently viewed the majority's position as bordering dangerously close to recycling substantive economic due process through the dormant Commerce Clause. He emphasized that the Commerce Clause was not designed to protect forms of business activity, but rather to ensure only that no discrimination in competition is based on the geographic location of the competitor.⁹⁷ In Justice Souter's view, because the burden of ensuring safe and efficient trash disposal is so peculiarly and

generated by its citizens, but it is placed potentially liable for improper disposal if it does not arrange wisely. To be without some power to ensure that waste for whose disposal it has arranged ends up in a "proper" facility would seem unduly to tie the state's hands. If the Court is serious about establishing a complete "hands off" approach, that prevents government telling its own citizens what they may do with their waste once they commit to shipping it out-of-state, then the CERCLA liability and RCRA obligation rules will have to be relaxed to treat such waste as not within the state's regulatory control except for the time that the waste is within the jurisdiction.

91. *C&A Carbone*, 511 U.S. at 404 (O'Connor, J. concurring) (emphasis added).

92. *Id.* (O'Connor, J. concurring).

93. See *supra* notes 45-50 for discussion of virtual representation rationales.

94. See *C&A Carbone*, 511 U.S. at 403-05 (O'Connor, J., concurring).

95. *Id.* at 402 (O'Connor, J., concurring).

96. Although she ultimately found that Clarkstown's ordinance unreasonably burdened interstate commerce under the *Pike* test, she thus felt compelled to write separately to object to the majority's application of the heightened scrutiny test, terming the distinctions she found "of more doctrinal significance than the majority acknowledges." *Id.* at 404 (O'Connor, J., concurring).

97. See *id.* at 424-25 (Souter, J., dissenting) (citing Justice Holmes' dissent in *Lochner v. New York*, 198 U.S. 45, 75 (1905) and *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978) and emphasizing that monopoly was outlawed only by the Sherman Act, not by any constitutional provision); see also *id.* at 416-17 (Souter, J., dissenting) (citing Professors Regan, Smith and Tribe to similar effect).

longstandingly a matter of local government concern, this argued in favor of upholding the validity of the regulation.⁹⁸ Additionally, because the primary economic burdens of Clarkstown's flow control, in the form of higher disposal costs, would fall on the very citizens who voted for the flow control measures,⁹⁹ declaring flow control invalid is not only *not* required under the Constitution, it is an intrusion on fundamental democratic law making. As he emphasized in conclusion, "The Commerce Clause was not passed to save the citizens of Clarkstown from themselves."¹⁰⁰

Given the majority's clear rejection of both Justice Souter's and Justice O'Connor's concerns, the *C&A Carbone* case legitimately should be viewed as a significant dormant Commerce Clause decision. In labeling monopoly arrangements per se discriminatory, the Court confirmed the trend begun in *Fort Gratiot* of finding factual situations, even if not aimed at protecting local business interests, increasingly subject to heightened scrutiny when local regulation prevents out-of-state access to local private markets. In rejecting Justice O'Connor's virtual representation arguments, the *C&A Carbone* Court confirmed *Fort Gratiot*'s message that virtual representation is inapplicable once a court finds discrimination.¹⁰¹ By rejecting Justice O'Connor's concerns about expanding the per se test, and rejecting her invitation to instead focus on a regulation's actual overall effect on both local and interstate activity,¹⁰² the *C&A Carbone* majority also confirmed the *Fort Gratiot* and *Oregon Waste* Courts' insistence that the decision as to which Commerce Clause test should be applied must precede discussion of the policy merits of particular factual situations, even though any decision to apply the per se test will almost always be fatally determinative of the merits.¹⁰³

Carbone's message is not positive for state or local regulators wishing to operate with a freer hand. By emphasizing that local monopoly can itself become the evil that requires heightened dormant Commerce Clause scrutiny, the Court has effectively accomplished through the dormant Commerce Clause what it believes Congress has not permitted under the Sherman Act — to impose on states and localities potential liability for restricting competition, although the local government

98. See *id.* at 417-21 (Souter, J., dissenting).

99. See *id.* at 424-29 (Souter, J., dissenting).

100. *Id.* at 430 (Souter, J., dissenting).

101. See *supra* notes 45-50 and accompanying text. Since "discrimination" is defined by the *Oregon Waste* Court to mean merely "differential treatment," see *supra* note 64, 105, virtual representation arguments would be unavailing in all differential treatment situations.

102. See *C&A Carbone*, 511 U.S. at 402-03.

103. In the *C&A Carbone* case, having decided that monopoly flow control was subject to the per se test, the majority then immediately placed that test's presumptions against Clarkstown's flow control, thus dooming it to invalidity. See *id.* at 392-94. Under such Commerce Clause heightened scrutiny, it is not enough for the municipality to show that the method of regulation chosen is the *best* to accomplish a legitimate local purpose; the municipality must have "no other means to advance a legitimate local interest" under the Court's current formulation and application of the test. *Id.* at 392; see also *supra* notes 38-42, 43, 53-64, 105 and accompanying text (discussing similar determinative applications in *Fort Gratiot* and *Oregon Waste*).

thought the restriction necessary to accomplish a legitimate local purpose.¹⁰⁴ Any monopolies the state wishes to sponsor post-*C&A Carbone* may now have to be justified as the *only* way to accomplish legitimate local health and safety goals, rather than as preferred methods to obtain locally approved purposes. This would be a potentially significant expansion of Commerce Clause restriction in favor of free market goals.¹⁰⁵

104. State action exemption from Sherman Act antitrust liability is granted to private persons whom a political subdivision of the state has authorized to act anticompetitively. See generally Patrick v. Burget, 486 U.S. 94 (1988); Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97 (1980). However, under Dennis v. Higgins, 498 U.S. 439 (1991), claims may be brought under 42 U.S.C. § 1983 for alleged violations of the dormant Commerce Clause. These claims can impose direct costs to the government in the form of attorneys fees, even in situations where there is section 1983 immunity from individual liability. Such attorneys' fees claims have been pursued in several waste cases. See, e.g., National Solid Wastes Mgmt. Ass'n v. Meyer, 63 F.3d 652, 662 (7th Cir. 1995) (reversing lower court's dismissal of section 1983 claim); Medigen of Ky., Inc. v. Public Serv. Comm'n of W. Va., 985 F.2d 164 (4th Cir. 1993) (affirming district court's award of attorneys fees); BFI Medical Waste Sys. v. Whatcom County, 983 F.2d 911 (9th Cir. 1993) (remanding for consideration of attorneys' fees claim).

For arguments that advocate the merging of antitrust and Commerce Clause standards around free market values, see Randall S. Abate & Mark E. Bennett, *Constitutional Limitations on Anticompetitive State and Local Solid Waste Management Schemes: A New Frontier in Environmental Regulation*, 14 YALE J. ON REG. 165 (1997); Gifford, *supra* note 7; cf. Karl Manheim, *New-Age Federalism and the Market Participant Doctrine*, 22 ARIZ. ST. L.J. 559 (1990) (criticizing immunity for state "proprietary" functions as incompatible with existing market-participant immunity from dormant Commerce Clause scrutiny). Needless to say, I am opposed to increasing the pro-business aspects of the Commerce Clause doctrine, and believe instead that the purpose of the clause is to protect against state overreaching rather than to protect economic business relationships per se.

105. In response to *C&A Carbone*, the Third Circuit emphasized that all monopolies are subject to inquiry under the dormant Commerce Clause and that only the most compelling case can be made for upholding economic discrimination in favor of a local monopoly. See *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic City*, 48 F.3d 701, 713-15 (3d Cir. 1995) (*Atlantic Coast I*); see also *infra* notes 144, 150-54 and accompanying text for more discussion of the *Atlantic Coast* litigation.

A potentially important counterweight to *Carbone's* message about monopolies, however, may be present in the Court's very recent decision in *General Motors Corp. v. Tracy*, 117 S. Ct. 811 (1997), where a regulated monopolist was allowed differential tax treatment regarding natural gas sold in competition with other natural gas suppliers. Only Justice Stevens insisted that the focus for discrimination purposes should be upon the product both the monopolist and the non-monopolist sold. In Justice Stevens' view, all natural gas suppliers should get the same tax treatment for their sales of natural gas. See *id.* at 831-32 (Stevens, J., dissenting) (comparing to thermostats or gas furnaces). For the majority, however, if one of the possible justifications for the monopoly was that natural gas would not otherwise be available for all customers, then the favored tax treatment was also justified. See *id.* at 826-27. Apparently the Court is willing to define discrimination more leniently for authorized monopolists than in other situations. Cf. *Camps Newfound/Owatonna v. Town of Harrison*, 117 S. Ct. 1590, 1614 (1997) (Scalia, J., dissenting) (suggesting that the Court in *Tracy* created a public utilities exception from dormant Commerce Clause scrutiny). Perhaps we have yet another box into which the current Court is inclined to deterministically sort dormant Commerce Clause situations. Legitimate monopolies, under *Tracy's* logic, will receive fairly deferential Commerce Clause review. If the battle is to become the legitimacy of the monopoly for dormant Commerce Clause purposes, however, then the Court in future cases will need to provide more guidance about exactly what situations will and won't qualify as being the "only" ways legitimate discriminatory purposes can be accomplished which justify

Justice O'Connor is therefore right to emphasize that the distinctions between her approach and the majority's are significant. Justice Souter is correct in his view that the majority has, when "subsum[ing Clarkstown's] ordinance within the class of laws this Court has struck down as facially discriminatory . . . , in fact greatly extend[ed] the [Commerce] Clause's dormant reach."¹⁰⁶ Justice Souter's implied concerns about a return to substantive economic due process through the dormant Commerce Clause¹⁰⁷ should also be taken as an early warning of the direction the Court might yet take in the future if more attention is not paid to the implications of its current dormant Commerce Clause decision-making methodology. Nevertheless, *C&A Carbone* does not yet re-enshrine any particular form of economic relations or business interests as being constitutionally protected.¹⁰⁸ The *C&A Carbone* Court instead merely requires that no state can prohibit its citizens from having at least theoretical access to the competitive business systems approved by other states, except in situations where the state clearly justifies this cut-off as the *only* way to accomplish legitimate local objectives.

C&A Carbone is consistent with and perhaps a logical outgrowth of the trend identified in the earlier waste decisions. Taken together, the Court's five waste decisions demonstrate increasingly rigid use of a *per se* test to strike down regulations which are ambiguous as policy matters. State regulations which differentially burden outsiders will be cut no slack, even if the burden imposed on outsiders is slight. Under current tests, if a regulation cuts off outsiders from potentially profitable in-state business, or if it cuts off insiders from potentially profitable out-of-state business, the regulation constitutes *per se* discrimination which the state will not be able to justify. This constitutes a significant shift from the way Commerce Clause theory was operating only thirty years ago.

The extent of this shift can be demonstrated by comparing the approach in *Pike v. Bruce Church*¹⁰⁹ to the reasoning the Court might use on the same type facts in the post-*Fort Gratiot*, post-*Oregon Waste*, post-*C&A Carbone* world. In *Pike*, the Court balanced the weakness of the state's regulatory purpose against the significant harm to interstate commerce, and found the balance unconstitutional.¹¹⁰ The *Pike*

the monopolist exemption from being counted discrimination *per se*. We know after *C&A Carbone* that garbage management is not such an area, and we know after *Tracy* that natural gas service provided in connection with a local end-of-pipe utility apparently is such an area. The criteria by which either determination was made, however, are not spelled out in sufficient detail in either decision so as to provide guidance for the next monopoly and dormant Commerce Clause challenge.

106. *C&A Carbone*, 511 U.S. at 411.

107. See *supra* notes 97-100 and accompanying text.

108. Justice Souter's citations to prior decisions and to commentary which have emphasized that fact are not disputed by the majority. See *supra* note 97 and accompanying text.

109. 397 U.S. 137 (1970).

110. *Pike* involved an Arizona statute and regulation enacted pursuant to the statute that required locally grown cantaloupes to be packed so as not to deceive consumers about their quality. See *id.* at 138, 142-43. A California company which raised substantial quantities of cantaloupes in Arizona wished to ship the cantaloupes to its packing facilities in California rather than pack them in Arizona. Arizona prohibited such shipment outside the state on the grounds that it had a right to enforce its statute and regulations, in order to enhance the reputation of fruit grown within the state. See *id.* at 144. The *Pike*

facts, however, in *C&A Carbone* terms, represented a kind of indirect flow control, in that a local grower was prohibited from sending cantaloupe to the place where the grower thought the fruit could be safely¹¹¹ and most economically packaged. Whereas the *Pike* Court talked about a stronger local purpose perhaps justifying even outright discrimination,¹¹² the current Court requires that there be *no* alternatives before differential effect will be permitted.¹¹³ Although the *Pike* Court mentioned virtual per se invalidity,¹¹⁴ this discussion occurred only in the context of a single balancing test that weighed harm against legitimacy.¹¹⁵ The current Court instead seeks, without measuring strength of harms and legitimacies, to find out which of its two very different tests should be applied, and increasingly finds that the per se test is the appropriate test to apply to ambiguous facts. A requirement, as in *Pike*, that processing occur only in-state, would likely be struck under current Court tests as discriminatory. There is some irony in the realization that the very case which gives its name to the balancing test purportedly applicable to evenhanded regulation situations might be evaluated under *current* Court precedents as a discrimination case requiring use of per se scrutiny.¹¹⁶

As the garbage decisions demonstrate, the Court has shifted significantly since *Pike*. In response to these shifts, several lower courts have reacted in oppositely erroneous ways. On the one hand, some courts mistakenly have assumed that they can rely on *Pike*-era approaches and precedents, despite the Court having modified the ground rules in more recent decisions. On the other hand, some courts have seen in the current trends a green light to refashion Commerce Clause constraints

Court held that such a weak purpose could not outweigh the significant harm of forcing the California company to expend \$200,000 to build packing facilities within Arizona. *See id.* at 146.

111. In *Pike*, there was no argument that the shipment of cantaloupes to California for packing would involve any increased risk of health and safety harm to the general public. *See id.* at 143. In *C&A Carbone*, however, as in *Fort Gratiot*, the state *did* contend that its regulation was motivated by legitimate health and safety concerns. *See, e.g., C&A Carbone*, 511 U.S. at 392-93; *see also id.* at 420-21, 428-29 (Souter, J., dissenting). Whereas the *Pike* Court seemed to imply that the presence of legitimate health and safety concerns might be capable of tipping the Commerce Clause balance differently, the *Carbone* Court emphasized that, once differential effect had triggered its per se test, even the most compelling health and safety concerns could not outweigh real Commerce Clause harm, so long as there were *any* other ways, regardless of their increased expense, of addressing the health and safety problems. *Compare, e.g., Pike*, 397 U.S. at 143 with *C&A Carbone*, 511 U.S. at 392-93.

112. *See Pike*, 397 U.S. at 146.

113. *See supra* notes 44, 64, 105 and accompanying text.

114. *See Pike*, 397 U.S. at 145.

115. *See id.* at 142-46.

116. I am aware that the Court in more recent years has often included the *Pike* case in its citation of clearly discriminatory situations. *See, e.g., GMC v. Tracy*, 117 S. Ct. 811, 824 n.12; *C&A Carbone*, 511 U.S. at 391. The point in text, however, is that the current Court essentially pays lip service to the truth that there is inherent ambiguity in many situations which could fairly be classified either as discriminatory or evenhanded (or even more realistically as some combination of both). The Court says that there is "no clear line between these two strands of analysis." *GMC*, 117 S.Ct. at 824 n.12; *see also C&A Carbone*, 511 U.S. at 402 (O'Connor, J., concurring) ("Of course, there is no clear line separating these categories."). Nevertheless, the Court demands that all situations must first be classified one way or the other so that one of two very different tests can then be applied. This was not the approach of *Pike*.

in directions the Court has not approved, namely toward ushering in an age of economic vested rights. It is to both of these misinterpretations of recent Court precedent which we now turn.

III. Flowing Against the Stream: The Second and Third Circuits Unconvincingly Attempt to Recast the Court's Commerce Clause Messages

When the Court issues a clear but unpalatable message, governments and lower courts either can follow the Court's directives or attempt to recast the Court's message into something less objectionable. The danger of the latter course is that when the Court eventually reverses the recastings, it may do so with a vengeance and itself recast "objectionable" doctrine in a yet more determinative way, thus leaving even less wiggle room for the next time around. In the 1980s, for example, some waste planners pretended that *Philadelphia's* explicit prohibitions did not apply to waste which was clearly hazardous, even though Justice Rehnquist's *Philadelphia* dissent had emphasized the real harms of out-of-state waste, and even though one of New Jersey's main arguments to the *Philadelphia* Court had been to urge a quarantine exception which would apply only to clearly harmful substances. The Court responded in *Chemical Waste Management* with a decision that applied heightened scrutiny more mechanically than previously.¹¹⁷ Similarly, when waste planners argued to the Court in *Fort Gratiot* that the more serious waste planning being undertaken by states in the modern era justified treating *Philadelphia* as an outdated precedent not on point, the Court not only did not embrace this suggestion, but applied an expanded per se discrimination test to facts which were arguably more neutral.¹¹⁸

Because recent Second and Third Circuit opinions upholding flow control are clearly contrary to the Court's reasoning in *C&A Carbone*, any efforts to expand on or use their logic are not just doomed to eventual failure on the merits. They may also lead to the worse result of pushing the Court, in reaction, toward a version of substantive economic due process, recycled through the dormant Commerce Clause, that would prohibit what should be counted as constitutionally legitimate methods for addressing out-of-state burdens. Accordingly, although I support the environmental policy behind these recent pro-flow control decisions, they are so clearly contrary to what the Court recently has said that they must be severely criticized. The Second Circuit simply tried to ignore the *C&A Carbone* message and weave spurious market participant logic out of factual flow control differences which have no constitutional significance. The Third Circuit tried to limit *C&A Carbone* to its facts. Both circuits' approaches are untrue to the *C&A Carbone* decision and to the implications of other recent Court pronouncements.

More is at stake here than environmental policy. In claiming that *C&A Carbone* did not apply to their facts, the Second Circuit, especially, not only misread the breadth of the *C&A Carbone* holding and rationale, but also misconstrued market

117. See *supra* notes 31-32, 33 and accompanying text.

118. See *supra* notes 34-50 and accompanying text.

participant arguments for exemption. This is not the first time market participant logic has played a controversial role in trash decisions. In a 1989 Third Circuit decision, the lower court majority correctly held that free market forces should not alone be allowed to determine what is in the state's regulatory interests.¹¹⁹ This time around, however, the lower courts are erroneously claiming for the market participant doctrine more exemption than it logically can and should provide. The danger is that when the Court inevitably returns to the issue of what market participation logic should look like, there will be no voice upholding a legitimate version of the doctrine. Instead, there may be only detractors claiming that the exemption should not exist at all versus proponents claiming for it an ability to backdoor clearly unconstitutional forms of state regulation. In such a situation there is always the risk that the Court will not discern or craft arguments differently from those the parties put before it. Properly construed, market participation serves a crucial function in larger dormant Commerce Clause jurisprudence. Because this is so, the doctrine should be properly explicated rather than either perverted or discarded.

A. *Dust and Din About Flow Control Being Constitutional*

In *USA Recycling, Inc. v. Town of Babylon*,¹²⁰ and *SSC Corp. v. Town of Smithtown*,¹²¹ the Second Circuit paid lip service to *C&A Carbone*, but upheld, under flawed market participant reasoning, the same kind of New York flow control whose implementation the *C&A Carbone* Court had declared unconstitutional. In *Babylon*, waste haulers who had been denied the opportunity to compete in the local

119. See *Swin Resource Sys., Inc. v. Lycoming Co.*, 883 F.2d 245 (3d Cir. 1989) (majority ruling that county-owned landfill did not violate dormant Commerce Clause by charging higher fees to out-of-area residents). Perhaps because there was a vigorous dissent in this case by Chief Judge Gibbons, attacking market participation doctrine generally, the *Swin* case has served as an important discussion point for several commentators about the propriety of the market participation doctrine, especially in the waste context. See, e.g., Dan T. Coenen, *The Impact of the Garcia Decision on the Market-Participant Exception to the Dormant Commerce Clause*, 1995 U. ILL. L. REV. 727; C.M.A. McCauliff, *The Environment Held In Trust for Future Generations or the Dormant Commerce Clause Held Hostage to the Invisible Hand of the Market?*, 40 VILL. L. REV. 645, 667-82 (1995); Michael D. Diederich, Jr., *Does Garbage Have Standing? Democracy, Flow Control and a Principled Constitutional Approach to Municipal Solid Waste Management*, 11 PACE ENVTL. L. REV. 157, 228-43 (1993); Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989); David L. Johnson, *Recent Developments*, 49 VAND. L. REV. 753 (1996); 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 (1993).

Prior to the *Swin* decision, the decision in *LeFrancois v. Rhode Island*, 669 F. Supp. 1204 (D.R.I. 1987), upholding a ban on out-of-state trash to a state-owned landfill, even where that landfill was the only facility in the state, also served as a significant precedent for animated disagreement about the propriety of market participant exemption. Compare David Pomper, Note, *Recycling Philadelphia v. New Jersey: The Dormant Commerce Clause, Postindustrial "Natural" Resources, and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309 (1989) (approving of the case and upholding the doctrine) with Kovacs & Anderson, *supra* note 7 (criticizing the case and market participant exemption).

120. 66 F.3d 1272 (2d Cir. 1995).

121. 66 F.3d 502 (2d Cir. 1995).

market for commercial trash customers challenged the local township's insistence on monopoly trash collection. The monopoly contract also included a flow control requirement imposed on the winning bidder. The *Smithtown* case involved claims by a winning bidder in another township that he did not have to comply with flow control requirements in the monopoly haulage contract he had won. In both cases, decided by the same panel on the same day, the Second Circuit mistakenly asserted that the townships' monopoly flow control schemes were justified under market participant logic.

The Second Circuit's argument can be simply stated, and its fallacy quickly revealed. On the one hand, the court acknowledged that any legislation which directly requires all citizens of a town to dispose at or transport their trash to a specific local facility is prohibited flow control legislation. Accordingly, the *Smithtown* court declared unconstitutional the flow control regulations which the City of Smithtown had not had the good sense to repeal post-*C&A Carbone*.¹²² On the other hand, the Second Circuit held that it did not violate the Constitution for a local township to require that only one company be given the license to collect trash in the area, with this one company also required to take all the trash it collects to a single local facility designated, and even partially owned, by the township. Labeling such monopoly haulage contracts, with flow control strings attached, "market participation," the Second Circuit authorized Babylon and Smithtown indirectly to accomplish a form of flow control which they could not directly legislate under *C&A Carbone*.

122. See *Smithtown*, 66 F.3d at 506, 512-14. *Smithtown* argued that its economic investment in the facility to which it directed all waste made the town a market participant rather than a market regulator. This argument was of course foreclosed by *C&A Carbone*. In the *C&A Carbone* case, although the Town of Clarkstown did not own the facility to which it directed all trash be taken, ownership of that facility would revert to Clarkstown for \$1 after five years. Additionally, Clarkstown had entered into a put or pay agreement with the operator of the Clarkstown transfer facility by which the Township was obligated to pay for any trash below a certain amount not delivered and for which higher than market tipping fees accordingly had not been received by the transfer facility. See *supra* notes 79, 82-79, 82 and accompanying text. Thus it was not at all clear in the *C&A Carbone* case that the town of Clarkstown could not have made the same arguments of "participation" as *Smithtown*.

The more fundamental flaw in *Smithtown*'s economic investment argument, besides this lack of difference from *C&A Carbone*'s facts, however, is that it does not matter who owns the facility, when the issue is whether people may be forced to take their trash to that facility. Forcing someone to do something is market regulation, not market participation. If anything, the economic investment of *Smithtown* in its flow control legislation exacerbates the Commerce Clause unconstitutionality under *C&A Carbone*'s logic. Essentially, *Smithtown* is arguing, "Since we've put a lot of money into this facility, we must be allowed to force people to use it so that we can make sure we don't lose our shirts." The *C&A Carbone* court labeled this an impermissible central purpose that a nonprotectionist regulation would not serve. See *C&A Carbone*, 511 U.S. at 393-94; see also *supra* notes 86-90 and accompanying text.

In the *Babylon* case, the township's flow control ordinance was not an issue, since the township had chosen not to enforce it post-*C&A Carbone*. See *Babylon*, 66 F.3d at 1278. As will become clear in text, the replacement of Babylon's flow control ordinance with monopoly contract requirements merely attempted indirectly what was directly prohibited under *C&A Carbone*. See *infra* notes 124-38 and accompanying text.

The large error in the Second Circuit's logic was its failure to acknowledge that the creation of a private local monopoly was itself the primary "evil" which the *C&A Carbone* majority had identified as unconstitutional. Justice Souter had argued in dissent in *C&A Carbone* that no particular form of economic relations were required under the Commerce Clause, and that a community which to its own detriment chooses to authorize monopoly in order to address legitimate health and safety concerns should not thereby be found to violate the Commerce Clause. The *C&A Carbone* majority rejected these arguments, however, and insisted that the evil of flow control was that it "squashes competition in the waste-processing service altogether."¹²³ It was not the particular method by which flow control came into existence that irked the *C&A Carbone* Court, but rather that town-wide mandatory flow control completely displaced the competition which those associated with other states are allowed to seek under the dormant Commerce Clause.

The Second Circuit simply refused to acknowledge that the Court meant to go so far in *C&A Carbone*. Acknowledging that creation of a local monopoly is market regulation rather than market participation,¹²⁴ the Second Circuit never successfully defended against *C&A Carbone's* logic that such absolute elimination of competition requires that monopolies be subjected to the per se test. Thus, despite the fact that two important Supreme Court precedents approving monopoly flow control *outside* of the dormant Commerce Clause context¹²⁵ had been argued to the *C&A Carbone* Court¹²⁶ and ignored as irrelevant by the *C&A Carbone* majority, the Second Circuit continued to rely on these cases for the principle that the Supreme Court could not possibly intend to rule municipal monopoly of trash collection unconstitutional.¹²⁷ Similarly, discussion in the Second Circuit cases about the free and open bidding process by which a favored hauler was awarded a monopoly¹²⁸ was completely wide of the mark.¹²⁹ Under *C&A Carbone's* logic, there is no constitutional distinction between accomplishing monopoly flow control by having all haulers dispose at the monopoly transfer station, versus achieving monopoly flow control by permitting only one monopoly hauler to take trash where the town dictates.

By emphasizing a township's rights, as market participant, to impose conditions on those with whom it does business, the Second Circuit lost sight of the fact that this was the less important part of the township's plan. Under a monopoly haulage regime, no one else is allowed to pick up trash. Presumably the bidder for such a monopoly franchise is willing either to give a volume discount or to pay the town

123. *C&A Carbone*, 511 U.S. at 392.

124. See, e.g., *Babylon*, 66 F.3d at 1282-83.

125. See *supra* note 77 (briefly describing *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905) and *Gardner v. Michigan*, 199 U.S. 325 (1905)).

126. See, e.g., Respondent's Brief at 13, 41-44 *C&A Carbone* (No. 92-1402).

127. See *Babylon*, 66 F.3d at 1276, 1292-94.

128. See *Babylon*, 66 F.3d at 1277, 1278-79, 1287, 1290; *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 507 (2d Cir. 1995).

129. This point became an even larger mistaken emphasis in the Third Circuit's mis-analysis, which shall receive more detailed attention shortly. See *infra* notes 143-49 and accompanying text.

a bonus for being able to charge for disposal of *all* of the town's trash. This monopoly discount or bonus only makes economic sense if no citizen within the township's boundaries can take her trash anywhere except to the approved hauler. When granting *exclusive* contract to the monopolist hauler, the town presumably is ready to penalize anyone who does not use that hauler's services, or at least who refuses to pay for that hauler's services.¹³⁰ This means that the flow control will be just as complete, or perhaps even more effective, than under a regime which mandates only ultimate destination.¹³¹

In the *Babylon* case, the recycling of flow control from one methodology to another was particularly transparent. Pre-*C&A Carbone*, Babylon achieved flow control by ordering all haulers to the designated local facility. Post-*C&A Carbone*, Babylon simply eliminated all competition and then ordered the winning bidder to dispose of its waste at the same pre-*C&A Carbone* designated facility. If anything, Babylon's post-*C&A Carbone* version of flow control was more disruptive of economic markets than the pre-version. At least haulers in Babylon's pre-*C&A Carbone* world could all try for as much of a piece of the local commercial waste processing market as they each could capture. In Babylon's post-*C&A Carbone* version of flow control, only one favored hauler is allowed access to the market, and the flow control thereby is effectively doubled, i.e., both at the pickup point and at the point of ultimate disposal.¹³² Decreasing the amount of local competition does not increase Commerce Clause constitutionality.

The *Babylon* flow control was additionally not market participation as defined in the post-*C&A Carbone*, post-*West Lynn Creamery* world, because it funded the favored facility via targeted, pass-through assessments rather than with government general revenues. To finance the monopoly commercial trash pickup, the town assessed a \$1500 annual benefit against improved properties in the District which would need commercial disposal service. The town then also assessed "user fees" against any such business parcels which would generate more than the amount of trash deemed to be covered by the \$1500 fee.¹³³ All of these collected funds were dedicated to the garbage service contract, or in other words, passed through to the favored hauler, as the town's agent for commercial garbage collection.

The basic constitutional problem with such an arrangement is that it forces a minority of citizens to bear the expenses for services a majority deems necessary,

130. See, e.g., *Babylon*, 66 F.3d at 1280, 1282.

131. When town residents can dispose of their trash only by putting it at the curb for pickup by one approved hauler, there is increased certainty that the trash will ultimately go where the town designates, since the only monitoring of trash required is to make sure it goes into the single approved company's receptacles. Should the monopoly hauler choose to take trash somewhere other than the approved facility, this would be at additional cost in a well-structured flow control arrangement, where tipping fees to the approved facility would be set appropriately low, at least for the approved hauler, based on the volume of trash to be collected by that hauler. The hauler may even be given free tipping at a designated town-owned facility, and be allowed to pass through the costs of his bid (which would finance the disposal facility) plus acceptable profit to the "customers" who are required to use his services. Cf. *id.* at 1279 (describing Babylon's financial arrangements with its monopoly handler).

132. See *supra* note 89 and accompanying text.

133. See *Babylon*, 66 F.3d at 1279.

without allowing the payer to seek satisfactory service from out-of-state contractors at a better price. At first glance, it might seem a full response to unfairness claims to emphasize that the fees collected must be reasonably related to the services provided, since the fees go entirely for the service provided.¹³⁴ But this hardly addresses a Commerce Clause claim of constitutional right of *access* to out-of-state servicers of the same quality who charge less. Nor is it accurate to compare a service required of only a minority, to a government monopoly desired to be used by the entire population.¹³⁵

What happens in situations where those "given" the monopoly service have not asked for it is that there is no incentive, except for reaction to the complaining voices of this assessed minority, to keep prices down, since the majority of those who vote for the monopoly do not feel its sting.¹³⁶ Additionally, since the total amounts of funds to finance the project come only from those who are assessed the monopolist's fees, there is absolutely no financial cost to the majority for such a self-financing project. As the Court recently has emphasized, the lack of normal political checks on government using its own funds for legitimate governmental purposes can serve as evidence of possible Commerce Clause harm.¹³⁷ In market participant terminology, the problem is that the funds never became the

134. *See id.* at 1286 n.12.

135. *See id.* at 1286 n.13. Even a monopoly for the "benefit" of the entire town also is unconstitutional under *C&A Carbone*, since the town generators are deprived of access to interstate competition which allegedly could do the job as safely but more cheaply. Under *C&A Carbone* logic, such denial of access constitutes facial discrimination. *See supra* notes 86-90 and accompanying text. A monopoly as in *Babylon*, however, which forces only *part* of the town to pay higher prices for "necessary" services even more directly risks that the majority of government will not oppose something which does not harm them. Whether one agrees with the logic of *C&A Carbone* or not, *Babylon* constitutes a much weaker case in favor of upholding the monopoly service provided, since it imposes alleged monopoly inefficiency upon only part of the citizenship. This is not the Town of Babylon imposing an arrangement upon itself to its own detriment (but also for its own benefit). *Cf. C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 429-30 (1994) (Souter, J., dissenting). This instead is the town imposing an arrangement upon *part* of the town for the alleged benefit of the rest of the town, and also for the direct pecuniary benefit of the monopolist server of the minority.

136. *Cf. Gifford, supra* note 7 (making similar arguments in the context of a larger critique of dormant Commerce Clause doctrine). While I disagree with Professor Gifford's larger argument that dormant Commerce Clause doctrine should be reshaped to look more like antitrust rules or made to uphold absolutely free markets as a constitutional value, his economic points make more sense as a counter to absolute exemption from dormant Commerce Clause scrutiny in situations where the state is claiming market participant exemption but is using that label to rearrange the economics of services for which those who pay did not vote.

137. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 198-99 (1994). In *West Lynn Creamery*, dairy farmers were given a subsidy from fees assessed against all milk processed or sold in Massachusetts. The Massachusetts dairy farmers, without the subsidy, might have opposed a fee placed on milk processing or sale in Massachusetts, since this cost might potentially be passed back to them via lower sales price for milk in order to tighten profit margins. However, on the *West Lynn* facts, because the fees raised went to them, they supported, and indeed sponsored, the measure. The normal political check of insiders' interests effectively representing outsiders' interests had been skewed by an economic arrangement which, for insiders, took money out of one pocket but then put even more money back into another pocket; whereas for outsiders the economic harm was still fully felt when the money was first collected.

government's own to use as it sees fit. This is so since the funds went directly from the regulated entity to the monopolist, rather than first to the government for consideration of what purposes, among several competing agendas, the government might find are in the best interests of the whole populace. Thus, the issue in *Babylon* was *not* the legitimacy of general taxes assessed against all businesses, which was the way the *Babylon* court framed the issue.¹³⁸ Rather, the issue was the illegitimacy of an assessment placed only against businesses, where those funds then never came at all under the government's direct majoritarian control.

In its claims that towns can act as market participants by eliminating competition, the Second Circuit may have been deliberately attempting to manipulate factual *C&A Carbone* differences which have no constitutional significance. Alternatively, the court fell into the trap of overreading the truth that a township may attach conditions to contracts it has the power to make, as standing for a quite different and fallacious set of propositions. Just because a township can attach conditions to *its* contracts, this does not imply that the township thereby has authority to keep others, with whom it does *not* contract, away from potential customers who are citizens of the township. To say this another way, the township's legitimate authority to attach conditions to any deals *it* enters into does not mean that the township can give over to a bid winner "customers" who did not choose the bid winner and who have no opt-out provisions. The *Smithtown* case offers a somewhat sympathetic factual scenario for part of this misreading, but even in that case there is no real excuse for the Second Circuit not to have been more careful in its analysis.

In *Smithtown*, the appellant was not a competitor cut off from access to the local market, but rather the monopoly bid winner. As I elsewhere have argued, it is particularly ungenerous and constitutionally inconsistent for a bid winner both to insist that it is entitled to exclude all other competitors from "its" market and at the same time complain about restrictive conditions that accompany the unconstitutional monopoly it desires.¹³⁹ The truly valid Commerce Clause objections to a double flow control arrangement are against local monopoly itself, rather than against the additional flow control directives given the monopoly winner. As explained above, the flow control attempted through a monopoly haulage contract is two-phase flow control. The residents are first flow controlled to the monopoly hauler; the hauler is then flow controlled to the designated facility. Absent the unconstitutional first phase requirement that *all* residents must use the winning hauler's services, there would be no flow control for the township as a whole. Absent the first phase monopoly, any competitors allowed access to the same customer base, but *not* subject to any contract directives, could take trash wherever they wish. As against the hauler who desires the benefits of such an exclusive government contract, *Smithtown* could rightly insist that this hauler should not be allowed to keep all the

138. See *Babylon*, 66 F.3d at 1286.

139. See Cox, *What May States Do?*, *supra* note 21, at 617-18 (labeling such behavior a "have-your-cake-and-eat-it-too" attitude).

customers he bid for but then also get a far higher profit margin than was part of the total package bid.¹⁴⁰

The *Smithtown* court was only partially correct, however, that there can be no constitutional objection to the government attempting to benefit its own or accomplishing "selfish" purposes through a contract the township did not have to offer to the private sector. Local governments may prefer local building contractors, hire primarily local workers, and limit access to only local residents for any products they produce with their own money. The *Smithtown* court correctly relied upon cases such as *White v. Massachusetts Council of Construction Employers, Inc.*¹⁴¹ for the proposition that a township which itself could provide city-owned trash trucks for curbside pickup and direct that trash wherever it wants does not lose the ability to direct this flow when it hires someone else to do curbside pickup for it.¹⁴²

Where the Second Circuit went wrong was in assuming that a township may prohibit others from trying to obtain curbside customers. To compare to a traditional governmental service like public education, it is certainly true that a local school board may prefer local building contractors, hire primarily local teachers, and limit access to its classrooms to only local residents. But local school boards may not insist that all local residents must attend the local school. If a local taxpayer wishes to pull her children out and pay the extra money to send her children to private institutions, the local school board may not insist that monopoly is required to keep enough bodies in the public school to justify payments made to those hired to run it. Similar possibility of competition is required regarding trash services under the *C&A Carbone* Court's reading of the dormant Commerce Clause.

Whereas the Second Circuit overread market participation possibilities as justifying a local government explicitly to prohibit competition against itself, the Third Circuit, in *Harvey & Harvey, Inc. v. County of Chester*,¹⁴³ attempted to distinguish and thereby limit the effect of both *C&A Carbone* and of a prior application of *Carbone*.¹⁴⁴ Focusing on the fairness of the bidding process that

140. *Cf. Smith v. Borough of East Stroudsburg*, 694 A.2d 19 (Pa. Commw. Ct. 1997) (setting aside bid won by competitor who priced his bid on assumption of being able to violate the local ordinance requiring flow control, when other bidders had priced on basis of having to comply with the flow control provisions).

141. 460 U.S. 204 (1983) (holding that city would be allowed as market participant to place condition in city construction contracts requiring that a certain percentage of employees be local).

142. *See SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 514-15 (2d Cir. 1995); *see also Babylon*, 66 F.3d at 1289.

143. 68 F.3d 788 (3d Cir. 1995).

144. The prior application was in *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic City*, 48 F.3d 701 (3d Cir. 1995) (*Atlantic Coast I*). The *Atlantic Coast I* court held that regulations requiring that all nonrecyclable waste be processed in a designated transfer facility triggers *C&A Carbone* requirements, even if the facility is owned by the waste district and constitutes part of a serious statewide approach to health and safety problems. *See id.* at 718. The case was remanded to district court for further fact-finding under the *per se* test. On remand, the district court held the provisions of New Jersey's flow control scheme clearly unconstitutional but stayed the injunction issued in connection with its final judgment for two years to give the state of New Jersey time to develop

produced a monopoly winner, and on the practical effects of monopoly flow control on the interstate waste market, a two judge majority for the Third Circuit mistakenly asserted that *C&A Carbone* could be read to allow *Pike* balancing whenever flow control did not seem truly designed to accomplish local economic protectionist purposes. While the Third Circuit's arguments make environmental and even dormant Commerce Clause policy sense, they are foreclosed by *C&A Carbone* and by prior Court waste precedents.

The Third Circuit majority argued that *C&A Carbone's* restrictions apply only to local monopolies established for an economic protectionist purpose. After defining economic protectionism as a benefit to insiders at the expense of outsiders, the majority then reasoned that it would be absurd to insist that the only way a community can avoid violations of the dormant Commerce Clause is to designate an out-of-state facility to be sole recipient of locally generated trash.¹⁴⁵ Accordingly, the Third Circuit thought not every situation where a local community designates a local entity to receive its trash would violate the Commerce Clause. If the community could demonstrate that its designation process was open to significant out-of-state bidders, and that its proposed contract terms did not realistically discourage open competition for the monopoly designation, the Third Circuit thought the designation might be constitutionally permissible.¹⁴⁶ Additionally, if the designation would not prohibit future competition with the monopoly winner by lasting for an unreasonably long time, the Third Circuit majority would take this into account as evidence of nondiscriminatory purpose.¹⁴⁷ The *Harvey & Harvey* panel therefore remanded to the trial courts¹⁴⁸ for further fact-finding regarding exactly how each challenged township's plan worked.

The Third Circuit improperly attempted to distinguish situations where a local community uses flow control to favor or finance local operations from situations where the main purpose of the flow control is to ensure safe and stable disposal capacity. The attempt was to shift the emphasis in dormant Commerce Clause waste decisions to the reality of a locality's motivations rather than to presume unconstitutionality because local citizens had been denied access to a competitive market. While there is some room in both *C&A Carbone* and in the prior Third Circuit *Atlantic Coast* decision for such attempted distinction based on local favoritism, this factual emphasis is unfortunately *not* true to the spirit of either of

a nondiscriminatory plan for waste management. See *Atlantic Coast Demolition & Recycling v. Board of Chosen Freeholders*, 931 F. Supp. 341 (D.N.J. 1996), *aff'd with modification*, 112 F.3d 652 (3d Cir. 1997) (*Atlantic Coast II*); see also *Waste Mgmt. of Pa., Inc. v. Shinn*, 938 F. Supp. 1243 (D.N.J. 1996) (declaring unconstitutional any aspects of New Jersey's waste self-sufficiency policy which would favor in-state long-term contracts over contracts for out-of-state disposal); *infra* notes 153, 159 (describing additional aspects of the *Atlantic Coast II* decisions).

145. See *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 803-04 (3d Cir. 1995).

146. See *id.* at 801-02, 805-08.

147. See *id.* at 799-800, 801, 806, 809.

148. The *Harvey & Harvey* opinion responded to two appeals involving two separate townships' flow control regimes which raised similar issues about whether Pennsylvania-authorized flow control could be found constitutional. The appeals had been briefed separately but were consolidated for oral argument. See *id.* at 791.

those prior decisions.¹⁴⁹ The attempted reshifting ignores the protectionism the *C&A Carbone* Court linked to flow control per se.

In *Atlantic Coast I*, the Third Circuit previously had addressed the constitutionality of New Jersey flow control arrangements at a time when the *C&A Carbone* decision was hot off the press. Although the *Atlantic Coast I* court did note that the facts of New Jersey's required flow control favored local operators at the expense of out-of-state facilities desiring the same business,¹⁵⁰ that was not the primary thrust of the decision. Instead, the *Atlantic Coast I* court focused on the evils of monopoly per se, noting that this also had been the thrust of the *C&A Carbone* decision.¹⁵¹ In response to New Jersey's arguments that because the public interest was being both burdened and served by such utility's existence, a regulated public utility would be subject at most to *Pike* scrutiny, the *Atlantic Coast I* court emphasized that state utility regulation was to be judged by the same Commerce Clause tests as all other forms of state regulation.¹⁵² What this meant was that because monopoly flow control by its very nature deprives local generators of access to the best price on the interstate market, it constituted discrimination per se. Only the most compelling state purpose, not achievable under any alternative means, would support monopoly flow control under the heightened scrutiny thus required to be applied.

This *Atlantic Coast I* reasoning was more true to the spirit of *C&A Carbone* than the later *Harvey & Harvey* majority's reasoning.¹⁵³ It might be a legitimate local

149. See also *supra* notes 75-108 and accompanying text (discussing *C&A Carbone*).

150. See *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic City*, 48 F.3d 701, 707-08, 715 (3d Cir. 1995) (*Atlantic Coast I*).

151. See *id.* at 711-12.

152. See *id.* at 713-15. New Jersey also argued that its flow control regulation was exempt from dormant Commerce Clause scrutiny under market participant logic, making erroneous arguments similar to those brought before the Second Circuit in *Babylon* and *Smithtown*. The *Atlantic Coast I* court correctly rejected these claims, emphasizing that the districts' flow control requirements "purport to control the market activities of private market participants" by "requir[ing] everyone involved in waste collection and transportation to bring all waste . . . to the designated facilities . . . [and] to purchase the government service — even when a better price can be obtained on the open market. New Jersey's waste flow control regulations were thus promulgated by it in its role as a market regulator, not in its capacity as a market participant." *Id.* at 717.

153. In *Atlantic Coast Demolition v. Board of Chosen Freeholders*, 112 F.3d 652 (3d Cir. 1997) (*Atlantic Coast II*), the Third Circuit reaffirmed the holding and most of the analysis of *Atlantic Coast I*. The *Atlantic Coast II* court specifically noted that no *Harvey & Harvey* claims of exemption can apply where the designation process requires waste to go only to in-state facilities. See *id.* at 662-63 (describing how New Jersey flow control only to New Jersey facilities is therefore clearly unconstitutional and distinguishing *Harvey & Harvey* on that ground). Applying the near-fatal heightened scrutiny required to be applied in such discrimination situations, see, e.g., *id.* at 664 n.16, the *Atlantic Coast II* court required New Jersey to stop denying access to out-of-state waste services for New Jersey generated waste, regardless of how much hardship this might cause local government. The court affirmed the trial judge's findings of unconstitutionality, but then also severely shortened a more liberal time frame the trial judge had set up before the injunction against enforcement of New Jersey's unconstitutional flow control would become effective. See *id.* at 660-61, 671-73.

It is interesting to note that the *Harvey & Harvey* decision was a 2-1 decision. The vigorous dissent in that case would have allowed no fair competition exceptions but simply would have struck the

purpose to lock up disposal capacity, and thereby assure that all locally generated waste will be properly discarded. Such control over the waste stream for health and safety reasons might best be achieved through a flow control arrangement which would guarantee volume to a single transporter or site. But the point of *C&A Carbone* is that all such arrangements deprive local generators of access to potentially lower priced services offered in the interstate market and therefore are per se discriminatory. They can only be justified if there are no alternatives to the proposed monopoly that might accomplish the same health and safety goals with less intrusion on interstate commerce.¹⁵⁴ Similar messages about legitimacy of local purpose not being able to overcome differential treatment had been delivered in *Fort Gratiot*.¹⁵⁵

The Third Circuit's attempt in *Harvey & Harvey* to recast the *C&A Carbone* decision as addressing only the second stage flow control designation completely ignores *C&A Carbone's* more fundamental emphasis that impermissible discrimination is deemed to occur at the *first* stage of flow control, when local generators are deprived of access to the competitive services of the interstate waste market. In *C&A Carbone*, as in *Harvey & Harvey*, the municipality was assumed to have sought competitive bids before it awarded its contract for a designated transfer facility. The precise argument that fair competition for a monopoly supposedly proves that there is no harm to the interstate waste market had also been heard and rejected by the *C&A Carbone* majority.¹⁵⁶ In sum, it is immaterial how fair the bidding process is, or who gets the final economic benefit of monopoly. If monopoly itself is per se discriminatory, *Pike* analysis is simply inappropriate under the Court's current precedents.

Why do some courts and waste planners continue to misread what the Court has said?¹⁵⁷ The most likely answer is that, trying to do a good job of addressing in

monopoly schemes involved as clearly discriminatory under *C&A Carbone*. See *Harvey & Harvey*, 68 F.3d at 809-11 (Nygaard, J., dissenting). This was also the approach taken by the trial judge in the *Tri-County* part of the *Harvey & Harvey* consolidated appeal. See *id.* at 807. The *Atlantic Coast* decisions, on the other hand, were unanimous. Although current Third Circuit panels and lower court judges in that circuit must try to reconcile the tension inherent between the approaches taken in *Atlantic Coast I* and in *Harvey & Harvey*, no similar need to mask over inconsistencies should be elsewhere encouraged or engaged in. The approach of the *Atlantic Coast I* panel is more in line with what the Supreme Court ruled in *C&A Carbone* than any exceptions the Third Circuit, by a divided panel, subsequently introduced into that circuit's dormant Commerce Clause analysis.

154. Cf. *id.* at 715 ("Where the regulation is addressed to a utility, like a local gas utility and unlike *Atlantic Coast*, whose service requires a *tangible* distribution system, a franchise monopoly may be the only economically feasible alternative . . ." (emphasis added)). In the waste context, it cannot credibly be argued that the only way to collect trash is to have one company own all the trucks that pick up at curbside. Whatever distribution system is involved may be of the trash haulers' makings, so long as all trash ends up being safely disposed. The *Atlantic Coast I* court's comments accurately distinguish the Court's subsequent decision in *General Motors Corp. v. Tracy*, 117 S. Ct. 811 (1997) (allowing differential tax treatment for regulated monopolist utilities which provide bundled natural gas to consumers via direct pipes to their homes).

155. See *supra* notes 34-50 and accompanying text.

156. See Respondent's Brief at 45, *C&A Carbone* (No. 92-1402).

157. A different sort of misreading has been conducted in the Eighth Circuit recently in *Ben*

practical terms the real problems associated with waste disposal, those closest to the ground become convinced that the Court cannot possibly have meant its sweeping prohibition against the form of regulation they want to apply. Flow control in particular makes excellent waste planning sense,¹⁵⁸ and usually is not primarily motivated by economic rationales. Nevertheless, *C&A Carbone* declared it unconstitutional across the board. It is wishful thinking to believe that factual differences can undo the logic of a decision that was not based on and did not emphasize the facts before it. *C&A Carbone's* prohibition of fiat flow control indeed makes it exceedingly difficult for waste planners to deal effectively with the reality of their waste problems. But no amount of proof that flow control serves

Oehrleins & Sons & Daughters v. Hennepin County, 115 F.3d 1372 (8th Cir. 1997). In this case, the Eighth Circuit held that waste generators do not have standing to challenge higher waste fees they are charged as a result of flow control, at least where the haulers who charge them those fees are the main plaintiffs in the action. *See id.* at 1379-82. With the important qualification of the last clause of the previous sentence, the *Ben Oehrleins* opinion may do little damage to dormant Commerce Clause standing rationale. On the facts of the *Ben Oehrleins* case, the plaintiff generators apparently shot themselves in the foot by claiming that their *only* harms were derivative of the haulers with whom they had contracted. *See, e.g., id.* at 1379 n.6.

In most Commerce Clause situations, however, the waste generator would claim that her Commerce Clause harms are direct. Flow control deprives the generator of the ability to choose for herself, from among competitors participating in an interstate market, who will take care of her waste needs. If the generator desires to haul her own waste to a facility not on the flow control list, the flow control regime clearly directly harms her. The Commerce Clause harm should be considered just as real, and the attendant standing requirements therefore satisfied, if the generator wishes to hire someone else to haul for her. The plaintiff in *C&A Carbone* was in fact a local waste generator and the *C&A Carbone* Court's invalidation of flow control was for the benefit of all such local waste generators. The *C&A Carbone* analysis focused as much on the deprivation to these generators of access to an interstate market as it did on deprivation to any out-of-state waste haulers, who were not even parties in the *C&A Carbone* suit. And it was the deprivation of waste generator access to that interstate market which the *C&A Carbone* Court labeled discrimination *pre se*, triggering heightened scrutiny. *See supra* notes 75-108.

The Eighth Circuit's analysis seems especially misguided, therefore, when the court seems to argue that to be within the zone of interests designed to be protected by the dormant Commerce Clause, the plaintiff must contract with or be an out-of-stater. *See Ben Oehrleins*, 115 F.3d at 1382. This idea that the court can call no Commerce Clause foul for in-state harms is similarly echoed in the *Ben Oehrleins* court's remand for *Pike* analysis of the part of Hennepin County's regime which affected only waste destined for disposal somewhere else in Minnesota. *See id.* at 1385-87. Under the *Ben Oehrleins* court's reasoning, to claim Commerce Clause protection, a plaintiff apparently has to try to ship waste physically out-of-state. This is a strange result in situations where it is the competitive pricing of the interstate market which makes in-state and out-of-state competitors essentially identical from the plaintiff's point of view. Under the *Ben Oehrleins* court's apparent reasoning, however, if one plaintiff wished to ship to a landfill barely within the Minnesota border, whereas another plaintiff wished to ship to another landfill located just across the state line which charged the same, only the second plaintiff would have Commerce Clause protection. This result seems contrary to Court precedent, which consistently reads the scope of dormant Commerce Clause protection to be at least as wide as what Congress directly would be able to regulate. *See, e.g.,* *Camps Newfound/Owatonna v. Town of Harrison*, 117 S. Ct. 1590, 1596-97 (1997) and sources cited therein; *cf. Wickard v. Filburn*, 317 U.S. 111 (1942) (scope of congressional power to regulate extends to purely local activity that affects national economic market for same goods or services).

158. *See supra* notes 79, 82-100 and accompanying text; *see also* Petersen & Abramowitz, *supra* note 75, at 365-69.

very legitimate governmental purposes can bring it back under *Pike* scrutiny in the post-*C&A Carbone* world.¹⁵⁹ *Carbone* instead requires governments to try *all* less discriminatory methods of managing solid waste, despite how burdensome and inefficient these are from the local waste planner's perspective.¹⁶⁰

B. The Need to Preserve Legitimate Market Participation Exemption

The prime danger in pushing flow control out of keeping with Court precedent, as the Second and Third Circuit have done, is that this may do damage to other doctrines which the Court has not yet invalidated. The main such doctrines I have in mind are the market participant exemption from dormant Commerce Clause scrutiny and the state action exemption from Sherman Act violations. There is no shortage of critics of the market participant doctrine. These critics would relish the opportunity to persuade the Court that the doctrine should be severely curtailed, if not abolished altogether.¹⁶¹ Similarly, there has been a renewed push by some

159. Only if waste managers in the future are able to prove that, without flow control, waste indeed cannot be effectively managed, would there be any chance that flow control constitutionally could be reinstated. Even in the face of some evidence to that effect, the Third Circuit still invalidated the flow control before it. The district court, after remand from *Atlantic Coast I*, was offered evidence that failure to require flow control was in fact leading to more unaccounted-for trash presumably being improperly disposed of. While the trial judge wrote that he was "befuddled" by this information, *Atlantic Coast Demolition & Recycling v. Board of Chosen Freeholders*, 909 F. Supp. 229, 237 (D.N.J. 1995), he nevertheless issued, in November 1995, a preliminary injunction against any flow control of construction and demolition waste. This injunction was made permanent in July 1996 and expanded to include other aspects of New Jersey's flow control regime. *Atlantic Coast Demolition & Recycling v. Board of Chosen Freeholders*, 931 F. Supp. 341 (D.N.J. 1996). The Third Circuit, on appeal in *Atlantic Coast II*, as previously noted, affirmed all trial court findings of unconstitutionality regarding New Jersey's flow control regime, and shortened the time frame for imposition of the injunction as to waste not already enjoined by the trial court's 1996 order. See *supra* note 153.

160. The fact that the *C&A Carbone* decision makes such bad policy sense is to my mind some indication of its unsoundness.

161. See, e.g., Theodore Y. Blumoff, *The State Proprietary Exception to the Dormant Commerce Clause: A Persistent Nineteenth Century Anomaly*, 1984 S. ILL. U. L.J. 73; Kovacs & Anderson, *supra* note 7; Manheim, *supra* note 104; Michael J. Polelle, *A Critique of the Market Participation Exemption*, 15 WHITTIER L. REV. 647 (1994); Barbara J. Redman, *The Market Regulator-Market Participant Distinction and Supreme Court Vigilance over Discriminatory State Programs: Does Economic Theory Justify the Judicial Effort?*, 25 AM. BUS. L.J. 585 (1988); Paul R. Harper, Note, *Solid Waste Transport: Commerce Clause Restrictions and Free Market Incentives*, 24 AKRON L. REV. 681 (1991); cf. Barton B. Clark, *supra* note 119 (expressing concern over broad interpretations of the doctrine); Kenton R. O'Neil, Comment, "Buy American" Statutes: *Should the Market Participant Doctrine Shield Pennsylvania's Steel Products Procurement Act from Commerce Clause Scrutiny?*, 96 DICK. L. REV. 519 (1992) (expressing concerns that overly broad definitions of market in which state participates would allow improper protectionist actions).

For other commentary which is not so hostile to the market participant doctrine, see, e.g., Thomas K. Anson & P.M. Schenkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 TEX. L. REV. 71 (1980); Benjamin C. Bair, *The Dormant Commerce Clause and State-Mandated Preference Laws in Public Contracting: Developing a More Substantive Application of the Market-Participant Exception*, 93 MICH. L. REV. 2408 (1995); Mark P. Gergen, *The Selfish State and the Market*, 66 TEX. L. REV. 1097 (1988); Richard H. Seamon, Note, *The Market Participant Test in Dormant Commerce Clause Analysis — Protecting Protectionism?*, 1985 DUKE L.J. 697.

academic critics and judges to reevaluate the state action exemption which states currently enjoy from Sherman Act antitrust suits.¹⁶² By attempting to stretch the market participant exemption doctrine beyond Court precedents, courts like the Second and Third Circuits risk undermining state exemptions from constitutional and statutory challenge which are appropriate in other factual contexts. I leave elaboration of the Sherman Act arguments for another day, but comment here in some detail on how properly constructed market participant arrangements are consistent with the Court's most recent precedents.

The main criticism offered against market participant exemption is that when the state acts in a market, it almost never acts like a regular participant, but instead usually skews free market forces, thereby destroying competition. This point was acknowledged by Justice Souter in his *C&A Carbone* dissent, when he noted that "it is far from clear that the alternative to flow control (i.e., subsidies from general tax revenues or municipal bonds) would be less disruptive of interstate commerce than flow control, since a subsidized competitor can effectively squelch competition by underbidding it."¹⁶³ Opponents of market participation urge that the doctrine, if it should ever be employed at all, should be allowed only in situations where the state is acting purely as a participant, rather than with any extra clout (financially subsidized or otherwise) associated with government.

Such criticisms misconstrue the justification for the market participant exemption. The point of prior Court precedents is not simply that the state has a right to pick and choose its customers like any other business.¹⁶⁴ The larger point of the market participation exemption is the state's ability to implement important social policies which otherwise might not be undertaken. When Boston required more local employment,¹⁶⁵ when Virginia created a market in scrap hulks,¹⁶⁶ whenever the state acts as a market participant, there is likely to be *significant* interference with the private sector. The whole point of market participation is that the private sector may not be able or willing to do a job the way government needs it done. Thus, in the waste context, the necessity for Materials Recovery Facilities (MRF's), or for composting facilities, may be something the state sees more of a need for than does

162. See, e.g., Abate & Bennett, *supra* note 104; Gifford, *supra* note 7; James F. Ponsoldt, *Balancing Federalism and Free Markets: Towards Renewed Antitrust Policing, Privatization, or a "State Supervision" Screen for Municipal Market Participant Conduct*, 48 SMU L. REV. 1783 (1995); cf. John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713 (1986) (arguing that Supreme Court's earlier broad deference to state sovereignty has been narrowed by restrictive definitions of state action that often permit federal antitrust review of important state regulatory policies).

163. *C&A Carbone*, 511 U.S. 383, 429-30 (1994).

164. For language emphasizing the state's right to pick and choose customers, see, e.g., *Reeves, Inc. v. Stake*, 447 U.S. 429, 437-39 (1980). My point in text is that the state's right so to pick and choose its customers cannot logically be made contingent on the state giving up its right to regulate the market in which it also chooses to participate. The choice is not market participant *or* market regulator. The state always remains regulator, for to give up its duty to regulate health and safety issues would return us to a *laissez faire* mentality opposite to the model of potentially activist government at the heart of the market participant doctrine.

165. See *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983).

166. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

the private sector.¹⁶⁷ The Commerce Clause quite properly does not tie government's hands when it wishes to spend its funds to accomplish social, political, or even economic goals.

This immunity from further Commerce Clause scrutiny is appropriate, because the state's participation proves its unambiguous commitment, at its economic detriment, to accomplishing its policies. In situations where the state merely regulates to accomplish an arguably legitimate local purpose, there is not necessarily any direct cost to the state's citizenry. The dormant Commerce Clause accordingly steps in to make sure the state regulation is not primarily taxing outsiders for insider benefit.¹⁶⁸ But when general revenue public funds must be expended on a project, the citizens are acting directly at their own cost. There is no need for additional Commerce Clause scrutiny, not because there may not be economic harm to outsiders, for there likely will be. The exemption from scrutiny is unnecessary, because a state which spends its own money to promote interests that its citizens deem important does not overreach its Commerce Clause authority vis-à-vis other states or their citizens.

The main requirement for market participation exemption, then, is participation, not that the government go no further than could a private entity in its operations and goals. Thus, when the Court inquires as to whether the state is acting as participant or regulator, the emphasis is on whether the state really has entered the market, or only pretended to do so in an effort to mask its regulation of others. If the state really has entered the market, its effects on that market are not to be measured against any other values. Absolute exemption from further dormant Commerce Clause scrutiny is quite properly granted under the market participant exemption.

However, the state's exemption extends only so far as it actually participates. When the state makes and sells cement, it may sell that cement to whomever it wants, for profit or loss, regardless of how this affects the profitability of other cement manufacturers or users.¹⁶⁹ But the state may not set prices or terms for *others* involved in cement sales or manufacturing based on the fact that *it* is involved in the cement market. Such regulation of others' involvement in the cement market is subject to normal dormant Commerce Clause scrutiny, regardless of how many cement plants the state owns.¹⁷⁰

167. See, e.g., Petersen & Abramowitz, *supra* note 75.

168. A special interest group wishing regulatory favors that could be couched in terms of public good, but which are really aimed at gaining competitive advantage over outsiders, might easily persuade a state or local legislature to pass a measure in its favor. Taking care of one segment of the constituency in this way would provoke no voices of protest from the rest of the constituency not directly affected by the measure.

169. See, e.g., *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (holding that a state-owned cement plant may limit sales to in-state customers).

170. Cf. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984) (denying market participant exemption and finding that Alaska's attempts to require in-state processing were downstream regulation of a separate market in which the state did not participate). When the *Wunnicke* Court speaks of impermissible downstream controls, I equate this with its emphasis that the state was acting as regulator rather than participant. The point is not whether the state regulates, because it always does, but

The Second Circuit's attempts to recast market participant logic to allow regulation over parts of the waste market which the state has not entered, and under *C&A Carbone* could not completely monopolize, is thus inconsistent with previous Court logic and case law in other circuits. In *Fort Gratiot*, for example, the petitioner landfill persuasively argued to the Court that one reason the St. Clair county ban on out-of-state waste should be rejected was because the government was unwilling to assume the economic costs it attempted to impose on the petitioner's operations.¹⁷¹ The county could not claim any of the benefits of market participation — e.g., the ability to exclude out-of-area waste — until it had paid the actual dollar price of becoming the investment creator of the landfill.

The pre-*C&A Carbone* case of *GSW, Inc. v. Long County*¹⁷² also demonstrates that the sole qualification for the market participation exemption is the state's expenditure of its own resources. In this contract dispute between a Georgia county and a private disposal facility operator,¹⁷³ Long County attempted to claim market participant exemption, so that it could impose service area limits on the facility's operations.¹⁷⁴ The *Long County* court rejected claims that the county was acting as a market participant when it authorized the disposal project to care for its own waste needs and then tried to impose on the operator geographic origin restrictions for terms of waste disposal. The court emphasized that no public funds were at stake, nor had any been put at risk regarding the disposal facility's operations, and that such public expenditure is the *sine qua non* of the market participant exemption.¹⁷⁵ Since the county assumed none of the risks inherent in the operation of the facility, its attempted source impositions amounted to regulation and capture of a private entity for public purpose, similar to the economic protectionism

whether it *only* regulates. The *Wunnicke* opinion thus should be read as standing for no more than the proposition that a state's exemption from dormant Commerce Clause constraints extends only so far as the state actually participates in the market.

171. See Petitioner's Reply Brief at 13 n.8, *Fort Gratiot* (No. 91-636). The argument was that only if the county was willing to condemn the landfill and pay just compensation would it be entitled to exclude waste as a market participant. See *id.*

172. 999 F.2d 1508 (11th Cir. 1993).

173. Actually, the dispute was between the Georgia county and a successor corporation to the company which originally negotiated with the county. See *id.* at 1509-10.

174. The county wished to impose a 150 mile geographic limitation on any waste brought to the disposal facility. See *id.* at 1509.

175. The court stated:

The County's failure to expend or risk public funds has several ramifications which negate a finding of market participation. First, it indicates that the County is acting more as a regulator because its policies affect a private company which incidentally benefits from the County's policy decision regarding waste disposal

Id. at 1513. The court further elaborates on this point:

In the instant case, the landfill was to be wholly owned by Allsafe, a private company. Allsafe assumed all risk of failure and liability. Thus, the County was maintaining a policy which would restrict the return on the investment of private actors and would regulate a private company. The County was attempting to control a business that happened to benefit from the County's desire to develop a plan for waste disposal.

Id.

foreclosed by *Philadelphia* and *Fort Gratiot*. To obtain the market participant exemption, the county would have had to put its funds where its regulatory interests were.

Significantly, the *Long County* court also recognized that a market participant need not act like a profit maximizer to retain the exemption. The court cited *Reeves* for the proposition that "the market participant doctrine relies upon the premise that economic restrictions affect both the state actor and other market participants" and that this serves to justify the economic freedoms to pick and choose customers.¹⁷⁶ The court also explained by example how the market's inherent protection from abuse works in the market participant waste context. If the county were a market participant and had invested its own money in the facility, it would have had to answer to the citizens whose funds had been expended. When the county imposed a geographic source restriction which decreased profits or increased operating costs, this might not please voters whose money thus had been managed.¹⁷⁷ The citizens whose funds are being expended are like the shareholders of a corporation who can vote the management out when their investment is not being properly managed. But the criteria by which citizens decide what is good or bad public investment is not solely economic. It is fine if citizens desire to have their money spent to achieve the policy objectives of limiting geographic sources, because the knowledge that their funds could have been spent in more economically profitable ways acts as a constraint on costless attainment of such public benefit. The potential cost to government of inefficient deals is what entitles it to reap social benefits through market participation.

The problem with the fiat attempted under the Second Circuit's perversion of market participation logic is that the government had not yet paid the full price required for being able to impose unprofitable terms on its citizens. It had not yet sufficiently subsidized its haulage contract so that its citizens had no viable financial option but to use the government sponsored service. Absent compelling health and safety goals that cannot be achieved except through monopoly, the only way to induce all citizens post-*C&A Carbone* to use a government designated service is to subsidize that service with government funds to such extent that all citizens will use the service because it is in their economic self-interest to do so. In contrast, when *Babylon* and *Smithtown* ordered their citizens to use one approved hauler, this was costless (to the government) fiat flow control, rather than economic incentive flow control.¹⁷⁸

However, when the state does put up sufficient funds, it may attach whatever strings it wants. It also retains the ability as regulator to ensure that those not subject to the strings act in ways which do not harm state citizens. The government

176. *Id.* at 1513-14.

177. *See id.* at 1514 n.7.

178. *Babylon's* flow control regime was even worse than costless, in that the flow control regulation extorted funds from only a portion of the citizens forced to use the service, which funds were then directly passed over to the monopolist designated by the government. *See supra* notes 133-38 and accompanying text (critiquing in more detail this aspect of the *Babylon* arrangement).

always remains the government, whether it participates in markets or not, and one of the functions of government is to ensure that all operators, subsidized as well as unsubsidized, act in ways which do not cause harm to the public. Arguments to the contrary vest private enterprise with substantive due process rights which are not part of the Court's current constitutional jurisprudence.

Although citizens retain the right under the dormant Commerce Clause to save money if they can accomplish legitimate health and safety goals at less cost by seeking the services of an out-of-state merchant, this is not a constitutional guarantee of the best economic terms per se. Rather, it is an inter-sovereign guarantee that the economic activities promoted or approved by one state will be allowed a chance to compete for market share in other states, on the selling state's terms.¹⁷⁹ Fair access is guaranteed; not the right to a particular way of doing business. The dormant Commerce Clause provides no mandate for doing business on whatever terms industry thinks are most profitable, nor does it ensure that business will even be able to get any customers at all.

Waste industry arguments that the state should lose market participant exemption when it both regulates and participates are accordingly always wide of the mark regarding the real basis for the exemption. The key question should never be the effect of government market participation, but rather the genuineness and the extent.¹⁸⁰ Although this means that private enterprise is deprived of the ability to

179. It is here that I part company with those commentators who see the dormant Commerce Clause as a guarantee to competition on what they deem economically efficient terms. *See, e.g.*, Gifford, *supra* note 7; Kovacs & Anderson, *supra* note 7; Schoettle, *supra* note 7; *cf.* Collins, *supra* note 7; Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401 (1994).

The basic problem with instituting any form of economic efficiency as a constitutional value is it runs contrary to principles of state sovereignty. The protections of the dormant Commerce Clause are protections which come from federalism. To the extent national markets are truly desirable, the dormant Commerce Clause protections run to business entities as citizens of the nation, rather than by reason of economic efficiencies. *See, e.g.*, Kassel v. Consolidated Freightways Corp. of Del., 450 U.S. 662 (1981); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945). In such situations the Court, as a matter of federal common law, has determined that there can be only a national market because this is in the public interest.

More often, the dormant Commerce Clause operates only to prohibit economic favoritism. *See, e.g.*, Wyoming v. Oklahoma, 502 U.S. 437 (1992); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984); Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333 (1977); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Dean Milk Co. v. Madison, 340 U.S. 349 (1951). In such situations, the Court has determined that out-of-state commerce is either being discriminated against or unduly burdened as a result of state law. Here, the protections of the dormant Commerce Clause run to business entities as members of other states which are entitled to be respected as co-equal sovereigns. *See supra* notes 7, 97 and accompanying text; *infra* notes 237-49 and accompanying text.

180. The question of how much government investment is required post-*C&A Carbone* to be able to claim market participant status thus *would* need to be addressed. The *Long County* court correctly noted that the issue of how much public expenditure must be required before the market participant exemption can be claimed is a tricky one, but does not require sole government ownership.

The district court appeared to construe the market participant doctrine as requiring state or county ownership of the landfill. This goes too far. The public entity need not own the operation to be a market participant, but it must risk or expend public funds in some way.

compete on equal terms with the state in markets which the state enters, the alternative would be to deprive government of the ability to act in precisely those areas about which it is most concerned. The government's concern is proved by the government's willingness to put up its funds to ensure that things are done in a certain way. The market participant exemption is thus at the heart of government's power to act for the benefit of its citizens. Full scale attacks on the market participant doctrine are essentially arguments for a return to *Lochner* era views that private contract rights trump governmental power to act. Unfortunately, some courts seem eager to push for such an unfettered free market reading of Commerce Clause requirements, as the next section demonstrates.

IV. Pushing Per Se Presumptions Too Far

Several lower court decisions depart from prior dormant Commerce Clause jurisprudence in two significant ways. First, some decisions place new emphasis upon the purpose behind a regulation's enactment. According to the courts in these cases, a regulation's purpose is *determinative* of whether the regulation should be held invalid. Whereas prior Court precedent used legislative purpose to confirm, in doubtful areas, whether a regulation unfairly burdens out-of-state interests, the new emphasis in some lower court decisions effectively bypasses inquiry about effects of regulation, preferring to focus instead on the motivation behind the regulation. This trend is dangerous because it allows the judiciary to infringe too much on legislative powers and processes. The possibility is that judges will invalidate laws based solely on their displeasure about the legislature's perceived intentions, regardless of whether there is any real Commerce Clause harm.

The second disturbing lower court development is complementary to, but opposite of the first. In situations where it is impossible to discern any discriminatory regulatory benefit to insiders as against outsiders of the same type, some lower courts nevertheless subject a regulation to the heightened dormant Commerce Clause scrutiny reserved for discrimination situations. They reason that the per se test for presumptively discriminatory situations should be applied to any situation where out-of-state interests are extensively affected. Such courts improperly attach the label of unconstitutional discrimination to regulations which cause an outsider to lose business, regardless of why that business is lost. The recent decisions thus convert incidental effect on out-of-state interests into per se discrimination. Such decisions attempt to reread the dormant Commerce Clause as primarily designed to protect businesses from state regulation rather than to prevent states from overreaching.¹⁸¹ This trend is dangerous to the extent that it places the citizens of

We decline to define the economic involvement necessary to qualify as a market participant, but merely note that the facts of this case do not support such a finding
GSW, Inc. v. Long County, 999 F.2d 1508, 1513 n.5 (11th Cir. 1993).

181. Such reading of the dormant Commerce Clause also makes what was formerly thought to be the dominant and appropriate test for dealing with evenhanded regulation — the *Pike* balancing test — effectively surplusage, since almost every state regulation will have some disproportionate effect on some out-of-state concern.

every state at the mercy of the morals of the marketplace, effectively vesting interstate economic activity with an immunity from state regulation which has not been advocated since the *Lochner* era.

A. Why Regulatory Sticks and Stones Alone Should Be Counted as Breaking Commerce Clause Bones

The factual background surrounding passage of state legislation or of a local ordinance may help confirm what the legislation accomplishes. But courts should not find violations of the dormant Commerce Clause unless there is likely to be actual discriminatory effect on interstate commerce. Nor should heightened scrutiny be applied to legislative enactments which actually do *not* discriminate against interstate commerce, regardless of what motivated their enactment. For example, one can imagine communities so opposed to the importation of out-of-state trash that they would be willing to pay more to ship all their own locally generated trash elsewhere, if that is the price required to ensure no out-of-state trash ever enters their borders. An absolute ban on landfilling in the community would accomplish this result, and such an evenhanded ban should not be found to violate the dormant Commerce Clause.¹⁸² This would be true despite explicit uncontradicted (or even admitted) proof that the *sole* motivation for passing the local landfill ban was to exclude out-of-state trash.¹⁸³ One does not have to endorse such selfish NIM-BYism¹⁸⁴ in order to endorse the principle that the dormant Commerce Clause does not protect against such selfishness. A potential landfill operator does not have a vested right to operate in communities which, for whatever reasons, have decided that there will be no landfilling.¹⁸⁵

182. See, e.g., *Al Furi Landfill, Inc. v. Town of Goshen*, 556 F. Supp. 231 (S.D.N.Y. 1982) (holding that zoning regulations which prevent landfill expansion do not violate the dormant Commerce Clause); see also *Philadelphia v. New Jersey*, 437 U.S. 617, 631 (1978) (Rehnquist, J., dissenting) (arguing that the Court's opinion leaves states only the option of banning all trash if they wish to avoid health harms associated with out-of-state trash); *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 349 (1992) (Rehnquist, C.J., dissenting) (making a similar argument); cf. *Gary D. Peake Excavating, Inc. v. Town Board of Hancock*, 93 F.2d 68 (2d Cir. 1996) (holding that an ordinance prohibiting any dumping of waste in town except for limited quantities at town-owned transfer facility did not violate Commerce Clause).

183. Cf. *Cox*, *supra* note 21, at 625 n.291 (describing unreported Kentucky landfill case with such factual background). For subsequent history of this case, see *Eastern Ky. Resources v. Fiscal Court of Magoffin County*, No. 95-6360, 1977 U.S. App. LEXIS 28528 (6th Cir. Oct. 15, 1997).

184. For a discussion of NIMBYism, see *supra* notes 35-37 and accompanying text.

185. It is a closer call when a local community which has already solved its own disposal problems for locally generated trash, by locking up long-term contracts for local dumping, refuses to site any additional facilities in the area because there is no need for them, and because the town wishes no influx of out-of-state trash. Even here, however, I believe the community would have the right to so exclude. First, whatever "deal" the town has worked in regard to its own disposal may not be as airtight as it supposes. If any unconstitutional restrictions, such as prohibiting importation of others' trash, or allowing a local permit only on condition that the operator provide for local needs, are attached to the guaranteed capacity for in-area disposal, the operator would be in a good position, post-*Fort Gratiot* and post-*C&A Carbone*, to challenge such conditions. If the community never had a right costlessly to lock up private disposal capacity for its own use, prior attempts to coerce this are constitutionally suspect. Assuming,

Some courts, nevertheless, have come close to embracing a doctrine of unconstitutionality based solely on intentions. In *SDDS, Inc. v. South Dakota*,¹⁸⁶ for example, the Eighth Circuit separately analyzed, apart from any discriminatory effect or language it might have, an enactment which allowed direct referendum on a proposed landfill. The court wanted to know whether the measure had been enacted for a discriminatory purpose.¹⁸⁷ The court asserted that "the presence of a discriminatory purpose is one of three ways to trigger strict scrutiny."¹⁸⁸ Finding that the referendum at issue was certified and enacted for a discriminatory purpose, the court implied that this alone would be independent grounds for imposing heightened scrutiny which would lead to constitutional invalidity.¹⁸⁹

While I do not quarrel with the particular result of having this South Dakota referendum declared unconstitutional, I do object to having per se scrutiny applied to a legislative or electoral act based on the motivations behind its passage. By subjecting South Dakota's referendum vote to a per se test of unconstitutionality, the Eighth Circuit impermissibly attributed to South Dakota voters intentions they may or may not have possessed. For example, the votes of those who opposed *any* landfilling, regardless of origin of the trash, or of those who opposed large volume landfill operations because of their increased nuisance aspects or their concentrated waste volumes, were alike counted as being unconstitutionally aimed against the SDDS facility based on the origin of its trash.¹⁹⁰ Not all voters may have been motivated by the desire to exclude out-of-state trash.

I hasten to emphasize, however, that *why* South Dakota voters pulled levers one way or the other should not determine the constitutionality of their actions. Courts should not snoop behind the closed curtain of the ballot booth. Why voters either approve or disapprove a proposed landfill is irrelevant to whether their referendum should be counted valid. The fundamental problem in the Eighth Circuit's willingness to rule based on its independent assessment of electoral motivation, is that this intrudes directly into fundamental democratic processes. To make constitutionality potentially hinge on actual motivations for casting ballots, either of individual voters or of legislators, transforms courts into thought police.

however, that the prior disposal deal was entered into in an arms-length kind of way (for example, by locking up only part of the capacity of the local landfill at fair market rates), the situation seems indistinguishable from one where the community goes outside of the area to take care of its trash needs. The fact that a community has been able to take care of its disposal needs should not prevent it from continuing to regulate evenhandedly against further landfill harms, even if this is motivated primarily or solely by bias against out-of-state trash. Should its deal fall through (say the landfill is closed because of lack of compliance with state regulations), the community would be back on the competitive fair market street looking for disposal capacity. Its prior benefits, if obtained solely as a matter of market participant contracts, should not obligate it to give proposed new operators something they have no inherent right to demand.

186. 47 F.3d 263 (8th Cir. 1995).

187. *See id.* at 268-70.

188. *Id.* at 268.

189. *See id.* at 268-70.

190. *See id.*

If South Dakota's referendum was invalid, this was not because of the actual motivation of the voters, but rather because the referendum vote lacked standards for decision making where standards were inherently required. In other words, the referendum violated due process, not the dormant Commerce Clause.¹⁹¹ Under due process, SDDS may have had a right to know *why* it was being denied the use of its property.¹⁹² A standardless electoral referendum could not provide such information.

Although the *SDDS* court focused on these issues of standardless decision making,¹⁹³ it mislabeled them as raising dormant Commerce Clause concern. It is important to correct such mislabeling because of the difference in the type of test the Court might impose under each clause. Whereas a challenge to legislative action under the due process clause requires a means-end analysis that is deferential to the state as legislator,¹⁹⁴ a dormant Commerce Clause challenge, under heightened scrutiny such as the Eighth Circuit is advocating, would almost certainly doom any state legislation found to have had improper motivation.¹⁹⁵ I reemphasize that I have no trouble with South Dakota's referendum being invalidated under a due process analysis, given the relative impossibility of showing how means would match ends on South Dakota's facts.¹⁹⁶ There should be considerable pause, however, before courts expand the *per se* dormant Commerce Clause test to situations based on the judiciary's conclusion that legislators were improperly motivated.

Given a potentially proper holding on other grounds, the *SDDS* decision could be discounted as a matter of aberrational confusion, but for the fact that at least one

191. *Cf. Geo-Tech Reclamation Indus., Inc. v. Hamrick*, 886 F.2d 662 (4th Cir. 1989) (finding that a statutory provision giving administrative officials power to deny landfill permits solely on the basis of adverse public sentiment was not rationally related to health and safety goals for which permit denial could be based and therefore violated due process). The *Hamrick* court emphasized that the administrative official was given no criteria by which to evaluate public sentiment and that some such criteria rationally related to public welfare, however broadly construed, were necessary to a land use law. *See id.* at 666-67.

192. Reasons for needing to know the basis for permit denial would include the ability to have grounds for substantive appeal, as well as the practical goal of perhaps desiring to bring one's conduct into conformity with what the voters desired, so that they might approve a differently structured facility. Some standardless votes are of course inherently permissible within a representative democracy. A vote to elect representatives for the populace requires no substantive standards, the representative being justifiably chosen if the voters merely feel "we like her — we think she'll do OK by us." When the voters act by referendum in a legislative or administrative capacity, however, their actions are subject to the same constraints as those of other legislators or quasi-legislators.

193. *See SDDS*, 47 F.3d at 269.

194. This is so regardless of the apparent motivation of the legislator except in certain suspect classification or fundamental rights areas. *Cf. generally* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (comparing approaches under the dormant Commerce, Privileges and Immunities, and Equal Protection Clauses)

195. The *SDDS* court frankly admitted as much. *See SDDS*, 47 F.3d at 268 n.8.

196. A referendum, because it is inherently standardless, cannot be the proper vehicle for determining propriety of land-use. South Dakota's referendum was a more direct violation of due process than the indirect reliance upon adverse public sentiment declared unconstitutional by the Fourth Circuit in *Hamrick*. *See supra* note 191.

other circuit has embraced similar logic, with a more questionable result. In *Chambers Medical Technologies of South Carolina v. Bryant*,¹⁹⁷ the Fourth Circuit remanded to the district court specifically for that court to determine whether a South Carolina limit on the amount of medical waste which could be incinerated in-state was enacted with discriminatory motivation.¹⁹⁸ What is particularly troubling about the remand is that the court remanded only *after* finding that the cap on waste incineration did *not* discriminate against interstate commerce in its practical effect.¹⁹⁹ Because the private facility that was involved could completely ignore in-state generators when selling its limited private capacity, there was no discrimination against interstate commerce by the cap provision alone.²⁰⁰ If I am reading the opinion correctly, the district court was invited to strike down legislation which the appellate court found did *not* burden interstate commerce.

The Eighth and Fourth Circuits offered in support of these novel propositions largely the same Supreme Court case law, which both circuits misconstrued. Both courts cited *Hunt v. Washington Apple Advertising Commission*²⁰¹ for the proposition that a finding of discriminatory purpose triggers heightened scrutiny.²⁰² The relevant portion of *Hunt* instead merely draws attention to the fact that the Court did *not* rest its decision upon a determination of the legislative intent in that case, since the discriminatory *effect* of the statute was so clear.²⁰³ The importance of legislative intent in *Hunt* was that it helped confirm that the statute was designed to, and therefore likely would, cause harm to Washington producers at the expense

197. 52 F.3d 1252 (4th Cir. 1995).

198. *See id.* at 1260, 1266.

199. *See id.* at 1258.

200. *See id.* The court also suggested, however, via footnote, that there might be independent grounds for heightened scrutiny because an exemption from the cap requirements had been granted to in-state hospitals which disposed of their own infectious waste on-site and not-for-profit. The lower court was only to address this issue, however, *after* it determined whether the legislation setting an overall cap was enacted with discriminatory intention. *See id.* at 1260 n.11.

201. 432 U.S. 333 (1977). *See supra* note 39 for a brief description of the *Hunt* facts and holding.

202. *See Chambers Medical*, 52 F.3d at 1259; *SDDS*, 47 F.3d at 268.

203. The *Hunt* Court wrote:

Despite the statute's facial neutrality, the Commission suggests that its discriminatory impact on interstate commerce was not an unintended byproduct and there are some indications in the record to that effect. The most glaring is the response of the North Carolina Agriculture Commissioner to the Commission's request for an exemption following the statute's passage in which he indicated that before he could support such an exemption, he would "want to have the sentiment from our apple producers *since they were mainly responsible for this legislation being passed*

Moreover, we find it somewhat suspect that North Carolina singled out only closed containers of apples, the very means by which apples are transported in commerce, to effectuate the statute's ostensible consumer protection purpose when apples are not generally sold at retail in their shipping containers. However, we need not ascribe an economic protection motive to the North Carolina Legislature to resolve this case; we conclude that the challenged statute cannot stand insofar as it prohibits the display of Washington State grades even if enacted for the declared purpose of protecting consumers from deception and fraud in the marketplace.

Hunt, 432 U.S. at 352-53 (citation omitted).

of North Carolina apple growers. It is a large jump from this dicta to the assertion that courts should inquire more intensely about legislative intent in order to find a new and independent ground for applying heightened scrutiny.

In *Bacchus Imports, Ltd. v. Dias*,²⁰⁴ the other case primarily relied upon by the lower courts, the Court stated that "[a] finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory *purpose*, or discriminatory effect."²⁰⁵ The actual analysis in *Bacchus Imports*, however, was not to analyze legislative intent in a vacuum, but to use evidence of legislative purpose to confirm presumptions that the challenged statute would benefit in-state business at the expense of out-of-state enterprises. Thus, the *Bacchus Imports* Court continually emphasized that improving the competitive position of native wines and liquors against outside products was both the intended purpose and the actual result of the legislation.²⁰⁶ Absent such finding of discriminatory effect, it is far from clear that the *Bacchus* Court would have ruled Hawaii's enactments invalid on the basis of intent alone. When intent alone was focused on in the case, it was in the context of Hawaii's arguments that proof of a *non*protectionist intent might *justify* its legislation.²⁰⁷ The Court properly countered that well-motivated intentions cannot overcome clearly discriminatory effects, and that Hawaii's arguments about positive intent to help its own industries were not valid anyway, since an intent to benefit one industry concomitantly conveys an intent to harm its competitors.²⁰⁸ Nowhere in the *Bacchus Imports* case did the Court rule that the legislative purpose it had discerned was *alone* determinative of Commerce Clause result, as the Eighth and Fourth Circuits advocate.

The difference in the Court's approach regarding intent versus that of the *SDDS* and *Chambers Medical* courts is nowhere more clear than in *Minnesota v. Clover Leaf Creamery Co.*²⁰⁹ In that case, responding to arguments that Minnesota's ban on the sale of milk in plastic jugs was motivated by the economic protectionist goal of helping the Minnesota pulp wood industry,²¹⁰ the Court did *not* remand for

204. 468 U.S. 263 (1984) (holding that tax exemption for locally produced pineapple liquor had economic protectionist motive and could not be justified as a purported attempt to assist or subsidize local industry).

205. *Id.* at 270 (emphasis added) (citations omitted).

206. *See id.* at 271-73.

207. *See id.* at 273. Hawaii argued that its tax break for local wines was not meant to harm other products but merely to help Hawaii's products. Additionally, Hawaii argued that its aid to a *fledgling* industry should be viewed differently from aid to an established industry. *See id.* at 272. The Court rejected both claims.

208. *See id.* at 273.

209. 449 U.S. 456 (1981). In *Clover Leaf Creamery*, the Court upheld a state ban on the sale of milk in nonreturnable nonrefillable plastic jugs on the grounds that Minnesota was entitled to promote recycling. *See id.* at 470, 473. Significantly, Minnesota did not ban the sale of milk in nonreturnable nonrefillable paperboard containers, and the pulpwood industry (suppliers for paperboard products) had significant Minnesota connections, while the more nationally dominant milk plastics industry had none. The Court nevertheless gave presumptive weight to Minnesota's stated legislative purpose because it bore a rational relationship to conservation purposes. *See id.* at 470.

210. *See id.* at 460, 473.

additional fact finding on this issue. Instead, the Court deferred to Minnesota's stated environmental purpose which accompanied the legislation,²¹¹ despite explicit findings by the trial court that Minnesota's legislation *was* motivated by intent to discriminate.²¹² As it is clear from other Court precedent that legislative statement of intent alone does not establish the reality of legislative purpose,²¹³ this deference to Minnesota's stated legislative purpose cannot be based on the Court's "trust" of Minnesota's stated legislative motivations.²¹⁴ It is a much fairer reading of the Court's discussion of legislative intent in *Clover Leaf Creamery* to view intent as mainly irrelevant to the Court's inquiry about whether legislation really regulates evenhandedly, or instead discriminates in effect against interstate commerce.²¹⁵ Instead of supporting the Eighth or Fourth Circuit notions that inquiry into legislative motivation should become a primary concern of courts adjudicating Commerce Clause attacks, the *Clover Leaf Creamery* message seems squarely to the opposite.

In sum, the Court seems never to have made intent determinative in its Commerce Clause analysis, although opportunities to go down that path have been factually presented to it several times. The Court's wisdom in not emphasizing what actually motivates legislation is clear. Although a proper Commerce Clause inquiry should focus on both intent and effect, it should declare unconstitutional only legislation that has a discriminatory effect. Courts may properly use information about discriminatory legislative intent to more carefully scrutinize purportedly evenhanded measures. This is so because it is likely that regulations enacted out of prejudice will in fact more likely harm interstate commerce than would rules

211. See *id.* at 471-73 (including internal references to *id.* at 465-70). The Court also noted that Minnesota's legislation could have been motivated at least partially by environmental concerns, and emphasized that, regardless of its motivation, it regulated evenhandedly. See *id.*

212. See *id.* at 460, 463 n.7.

213. See, e.g., *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951) (indicating that only a foolish legislature would artlessly disclose an intent to discriminate).

214. The Court is quite willing to go behind a stated legislative purpose when it realizes or suspects that the legislation really will have an impermissibly detrimental effect on interstate commerce. See *supra* notes 201-08 and accompanying text.

215. This is confirmed by the essentially cavalier way the Court subsumed the Commerce Clause discussion of legislative motivation into its discussion of legitimacy of legislative purpose under equal protection analysis. See *Clover Leaf Creamery*, 449 U.S. at 471 n.15. Since, under equal protection, the statement of a conceivable legislative purpose, whether it actually motivated the legislation or not, is usually seen as sufficient to protect the legislation from attack in all but suspect classification cases, if the Court had wanted to institute a more demanding standard for Commerce Clause scrutiny of legislative motivation, it certainly had opportunity to do so in *Clover Leaf Creamery*, where the analysis in the case proceeded separately under Equal Protection and Commerce Clause grounds. Instead, the Court summarily dealt with the Commerce Clause intent arguments by stating, "We have already considered and rejected this argument in the equal protection context . . . and do so in this context as well." *Id.* The Court also emphasized that it would "not invalidate a state statute under the Equal Protection Clause merely because some legislators sought to obtain votes for the measure on the basis of its beneficial side effects on state industry." *Id.* at 463 n.7. By conflating the analysis of intent under the dormant Commerce Clause with such analysis under the Equal Protection Clause, the *Clover Leaf Creamery* Court was properly emphasizing that the real interest under dormant Commerce Clause scrutiny is not motivation but likely or actual effect.

enacted without such motivations.²¹⁶ But if a measure truly regulates evenhandedly, the intent behind its passage should be irrelevant to further Commerce Clause inquiry. We do not want an unelected judiciary invalidating elected law-makers' actions on the basis of nothing more substantial than that the judges are convinced the lawmakers were improperly motivated.

B. Why We Should Not Recycle Substantive Economic Due Process Through the Dormant Commerce Clause

A finding of discriminatory effect *can* alone lead to a ruling of Commerce Clause unconstitutionality. As the first sections of this article demonstrate, the current Court increasingly has emphasized the illegitimacy of differential effects, regardless of how well intentioned the legislators' motivations or how unintended the differential impact on out-of-state commerce. The *per se* test thus has trumped benign legislative purpose. Nevertheless, even with this increased emphasis on the illegitimacy of differential effects, harmful does not mean harmful in the eye of the out-of-state beholder. Harm in a dormant Commerce Clause sense only occurs if similarly situated in-state and out-of-state parties are treated differently as a direct result of the regulation involved. In their rush to embrace the current Court's emphasis on illegitimacy of differential impact, some courts are too eager to claim that *any* harmful effects to out-of-state business equals unconstitutional Commerce Clause harm.

These lower courts are over-applying the *per se* test to evenhanded regulations. They are abandoning the *Pike* balancing test in favor of strict scrutiny whenever some particular aspect of out-of-state commerce is presumed or shown to suffer more than a different aspect of in-state commerce as a result of state regulation. This, however, makes the *Pike* balancing test effectively surplusage, since harms would never need to be balanced against benefits under *Pike* if the *per se* test were triggered every time harm occurs more to out-of-state than in-state interests. In fact, many times when the Court previously applied *Pike*, or a similarly deferential test, there was disproportionate effect on outside interests compared to insiders.²¹⁷ Nevertheless, the Court applied the balancing test rather than the *per se* rule of invalidity. By jumping to the *per se* test based solely on harm to particular out-of-state interests, some lower courts are running contrary to Court precedent and effectively immunizing interstate business from state regulation. These courts

216. Even commentators who have emphasized the illegitimacy of discriminatory intent as the cornerstone of their dormant Commerce Clause analysis have preserved some possibility for unintended harm to interstate commerce to be upheld as permissibly incidental. *See, e.g.,* Regan, *supra* note 7, at 1233-44.

217. *See, e.g.,* *Barclay's Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994) (California apportionment formula leads to multiple taxation on multi-national corporations); *Trinova Corp. v. Michigan Dep't of Treas.*, 498 U.S. 358 (1991) (Michigan apportionment formula results in greater tax liability for outsiders who have only sales in Michigan); *Minnesota v. Clover Leaf Creamery, Co.*, 449 U.S. 456 (1981) (out-of-state plastics producers would feel effect of regulation); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978) (national refiners, outsiders, would feel effects of Maryland's prohibition).

misread the basic purpose of the dormant Commerce Clause as being to protect business interests per se rather than to prevent discrimination against outside interests. Such return to *Lochner*-style constitutional valuing of private economic rights is not warranted under the dormant Commerce Clause.

In *Government Suppliers Consolidating Services, Inc. v. Bayh*²¹⁸ (*Government Suppliers II*²¹⁹), for example, the Seventh Circuit applied the per se test to all aspects of challenged Indiana waste legislation. The legislation required that trucks which haul waste in Indiana not be used for other purposes, required waste transporting vehicles to be registered and stickered, and authorized compensatory fees to be charged for the costs imposed on Indiana by out-of-state waste. Only the last provision was facially discriminatory.²²⁰ Although the first two aspects of the legislation applied equally to in-state and out-of-state carriers of trash, the *Government Suppliers II* court emphasized that just because a statute does not discriminate on its face and purports to regulate evenhandedly, the reviewing court must still seriously examine the enactment to determine if it nevertheless discriminates impermissibly against interstate commerce.²²¹ So far, so good. Certainly cases like *Dean Milk Co. v. City of Madison*²²² and *Hunt v. Washington State Apple Advertising Commission*,²²³ cited by the *Government Suppliers II* court,²²⁴ stand for the proposition that a claim of technical evenhandedness will not prevent heightened scrutiny, if the effects of discrimination are clearly evident, and if local benefits are questionable.²²⁵

218. 975 F.2d 1267 (7th Cir. 1992).

219. For more on the previous history to the *Government Suppliers* litigation, see *id.* at 1272.

220. See *id.* at 1270-71, 1271 n.4. Indiana's compensatory waste fees were clearly unconstitutional under *Oregon Waste*. See *supra* notes 51-74 and accompanying text (describing the rationale of the *Oregon Waste* case). I focus here only on those aspects of the Indiana legislation which operated facially evenhandedly.

221. See *Government Suppliers*, 975 F.2d at 1278.

222. 340 U.S. 349 (1951).

223. 432 U.S. 333 (1977).

224. See *Government Suppliers*, 975 F.2d at 1278-79.

225. For discussion of *Dean Milk* and *Hunt*, see *supra* notes 38-40. The *Government Suppliers II* court misread *Dean Milk* and *Hunt* to support its analysis. The point of *Dean Milk's* requirement that courts look behind facial neutrality, since legislatures do not usually "artlessly disclose[] an avowed purpose to discriminate," was to find out if the measure actually is aimed at out-of-state interests despite its language. See *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). Similarly, when North Carolina in *Hunt* prohibited Washington from including nonharmful apple grading information on apples coming into North Carolina, the Court was able to look behind the facial neutrality of the statute to discern its true purpose. In both situations, the Court was really inquiring about the legitimacy of the local purpose and finding that its facial neutrality did not help the statute; both statutory schemes on quick analysis proved to be designed to further economic protectionism by being aimed at outsiders. While the *Government Suppliers II* court could have similarly found, after identifying illusory local benefits, economic protectionism to be the true underlying motivation of the statutory scheme before it, this is *not* how *Government Suppliers II* proceeded. The *Government Suppliers II* court felt it did not need to investigate whether the local purpose was sham or legitimate, so long as the facts indicated that harms fell disproportionately on outsiders. This telescoping of economic effect into economic protectionism, when there is admittedly evenhanded application, is a severe misreading of how and when courts should apply the heightened scrutiny and *Pike* balancing tests.

But the *Government Suppliers II* court went further, using presumed economic effect on particular outsiders as complete proof of improper discrimination. The court argued that if trucks were required to be semi-dedicated to trash hauling rather than able to haul whatever they want, shipping costs for out-of-staters would effectively double. Out-of-state trash therefore would not come to Indiana.²²⁶ The court thus accepted the trash brokers' arguments that an act discriminates for Commerce Clause purposes if it primarily affects interstate business.²²⁷ The problem with this analysis is that it means a regulating state remains at the mercy of status quo ways of doing business. Whenever state regulation would have a disproportionate effect on out-of-state business the way it currently is done, the state would be unable to regulate at all.

Even if the *Government Suppliers II* court suspected that the Indiana back-hauling ban was sham regulation,²²⁸ proof of effect on outsiders should not *alone* have triggered determinative per se scrutiny. The court should have explained how the disproportionate impact, *combined* with weak evidence of the need for a ban, constituted presumptive discrimination.²²⁹ Jumping to per se scrutiny based solely on presumed effect on outsiders gives no room for legitimate local purpose to be accomplished in situations where the inevitable result will be some effect on out-of-state interests. Eliminating backhauling, for example, will *always* place a greater burden on outsiders than local haulers, since only outsiders are engaged in long-distance hauling. But if there really are legitimate health and safety concerns involved in transporting consumer foodstuffs in trucks which have just carried trash, it should not matter that long-haulers are more affected by the regulation.

Indiana's legislation likely would have fallen even under *Pike* balancing. Alternative means of addressing health harms, such as required sanitizing of vans, could have been used. Additionally, the legislation seemed aimed more to harass the waste hauling industry than to accomplish legitimate health and safety objectives.²³⁰ But under the approach of using *any* differential effect to trigger heightened scrutiny, far more legitimate regulations will be vulnerable to constitutional challenge under the per se test. To stick with the concerns raised by backhauling, for example, if Indiana wished to impose the requirement of either sanitizing or dedicating the fleet for vehicles which carry trash, such measures would *still* be felt primarily by out-of-staters, since locally generated trash would already likely be hauled in dedicated vehicles that did not make return commercial runs. If the per se test were applied to such measures because of their clearly differential effect on out-of-state business, sanitizing or dedication might not be

226. See *Government Suppliers*, 975 F.2d at 1273.

227. See *id.* at 1278.

228. See *id.* at 1278-79 (describing the motivation behind the legislative enactments).

229. On the *Government Suppliers II* facts it might not have been too difficult to find that the purported local benefits were indeed a sham pretext for keeping out out-of-state trash. Indiana offered no evidence of harm having occurred because of backhauling. Perhaps more importantly, the absolute ban on backhauling left no room for transporters to attempt to address health harms by alternative means such as required sanitizing of vans.

230. See *id.* at 1278-80.

capable of being shown to be the *only* ways to prevent health harms. But surely, contrary to the Seventh Circuit's parochially expressed concerns about extraterritoriality,²³¹ Indiana has some right to regulate against the health harms caused by trash trucks which first dump in the state and then carry their germs elsewhere. A requirement that fleets either be dedicated or sanitized seems to be a reasonable method of regulating in an area of legitimate concern. Something less rigorous than a per se presumption of invalidity should be applied to such regulation. Other examples of differential effects that inevitably result from legitimately motivated regulations come easily to mind.²³² The battle over whether the per se test should replace *Pike* in such situations is far from theoretical,²³³ and will have significant implications for many non-waste regulatory situations.

The *Government Suppliers II* approach is unfortunately no isolated occurrence. In *Waste Systems Corp. v. County of Martin*²³⁴ the Eighth Circuit invalidated a county ordinance which directed all compostable waste to a county composting facility, emphasizing the harm to a *particular* out-of-state disposal landfill (which otherwise would receive the waste) as proof of impermissible discrimination requiring heightened scrutiny.²³⁵ The fact that a particular out-of-state facility was severely impacted by the county's ordinance, however, should not in and of itself have triggered heightened scrutiny. Flow control is not unconstitutional under the *C&A Carbone* rationale because any particular facility loses business, but rather because all businesses are prohibited from competing with the government favored facility.²³⁶

If courts focus on impact to a particular business as proof of Commerce Clause discrimination, this completely ties a community's regulatory hands. The local community is prohibited from passing *any* regulation which prevents its citizens from doing business with out-of-staters on terms different from the *status quo*, even if the regulating state has come to believe that the way the particular out-of-staters do their business raises serious health and safety concerns. For example, the *Waste*

231. See *id.* at 1279-80 (suggesting that Indiana's interest in public health and safety concerns is limited to protecting its reputation for quality goods, should others elsewhere be contaminated, rather than in protecting out-of-staters directly from health harm risks).

232. Requiring a manifest documenting where waste has been may legitimately deter improper loads being mixed with proper loads, but will inevitably impose more burden upon waste which has been through more hands, and such waste is usually out-of-state waste which has moved through transfer stations. Any upstream inspections of how waste is handled are likely to be more costly for those further from the point of ultimate disposal, but may be more effective in identifying improper waste than disassembling compacted waste at its ultimate disposal point. Requiring that waste have certain kinds of recyclables removed may reflect proper local judgments about reserving capacity for what truly needs to be buried, but inevitably will also be at odds with out-of-state or national standard practice. Any such "quality" or processing requirements will also inevitably be more easily standardized regarding locally generated waste, since *all* such waste will likely be required to conform, whereas only that part of out-of-state waste destined for the local disposal site which has the unique requirements will be required to conform.

233. For examples, see *supra* note 232.

234. 985 F.2d 1381 (8th Cir. 1993).

235. See, e.g., *id.* at 1387.

236. See *supra* notes 86-90 and accompanying text.

Systems court considered it irrelevant that the county facility to which waste was to be flow controlled was a *composting* facility, while the out-of-state landfill which lost business via the flow control was a *landfill*.²³⁷ Does this mean that the *Waste Systems* court would have declared unconstitutional a ban on disposing of compostable materials in landfills, since such a ban just as fully would have taken away fees the Iowa landfill formerly received for Minnesota trash? It is hardly clear that the *Waste Systems* court would go so far, since this would metamorphose dormant Commerce Clause scrutiny under the per se test unambiguously into protection of interstate economic business relationships per se.²³⁸ My point is that an expanded per se test merely masks this protection afforded *status quo* economic interests, and is for that reason to be rejected.

The reasoning of cases like *Waste Systems* is flatly inconsistent with prior Court precedent. In *Minnesota v. Clover Leaf Creamery Co.*,²³⁹ for example, the Court applied the *Pike* test, despite the certainty of differential harm to out-of-state interests relative to Minnesota businesses.²⁴⁰ When Minnesotans were prohibited from buying milk in disposable plastic containers, this ban both harmed the out-of-state plastics industry and helped in-state paper container producers. Nevertheless, the Court allowed Minnesota's environmental goal of keeping nondegradable plastics out of landfills to triumph over these effects on interstate commerce. In *Exxon Corp. v. Governor of Maryland*,²⁴¹ the Court even more explicitly emphasized that "[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce."²⁴² The *Exxon* Court further emphasized that the Commerce Clause does not protect "the particular structure or methods of operation in a retail market,"²⁴³ nor guarantee consumers that they will receive a supposed best price from free market operations.²⁴⁴ Unfortunately, some of the most recent garbage cases seem

237. In other words, the composting facility by its very nature accomplished a legitimate environmental goal of reducing the flow of all waste that otherwise would go into landfills. See *Waste Systems*, 985 F.2d at 1383 n.2. Reducing the flow of all waste is stated to be a permissible goal under *Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978).

238. This hypothetical ban on disposal method merely pushes the fallacious rationale of the *Waste Systems* opinion to its (il)logical conclusion. Harm to any particular facility should not count if regulatory measures are evenhanded. The Commerce Clause only protects the right to compete on equal terms with one's competitors. It does not vest a particular way of doing business with constitutional protection.

239. 449 U.S. 456 (1981); see also *supra* notes 209-15 and accompanying text (analyzing *Clover Leaf Creamery* in context of arguments about improper purpose).

240. As the Court explained: "A non-discriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry." *Clover Leaf Creamery*, 449 U.S. at 474.

241. 437 U.S. 117 (1978) (holding that a statute, enacted during an oil crisis, prohibiting producers or refiners from operating retail service stations within Maryland and requiring them to extend price reductions uniformly to all stations they supply, did not violate dormant Commerce Clause).

242. *Id.* at 126.

243. *Id.* at 127.

244. See, e.g., *id.* at 128 ("It may be true that the consuming public will be injured by the loss of the high-volume, low-priced stations operated by the independent refiners, but again that argument relates to the wisdom of the statute, not to its burden on commerce.")

to be proceeding as if *Clover Leaf Creamery* and *Exxon* had not squarely addressed, and squarely rejected the very arguments industry advocates are still making.²⁴⁵

The mistaken analysis of *Government Suppliers II* and *Waste Systems*, for example, was more recently repeated in the *SDDS* decision, which I previously criticized for its improper reliance upon legislative intent.²⁴⁶ As alternative ground for its holding of dormant Commerce Clause unconstitutionality, the Eighth Circuit applied heightened scrutiny based on differential effect. The *SDDS* court reasoned that since South Dakota could not generate enough trash by itself to support a large scale facility, any ban on large scale trash processing facilities must be per se aimed at out-of-state trash.²⁴⁷ Thus South Dakota, under the *SDDS* court's logic, presumptively would be prohibited by the per se test from imposing bans on landfill capacity, even though the United States Supreme Court in prior dicta approvingly cited just such measures as being quintessentially evenhanded regulation that should withstand dormant Commerce Clause attack under *Pike*.²⁴⁸ The dormant Commerce Clause does not grant out-of-state corporations a constitutional right to mega-landfill in South Dakota, *SDDS* to the contrary.²⁴⁹

245. In fairness to the *Government Suppliers II* court, it should be noted that this panel attempted to distinguish *Exxon* as a case where there was no effect on the interstate flow of goods. See *Government Suppliers Consolidating Services, Inc. v. Bayh*, 975 F.2d 1267, 1279 (7th Cir. 1992) (citing *Exxon*, 437 U.S. at 126 n.16). The problem with this is that the *Exxon* Court did not make that point the central aspect of its analysis, but merely used this as additional evidence on the facts before the Court to defeat arguments of discrimination. The main point of *Exxon* was that there is no vested right to a national market or particular market share, so long as a state is regulating evenhandedly to accomplish an arguably legitimate local purpose. In *Clover Leaf Creamery*, the Court directly rejected arguments that a shift in business from out-of-state to in-state concerns would constitute discrimination per se, properly citing *Exxon* as support for this proposition. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473-74 (1981).

246. See *supra* notes 186-96 and accompanying text.

247. See *SDDS, Inc., v. South Dakota*, 47 F.3d 263, 270-71 (8th Cir. 1995).

248. See *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 (1992); *Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978).

249. The actual result in *SDDS* was invalidation of the facility-specific referendum that defeated *SDDS*'s application for a landfill permit, rather than invalidation of any across-the-board limit on landfill capacity. See, e.g., *SDDS*, 47 F.3d at 272. Hopefully, if confronted with the actual situation of an evenhanded regulation that disproportionately affects out-of-state interests, the Eighth Circuit would back away from its rhetoric advocating out-of-state business's right to establish large scale facilities in South Dakota, regardless of why South Dakota might not want such large scale facilities. Nevertheless, the current emphasis in that part of the *SDDS* opinion applying effect-based heightened scrutiny is as pro-free market as any Chicago-school law professor might desire. Improperly likening the "discrimination" against a large scale facility to the impermissible discrimination the Court found in *Hunt*, the *SDDS* court argued:

Hunt was a case where North Carolina sought to eliminate Washington's competitive advantages, so that North Carolina farmers could usurp part of the North Carolina apple market that belonged to Washington growers. Here South Dakota is attempting to exclude out-of-state trash that has a "negative" value, thus forcing other states to bear the cost of disposing of the trash when the market would otherwise dispose of the trash in South Dakota. Any distinction between these two species of protectionism is of no consequence . . . [B]ecause the garbage market of South Dakota is such that the referendum so predominantly affects only out-of-staters, we believe that the referendum of S.B. 169 is

The *Government Suppliers II*, *Waste Systems* and *SDDS* courts' attempts to substitute economic impact for Commerce Clause analysis represent a disturbing trend in lower court waste decisions of reading the Commerce Clause as designed to protect status quo economic arrangements rather than to prevent state over-reaching.²⁵⁰ Although states may not help their own at the expense of those similarly situated elsewhere, states are not prohibited by the dormant Commerce Clause from regulating evenhandedly, even when this has an incidental and disproportionate effect on out-of-state business. *Philadelphia*, *Fort Gratiot*, *Chemical Waste Management* and *Oregon Waste* invalidated bans and fees which attempted to impose the costs of state waste planning on outsiders, but they have not enshrined private waste industry methods of dealing with waste problems as protected interstate commerce which cannot be intruded upon without constitutional violation. Similarly, although *C&A Carbone* emphasized that prohibiting competition via flow control is unconstitutional, it did not guarantee particular competitor waste handlers a piece of any particular garbage pie. The lower court decisions here criticized, however, appear to wish to guarantee, under the dormant Commerce Clause, a constitutional right for particular types of out-of-state businesses, or even particular out-of-state business entities, to operate without being impeded by state regulation. Depriving states of the ability to regulate evenhandedly, and attempting to enshrine free market values within the Constitution, are trends which the Court should reject and correct at its first opportunity.

V. Conclusion

Dormant Commerce Clause doctrine consists of balancing the state's right to regulate and promote for the benefit of its own against outsiders' rights not to be gouged. On the one hand, a state must have power to regulate — the unfettered free market may produce injustices, or cause health and safety problems inimical to the welfare of its people. On the other hand, if a state attempts to foist the bill for its regulatory actions onto out-of-staters disproportionate to the harms *they* have caused or are likely to cause, this basic gouging of the unrepresented for others' benefit

discriminatory in effect, and must receive strict scrutiny.
Id. at 271.

The most obvious problem with the *SDDS* court's revisionist reading of *Hunt* is that it equates burden to a national market with impermissible protectionism. North Carolina's regulation in *Hunt* was invalid because it excluded outsiders from the very market in which the state's own producers were still competing. If North Carolina had banned the sale of all apples in the state (say, perhaps because of a newly discovered risk of cancer associated with apples), this would raise very different kinds of Commerce Clause arguments than the North Carolina regulation which promoted the consumption of North Carolina apples at the expense of Washington produce.

250. See also, e.g., *Valero Terrestrial Corp. v. Callaghan*, No. 5:93CV189, 1995 U.S. Dist. LEXIS 17490 (N.D. W. Va. September 28, 1995) (invalidating a capacity limitation on sewage sludge to be disposed of at landfills partly based on legislative history indicating out-of-state waste was attracted to West Virginia by its more lax standards and partly on basis that tonnage limitations were set too low for operators to get business to which court believed they were entitled); *Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth.*, 814 F. Supp. 1566 (M.D. Ala. 1993), *aff'd*, 29 F.3d 641 (11th Cir. 1994); *City of Auburn v. Tri-State Rubbish, Inc.*, 630 A.2d 227 (Me. 1993).

should be struck down. Similarly, if a state attempts through its regulatory powers, instead of expending its own resources, to give its citizens or businesses a competitive advantage over outsiders, this, too, is offensive to the notions of co-equal sovereignty and shared federal citizenship essential to our constitutional federalism.

Recent waste cases highlight these basic dilemmas of dormant Commerce Clause jurisprudence, but also demonstrate potentially disturbing trends. These trends could take dormant Commerce Clause doctrine in less balanced directions, if certain tendencies are not checked or corrected. Accordingly, I offer three concluding pieces of advice to those who have sympathy for striking a proper Commerce Clause balance. First, for those who might be frustrated with the handcuffs which the Court has placed on state regulators, I advise patience and honesty about what the Court has said. It is no good pretending the Court has not ruled what it has ruled. Ignoring or unfaithfully bending clearly controlling precedents is likely to do more damage in the long run than trying to act within the constraints of unsympathetic decisions which nevertheless leave room to accomplish legitimate goals, albeit at greater cost. In the current revival climate related to pro-market mythology, the risk of reaction and boomerang against legitimate state action is significant enough that short term victories on unconstitutional terms should not be attempted.

My other two pieces of advice are for the Court itself, and for all other members of the judiciary not yet seized of the "free-markets-are-in-the-constitution" disease. First, it might be productive for the Court to reconsider its recent inflexibility about the need to first determine what test must be applied. This insistence on first pigeon-holing has come at the expense of engaging in more searching inquiry about the real policies and effects of legislative enactments. The garbage cases provide examples of litigants fighting tooth and nail over what test will be applied. This is so because both sides, as well as the judge, assume that if per se is applied, the state will lose, whereas if *Pike* is applied, the state will win.

Something important is lost when all dormant Commerce Clause cases must be made to fit such Procrustean beds. Rather than engage in either-or deterministic labeling of facts which arguably could be characterized more neutrally, it might be well for courts to ask whether current tests serve as accurate shortcuts for imputing either protectionist or nonprotectionist effect to legislative enactments. If protectionism can be detected or evaluated more directly without the tests, or by making the tests truly rebuttable presumptions rather than deterministic categorizations, then this should be done, so long as it would not mire the judiciary in excessive sifting of facts. If the either-or tests are necessary to speed the judicial process, despite their occasional mischaracterizations about what is truly going on, then this should be more explicitly acknowledged.

Finally, if it is too much to hope that the Court in future dormant Commerce Clause decisions will realign its recent dormant Commerce Clause jurisprudence toward detecting actual policy effects rather than focusing so much on affixing the right label, it should not be too much to expect the Court to reaffirm in future cases that industry does not have a vested right to an unregulated market. The tendency

of some lower courts to promote economic vestedness or economic due process doctrines under cover of the dormant Commerce Clause should be rejected.

Political pressures and externalities associated with waste mean that state and local governments will inevitably try to regulate so that they are not overburdened with other states' exported problems.²⁵¹ The waste cases will likely continue to be debating pits where seriously divergent views about the reasons for and methodology of dormant Commerce Clause scrutiny will be offered up to appellate tribunals. As in the recent past, future appellate waste decisions are likely to have a significant effect on larger dormant Commerce Clause doctrine. Two Commerce Clause truths, currently under serious attack, should be reaffirmed in these future waste battles. First, reasonably evenhanded methods of dealing with serious problems should be allowed to have a fighting chance at surviving dormant Commerce Clause attack, despite incidental detrimental effect on outsiders. Second, states should be free of further dormant Commerce Clause scrutiny when they use their own funds through market participation to address problems. It is to be hoped that the Court in future cases will reaffirm these principles, and thereby keep dormant Commerce Clause analysis from becoming a recycling of substantive economic due process values.

251. For additional elaboration of this point, see, e.g., Cox, *What May States Do?*, *supra* note 21, at 556-64; cf. Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341 (1996) (arguing for changes in existing standards to deal with the reality of externalities imposed on states against their will).