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Constitutional Law - Interstate Commerce - Dormant Commerce Clause - Municipal Waste Control

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CONSTITUTIONAL LAW — INTERSTATE COMMERCE — DORMANT COMMERCE CLAUSE — MUNICIPAL WASTE CONTROL — The Supreme Court of Pennsylvania held that a municipal waste flow control plan violated the Commerce Clause of the United States Constitution because the plan required that all municipal waste generated within the municipality for ten years be disposed of at one of three designated sites.

Empire Sanitary Landfill v. Department of Envtl. Resources, 684 A.2d 1047 (Pa. 1996).

In 1988, the Pennsylvania legislature enacted the Municipal Waste Planning, Recycling and Waste Reduction Act ("Act")[1] to protect the public and the environment from dangers associated with the transportation, processing, treatment, storage and disposal of municipal waste.[2] The Act permitted each Pennsylvania county to submit a municipal waste management plan for approval to the Department of Environmental Resources ("DER"),[3] specifying the facilities at which it chose to process or dispose of municipal waste.[4] The Act required the counties to use a "fair, open and competitive process for selecting such facilities,"[5] but assumed that counties would prefer processing and disposal sites located within their borders.[6] Furthermore, the Act mandated that the counties choose facilities located within the state, and required detailed justification for the use of out-of-county facilities.[7]

Consequently, Lehigh County adopted a waste flow control plan

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1. 53 PA. CONS. STAT. §§ 4000.101-.1904 (1988).

2. 53 PA. CONS. STAT. § 4000.102(b)(3). The legislature passed the Act after determining that nearly all Pennsylvania counties had inadequate capacity for processing and disposing of municipal waste, and that most existing facilities would need replacement in the near future. *Id.* at § 4000.102(a)(1)-(3). Therefore, the legislature sought to establish a cooperative planning program while providing technical and financial assistance for solid waste management. *Id.* at § 4000.102(b)(1).

3. *Id.* at § 4000.501(a).

4. *Id.* at § 4000.303(e). The legislature authorized counties to control the flow of municipal waste, a measure deemed necessary to guarantee the long-term economic viability of processing facilities and landfills, to ensure financing for new facilities and landfills, to contain the long term cost of such facilities and landfills, and to protect existing capacity. *Id.* at § 4000.102(a)(10).

5. *Id.* at § 4000.502(f)(2).

6. *Id.* at § 4000.102(a)(6). The legislature believed that giving priority to in-county facilities ensured proper and adequate processing and disposal of municipal waste generated within the county. *Id.*

7. 53 PA. CONS. STAT. § 4000.502(g).

that became effective in June 1992 after DER approval.[8] Under the plan, the county designated three landfills where all municipal waste generated within the county was to be disposed of during the ten-year contract period.[9] However, all legally enforceable contracts entered into before April 1991 were to remain in effect until their original term ended.[10] Empire Sanitary Landfill ("Empire") and Danella Environmental Technologies ("Danella") had made agreements after the effective date of the Act, but before the effective date of the County Plan, under which Danella would deliver waste to Empire.[11] Although not specifying any minimum amount, Empire agreed to reserve space in its facility for waste delivered by Danella.[12]

In 1992, Empire and Danella filed a joint petition for injunctive relief against the County and the DER, insisting that the waste flow control provisions of the Lehigh County Plan violated the Commerce Clause of the United States Constitution.[13] They also argued that the Empire-Danella agreements were protected under both the Act and the County plan.[14] The Commonwealth Court of Pennsylvania granted the motion in part and denied in part, ruling that the County plan violated the Commerce Clause to the extent that the plan precluded transporting waste to facilities not located in Pennsylvania.[15] The court also ruled that Danella could dispose of its waste at Empire because the parties' agreement was executed before the effective date of the County plan.[16] The Supreme Court of Pennsylvania affirmed the commonwealth court's order.[17]

Both parties then moved for summary judgment, and in 1994, the

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8. Empire Sanitary Landfill v. Commonwealth, 684 A.2d 1047, 1051 (Pa. 1996).

9. *Empire*, 684 A.2d at 1051. Under the Lehigh County plan, the designated sites were to be selected after the county issued a Request for Proposals to any facility or disposal site that desired consideration. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 1058. Empire was not eligible for designation as a county landfill because it failed to respond to the County's Request for Proposals. *Id.* at 1051.

13. *Id.* at 1052.

14. *Id.* The DER challenged the jurisdiction of the Commonwealth Court of Pennsylvania to hear the matter. The court, however, did not address this issue, stating only that the proceeding fell within it's "original jurisdiction." *Id.* at 1053.

15. *Empire*, 684 A.2d at 1052.

16. *Id.* The court ruled that the June 1992 cutoff date for pre-existing contracts was the effective date of the County plan. *Id.* Therefore, the Empire-Danella contracts were exempt. *Id.* Also, the court invalidated the County plan under the Commerce Clause, to the extent that it prohibited transportation of waste to sites outside Pennsylvania. *Id.*

17. *Id.* at 1053.

commonwealth court granted DER's motion contesting the court's original jurisdiction, while also granting Empire's motion by issuing a declaratory judgment that the flow control provisions of the County plan were unconstitutional under the Commerce Clause.[18]

The Supreme Court of Pennsylvania affirmed the order of the commonwealth court.[19] The supreme court ruled that Empire and Danella failed to exhaust their administrative remedies by not appealing the County plan to the Environmental Hearing Board ("EHB").[20] The doctrine of exhaustion of administrative remedies requires that the aggrieved party exhaust all adequate and available administrative remedies before requesting judicial review.[21] Because the EHB has sole jurisdiction over challenges to county plans approved by the DER, the court ruled that Empire and Danella failed to exhaust their available administrative remedies by failing to appeal to the EHB.[22]

The court next addressed the issue of whether Empire and Danella were foreclosed from challenging the constitutionality of the County plan or the Act.[23] The court noted an exception to the exhaustion of administrative remedies doctrine that governs when the administrative agency is unable to provide the requested relief.[24] The court reasoned that, although the EHB can review constitutional questions about the regulations, the EHB does not have the power to grant declaratory judgments and injunctive relief; therefore, the commonwealth court did not err in exercising its jurisdiction on the declaratory judgment issue.[25]

Having determined that jurisdiction was proper, the supreme court addressed the validity of the County plan under the

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18. *Id.*

19. *Id.* at 1059.

20. *Empire*, 684 A.2d at 1053. The EHB is empowered to resolve procedural and substantive questions regarding the validity of actions taken by the DER. Beltrami Enterprises, Inc. v. Commonwealth, 632 A.2d 989 (Pa. Commw. 1993).

21. Canonsburg General Hospital v. Commonwealth, 422 A.2d 141, 144 (Pa. 1980). The purpose of the doctrine of exhaustion of administrative remedies is to ensure that claims are initially heard by a body having expertise in the specific area of controversy. Norristown Fraternal Order of Police, Lodge 31 v. DeAngelis, 611 A.2d 322 (Pa. Commw. 1992).

22. *Empire*, 684 A.2d at 1053. The court rejected Empire-Danella's argument that original jurisdiction existed pursuant to 42 PA. CONS. STAT. § 761(a)(1) as an action against the Commonwealth. The court cited the ripeness doctrine, which rejects judicial review if the challenged administrative action is "abstract, hypothetical, or remote." *Id.* The record in this case, according to the court, reflected no actions by the County or DER which would make Empire-Danella's claim ripe for judicial review. *Id.* at 1054.

23. *Id.* at 1054.

24. Ohio Casualty Group Ins. Co. v. Argonaut Ins. Co., 525 A.2d 1195 (Pa. 1987).

25. *Empire*, 684 A.2d at 1055.

Commerce Clause of the United States Constitution.[26] The court discussed the judicially created "Dormant" Commerce Clause that limits the power of states to "erect barriers against interstate trade where Congress has not affirmatively acted to authorize or forbid the state activity."[27] The court reviewed the two tests used in Dormant Commerce Clause analysis.[28] First, if the ordinance facially discriminates against interstate commerce, the court must apply a strict scrutiny test.[29] This strict scrutiny analysis invalidates the statute unless it serves a legitimate local purpose and there are no nondiscriminatory means available to serve the local interests adequately.[30] Secondly, if the ordinance does not facially discriminate, the Supreme Court of the United States' analysis in *Pike v. Bruce Church* must be used.[31] The *Pike* test upholds an ordinance unless the burden on interstate commerce clearly exceeds local benefits.[32]

The Supreme Court of Pennsylvania concluded that the *Pike* analysis was proper because the County plan contained no facially discriminatory language.[33] However, because the County plan required that all county-generated waste be disposed of at designated sites, and the county designated only facilities within the county, the net effect of the County plan burdened interstate commerce.[34] The court also reviewed the Commerce Clause implications of the Act itself.[35] The Act required that all county designated sites be approved by the Pennsylvania DER.[36] The DER was only authorized to approve Pennsylvania sites, however, the result of this limitation was that all designated site had to be located within Pennsylvania.[37]

Having held that both the County plan and the Act burdened

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26. *Id.* The Commerce Clause grants Congress the power to regulate commerce among the states. *Id.* Furthermore, flow control ordinances have been determined to implicate the Commerce Clause. *See* Carbone v. Clarkstown, 511 U.S. 383 (1994).

27. Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35 (1980).

28. *Empire*, 684 A.2d at 1055-56.

29. *Id.* at 1055.

30. *Id.* (citing Carbone v. Clarkstown, 511 U.S. 383, 393 (1994)).

31. *Id.* (citing Pike v. Bruce Church, 397 U.S. 137 (1970)).

32. *Id.*

33. *Empire*, 684 A.2d at 1056.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* There are other burdens to designating sites located outside of the county. The county must identify the general location where each facility must be located, and if the selected facility is located outside of the county, the plan must explain in detail the reasons for the selection of such a facility. *Id.* at 1057.

interstate commerce, the court found that the *Pike* analysis requires a determination of whether the burden on interstate commerce is excessive in relation to the local benefits.[38] The court determined that the commonwealth court did not err when it ruled that the local benefit (the certainty of available landfill space for ten years) outweighed the burden on interstate commerce.[39] The supreme court, therefore, affirmed the commonwealth court's ruling that the waste flow control provisions of the County plan were unconstitutional.[40]

The DER argued that the Commerce Clause should not apply because the County was acting as a "market participant," not a "market regulator."[41] The court noted that when a county operates a landfill and decides to give county residents a preference over outsiders in the use of the landfill, the Commerce Clause is not implicated.[42] The court concluded, however, that since the County was not a landfill operator and could only implement its contracts by adopting the plan, the county was not a market participant and, therefore, the plan was subject to the Commerce Clause.[43]

The court concluded by addressing the issue of Empire-Danella's rights under their pre-existing contracts.[44] The court reasoned that although Danella was not required to deliver any minimum amount of waste to Empire under their contract, the commonwealth court did not err in finding that the contract was enforceable.[45] Also, the court noted that, in Pennsylvania, statutes generally should not be applied retroactively to a contractual relationship when the

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38. *Empire*, 684 A.2d at 1057.

39. *Id.* at 1057. The commonwealth court concluded that the plan placed a significant burden on interstate commerce because no county-generated waste could be transported to an out-of-state facility. The local benefit of certain landfill space, according to the court, was not adequate to overcome the burden on interstate commerce. Empire Sanitary Landfill v. Commonwealth, 645 A.2d 413, 419 (Pa. Commw. Ct. 1994).

40. *Empire*, 684 A.2d at 1057.

41. *Id.* The market participant doctrine allows the government the same freedoms as other private parties competing in the market. This exception to the Commerce Clause is based on the theory that the government is not enforcing restrictions under the threat of prosecution, hence, the market participant doctrine generally applies when the government enforces restrictions through a specific contract with a private party. White v. Massachusetts Council of Constr. Employers, 460 U.S. 204 (1983).

42. *Empire*, 684 A.2d at 1057.

43. *Id.* at 1057-58. When a government entity is also a proprietor, it is free to contract like any other private party. J.F. Shea Co. v. City of Chicago, 992 F.2d 745 (3d Cir. 1989).

44. *Empire*, 684 A.2d at 1058.

45. *Id.* The court noted that the term "acceptable waste" did not necessarily mean that Danella was free not to deliver any waste to Empire. *Id.* Therefore, it concluded, that both parties had changed their position in reliance upon the agreement. *Id.*

application would alter existing contractual obligations.[46] The court decided that since neither the Act nor the County Plan affected Danella and Empire until the plan was passed, the date the plan became effective was the proper date from which agreements of private parties should be subject to the Act.[47] Therefore, the Supreme Court of Pennsylvania affirmed the order of the commonwealth court.[48]

The Supreme Court of the United States first applied a state waste flow control law to the Commerce Clause in the 1978 case of *City of Philadelphia v. New Jersey*.[49] In *Philadelphia*, the Court struck down the provision of a New Jersey statute that prohibited the importation of waste from outside New Jersey[50] unless the State Department of Environmental Protection: (1) determined that such action would not negatively impact public health and safety, and (2) promulgated regulations permitting and regulating its treatment and disposal.[51] The Court concluded that "valueless" municipal waste is an article of commerce worthy of constitutional protection.[52] Consequently, the Court invalidated the statute,

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46. *Id.* at 1059. Although this is the general rule, statutes having an incidental effect on contractual obligations satisfy the Contracts Clause if they are necessary for the public good. DePaul v. Kauffman, 272 A.2d 500, 506-07 (1971).

47. *Id.* The court noted that the enactment of the Act notified the parties that, at some point, future contracts would be subject to county plans. *Id.* However, until the county ordinance was passed, the parties could not know what specific changes would be required by the County plan. *Id.*

48. *Id.*

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

50. *Philadelphia*, 437 U.S. at 620. The statute affected private landfill operators and cities outside New Jersey that had entered into agreements for waste disposal. *Id.* They brought suit and were granted summary judgment by the trial court, which found the statute unconstitutional. *Id.* The Supreme Court of New Jersey, however, found that the statute advanced the State's legitimate health and environmental goals with little affect upon interstate commerce. Hackensack Meadowlands Dev. Comm. v. Mun. Sanitary Landfill Auth., 384 A.2d 505 (N.J. 1975).

51. N.J. STAT. ANN. § 13:1I-10 (West Supp. 1978). The New Jersey DEP established regulations that permitted four types of waste to enter New Jersey. These included:

> 1. Garbage to be fed to swine in the State of New Jersey;
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> 2. Any separated waste material . . . that is free from putrescible materials and not mixed with other solid or liquid waste that is intended for a recycling or reclamation facility;
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> 3. Municipal solid waste to be separated or processed into usable secondary materials . . .
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> 4. Pesticides, hazardous waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be treated, processed or recovered in a solid waste disposal facility which is registered with the Department . . .

N.J. ADMIN. CODE 7:1-4.2 (Supp. 1977).

52. *Philadelphia*, 437 U.S. at 622. The court thus rejected the decision of the Supreme Court of New Jersey, which stated that harmful materials "are not legitimate subjects of

holding that regardless of the ultimate goal, it may not be accomplished by restricting articles of commerce from coming into the State unless there is some reason, apart from their origin, to treat them differently.[53] The Supreme Court thus extended constitutional protection to "garbage" for the first time, prohibiting states from enacting legislation barring the import of waste from other states.

In the 1992 case of *Chemical Waste Mgt. v. Hunt*,[54] the Court examined whether states could impose additional fees for disposal of waste imported from other states.[55] An Alabama statute[56] imposed an additional fee on the disposal of any hazardous waste generated outside Alabama and disposed of at a facility located within Alabama.[57] The Court noted that the Act facially discriminated against hazardous waste generated in other States by imposing a heavier tax on the transaction when it crosses state lines; therefore, the Act "invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives."[58] The Court concluded that the Alabama act was unconstitutional because the only basis for the act's "additional fee" was the origin of the waste, reasoning that there was no evidence that out-of-state waste was more dangerous than in-state waste.[59] Finally, the Court suggested other less

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trade and commerce." Hackensack Meadowlands Dev. Comm'n v. Mun. Sanitary Landfill Auth., 384 A.2d 505 (N.J. 1975).

53. *Philadelphia*, 437 U.S. at 626-27. The court, therefore, made no conclusion as to the actual purpose of the statute. The Supreme Court of New Jersey concluded that the statute was designed to protect the State's environment with only a slight impact on interstate commerce, while the appellants urged that the purpose of the state was primarily financial. *Id.* at 626. They suggested that the goal was reduction of the total flow of waste into landfills within New Jersey, thus, extending their lives and delaying the time when New Jersey would need to export waste at a higher cost. *Id.* at 626.

54. Chemical Waste Mgt. v. Hunt, 504 U.S. 334 (1992). The plaintiff operated a facility in Emelle, Alabama that disposed of hazardous waste, 90% of which was shipped in from other states. *Id.* at 337-38.

55. *Id.*

56. ALA. CODE §§ 22-30B-1-22-30B-18 (1990 and Supp. 1991).

57. *Chemical Waste Mgt.*, 504 U.S. at 336. Specifically, the Act imposed a "base fee" of $25.60 per ton on all hazardous waste disposal, but imposed an "additional fee" of $72.00 per ton on waste generated outside Alabama and disposed of within Alabama. ALA. CODE § 22-30B-2(b).

58. *Chemical Waste Mgt.*, 504 U.S. at 342-43. The court concluded that the Act facially discriminated against interstate commerce, hence, the court rejected the State's argument that the reduced scrutiny test of *Pike* was applicable. *Id.* at 342. "[T]he Act's additional fee on its face targets only out-of-state hazardous waste. While no 'clear line' separates close cases on which scrutiny test should apply, 'this is not a close case.' " *Id.*

59. *Id.* at 344. Alabama set forth several "legitimate local interests that cannot be

discriminatory alternatives that would alleviate the health and safety risks. These included: "1) a generally applicable per-ton additional fee on all hazardous waste disposed of in Alabama, 2) a per-mile tax on all vehicles transporting hazardous waste across Alabama, or 3) an evenhanded cap on the total amount to be landfilled."[60] Justice Rehnquist, in dissent, also suggested alternatives such as: 1) tax breaks for Alabama industries that generate hazardous waste, or 2) a state operated facility exempt from Commerce Clause scrutiny under the market participant doctrine.[61] The Court, therefore, showed skepticism toward environmental protection arguments favoring restrictions on the interstate commerce of waste, citing several alternatives to achieve purported environmental goals without implicating interstate commerce.

On the same day in 1992, in *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*,[62] the Supreme Court first addressed whether a state could restrict the movement of municipal waste within the state.[63] In *Fort Gratiot*, the Supreme Court struck down a provision in the Michigan Solid Waste Management Act[64] that prohibited private landfill operators from accepting solid waste originating outside the county in which the

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adequately served by reasonable nondiscriminatory alternatives," including: (1) protection of health and safety of Alabama citizens, (2) conservation of Alabama's environment, (3) provision for revenue for the costs and burdens imposed on Alabama by out-of-state generators, and (4) reduction in the overall flow of waste traveling on Alabama's highways, thus, reducing the health and safety concerns that the Alabama statute purported to address. *Id.* at 343. The court rejected the state's concerns, however, because "rhetoric, and not explanation, emerges as to why Alabama targets only interstate hazardous waste to meet these goals." *Id.* at 343.

60. *Id.* at 344.

61. *Id.* at 351 (Rehnquist, J., dissenting). Justice Rehnquist reasoned that "a safe and attractive environment is the commodity really at issue," and that "the State may pursue such an objective by means less Draconian than an outright ban" on "waste disposal altogether." *Id.* at 350.

62. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 504 U.S. 353 (1992).

63. *Id.*

64. 1978 MICH. COMP. LAWS §§ 299.401-299.437 (1984 ed. and Supp. 1991). Michigan's Solid Waste Management Act ("SWMA") required each Michigan county to adopt a plan for disposal, at facilities complying with state health standards, of all solid waste estimated to be generated in the county over the next twenty years. *Id.* at 425. Fort Gratiot received a permit from the Department of Natural Resources to operate a landfill in St. Clair County, and then submitted an application to the St. Clair Solid Waste Planning Committee for permission to accept out-of-state waste. *Fort Gratiot*, 504 U.S. at 356. This request was rejected, although Fort Gratiot promised to reserve enough landfill space to dispose of all county generated waste for the next twenty years. *Id.* at 356.

facility was located, unless the state Department of Natural Resources explicitly approved acceptance of such waste.[65] The Court reasoned that the Michigan statute violated the Constitution because a State may not avoid the Commerce Clause by restricting commerce through its counties.[66] Under the Michigan law, out-of-state waste producers were unable to compete for local waste disposal unless the county acted affirmatively to permit other waste to enter its jurisdiction.[67] Furthermore, the Court stated that because the Waste Import Restrictions "unambiguously discriminate" against interstate commerce, the State was required to show that it could not attain its objective of safe disposal of future waste through reasonable nondiscriminatory alternatives.[68] In this case, however, there was no evidence of health and safety reasons to limit only out-of-state waste; therefore, the State failed to meet its burden.[69] In *Fort Gratiot*, the Supreme Court held that states that imposed restrictions on the movement of municipal waste across county lines within the state violated the Constitution.[70]

In 1994, the Court was faced with two more cases involving waste flow control regulations. In *Oregon Waste Sys. v. Oregon Dep't of Envtl. Quality*, the Supreme Court addressed whether a state could assess a cost-based surcharge on the in-state disposal of out-of-state-generated solid waste.[71] The Court invalidated the portion of an Oregon law[72] that imposed an additional fee on out-of-state waste "based on the costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state which are not otherwise paid for."[73] The State argued that the purpose of the law was merely to recoup the costs of

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65. *Fort Gratiot*, 504 U.S. at 353.

66. *Id.* at 361.

67. *Id.* at 360.

68. *Id.* at 366-67.

69. *Id.* at 367. The Court acknowledged that its conclusion would differ if the same out-of-state waste presented additional or different health and safety concerns than in-state waste. *Id.* The Court noted the difference between economic protectionism and health and safety regulation, citing *Maine v. Taylor*, 477 U.S. 131 (1986), which upheld a ban on importation of out-of-state baitfish into Maine because the fish were subject to parasites foreign to Maine baitfish. *Id.*

70. *Fort Gratiot*, 504 U.S. at 367.

71. Oregon Waste Sys. v. Oregon Dep't of Envtl. Quality, 511 U.S. 93 (1994).

72. OR. REV. STAT. § 459.297(1). The law imposes a "surcharge" on "every person who disposes of solid waste generated out-of-state in a disposal site or regional disposal site." *Id.*

73. *Id.* at § 459.298. The resulting surcharge was $3.10 per ton for out-of-state waste, but only $0.85 per ton for Oregon waste. *Oregon Waste*, 511 U.S. at 96.

disposing out-of-state waste in Oregon, because interstate transporters purportedly did not pay their share of the costs through general taxation, unlike in-state residents.[74] In response, the Court stated, (1) "the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory,"[75] and (2) "a law is discriminatory if it taxes a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State."[76] Having found that the statute discriminated against interstate commerce, the State was required to show that no reasonable nondiscriminatory alternatives existed to solve legitimate state concerns.[77] The Court concluded that the State's "failure to identify a specific charge on intrastate commerce equal to or exceeding the surcharge is fatal to [its] claim."[78] However, the Court again acknowledged the possibility that a State could accomplish the same objectives if it were acting as a market participant, thus escaping the net cast by the Commerce Clause.[79]

Later in 1994, the Court, in *Carbone v. Clarkstown*,[80] examined whether a New York flow control ordinance violated the Commerce Clause when it required all solid waste to be processed at a designated transfer station before leaving the town.[81] In *Carbone*, the town ordinance required that all nonhazardous waste within the town be sent to a single designated facility at a higher cost than the price available in the private marketplace.[82] Carbone operated a

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74. *Oregon Waste*, 511 U.S. at 104. The Court rejected the general taxation argument stating that the surcharge and the in-state taxation are not "substantially equivalent events." *Id.* Also, the Court noted that out-of-state waste generators pay taxes in their home states, a portion of which likely goes to waste disposal activities. *Id.*

75. *Id.* at 100. The Court acknowledged that if out-of-state waste was shown to be more costly to dispose of than in-state waste, the statute would be constitutional because "there would be a reason apart from its origin, why solid waste coming from outside the State should be treated differently." *Id.* at 101 n.5. However, the evidence indicated that the cost per ton for disposal for in-state waste was equal to that of out-of-state waste. *Id.*

76. *Id.* at 99 (citing Chemical Waste Management v. Hunt, 504 U.S. 334 (1992)).

77. *Id.*

78. *Id.* at 104.

79. *Oregon Waste*, 511 U.S. at 106.

80. Carbone v. Clarkstown, 511 U.S. 383 (1994).

81. *Id.* The purpose of the ordinance was to retain the fees charged by the facility to pay for its $1.4 million price. *Id.* at 387. In order to build the facility, the town entered into an agreement with a private contractor who agreed to build the facility and then operate it for five years, after which the town would purchase the site for one dollar. *Id.* at 387. During the five year period, however, the town was obligated to provide a minimum waste flow of 120,000 tons per year. *Id.* at 387. The contractor would subsequently charge waste haulers a tipping fee of $81 per ton, thereby ensuring recoupment of the construction costs. *Id.* at 387.

82. *Id.* at 387.

recycling center in Clarkstown, New York.[83] Under the ordinance, Carbone was required to send all nonrecyclable residue from its facility to the designated facility and pay a tipping fee.[84] The Court reasoned that the Commerce Clause applied because, although the immediate impact of the ordinance was to direct waste to a facility within the municipality, the ordinance had an economic impact that was "interstate in reach," since out-of-state businesses could not compete equally for the local market.[85] The Court described the article of commerce in this case as the service of processing and disposing of waste rather than the waste itself.[86] In that light, the Court characterized the discrimination against interstate commerce as favoring only the single local operator over all other potential market competitors.[87] Therefore, the ordinance was determined to facially discriminate against interstate commerce.[88] The Town was required to show that it had no reasonable nondiscriminatory alternatives to advance its legitimate local interest.[89] The Court found that nondiscriminatory alternatives, such as uniform safety regulations, would be sufficient to solve the alleged health and environmental issues.[90] Furthermore, the Court determined that the ordinance served only one purpose that a nonprotectionist regulation would not; ensuring the profitability of the town-sponsored facility, a local interest that did not justify discrimination against interstate commerce.[91]

Both the concurring and dissenting opinions disagreed with the majority because, unlike previous waste flow control statutes

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83. *Id.*

84. *Id.* at 388. The tipping fee was imposed on recyclers such as Carbone who were required to send only their already separated nonrecyclable residue to the Clarkstown site. *Id.*

85. *Id.* at 389. The Court came to this conclusion because the ordinance drove up the cost for out-of-state interests to dispose of solid waste, due to the fact that the tipping fee exceeded the equivalent cost on the private market. *Id.* Also, since all waste generated by the town had to be processed at the designated site, the ordinance deprived out-of-state businesses of access to the local market. *Id.*

86. *Carbone*, 511 U.S. at 391. The discrimination was thus characterized as favoring only the local operator within the town. *Id.*

87. *Id.* According to the Court, the fact that both in-state and out-of-state processors are covered by the ordinance has no effect on the Commerce Clause analysis. *Id.*

88. *Id.* at 392.

89. *Id.*

90. *Id.* at 393. The Court rejected the environmentally based argument that the ordinance was justified to ensure the safe handling and proper treatment of solid waste as landfill space diminishes. *Id.*

91. *Carbone*, 511 U.S. at 393. The Court suggested that the town subsidize the facility through nondiscriminatory methods such as taxes or municipal bonds. *Id.* at 394.

invalidated by the Supreme Court, the parties burdened by the statute included parties located within Clarkstown, such as Carbone.[92] Justice O'Connor concluded that the ordinance did not facially discriminate; hence, application of the *Pike* test was proper.[93] However, according to Justice O'Connor, the burden on interstate commerce was excessive in relation to the local benefit of financing the transfer facility.[94] Justice Souter, in dissent, argued that the Commerce Clause was not implicated at all since there was no hint of economic protectionism in the ordinance, because the "burden falls entirely on Clarkstown residents."[95]

In *Empire*, the Lehigh County plan made the transportation of any waste generated within the County to a facility other than a facility designated by the County unlawful.[96] The Supreme Court of Pennsylvania reasoned that this constituted non-facially discriminatory language and, therefore, used the *Pike* balancing test to determine its constitutionality.[97] The Court determined that the impact on interstate commerce was "clearly excessive in relation to the putative local benefits."[98]

Specifically, both the County plan and the Act presented the following problems: 1) under the Act, counties were forced to choose facilities located within the state and had to justify, in detail, the use of out-of-county facilities; 2) the Act required that designated sites be approved by the Pennsylvania DER (however, only Pennsylvania landfills can be so approved); and 3) the DER's policy regarding waste disposal outside Pennsylvania was inconsistent with the Act.[99] Since the County Plan required DER approval, the supreme court found that the impact on interstate commerce was clear. Also, considering the County plan in concert with the requirements of the Act, it can be argued that the County plan and the Act were facially discriminatory. This reasoning, based

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92. *Id.* at 404 (O'Connor J., concurring); and 427 (Souter J., dissenting).

93. *Id.* at 405 (O'Connor, J., concurring). Justice O'Connor determined that the ordinance did not facially discriminate against interstate commerce, because it "discriminates evenhandedly against all participants in the waste processing business, while benefiting only the chosen operator of the transfer facility." *Id.* at 404.

94. *Id.* at 405-06 (O'Connor, J., concurring). Justice O'Connor suggested other means, such as taxes, price reductions, and municipal bonds to finance the transfer station which would have a less dramatic impact on interstate commerce. *Id.*

95. *Id.* at 427 (Souter J., dissenting).

96. Empire Sanitary Landfill v. Commonwealth, 645 A.2d 413, 416 (Pa. Commw. Ct. 1994).

97. Empire Sanitary Landfill v. Commonwealth, 684 A.2d 1047, 1056 (Pa. 1996).

98. *Id.*

99. *Id.*

on the *Carbone* strict scrutiny analysis, clearly invalidated both the Act and the County plan.

The Dormant Commerce Clause has claimed several victims in the waste flow control law arena. Although many commentators fear that the result will be detrimental to the environment,[100] the Environmental Protection Agency ("EPA") found that "there is no evidence that flow control either positively or negatively impacts the statutorily assured level of environmental protection, because the underlying regulatory requirements are controlling."[101] Because environmental protection has become such an important political issue, it is inconceivable that Congress would allow the Commerce Clause to stand in the way of local laws that are necessary to protect the environment. Because federally mandated environmental quality standards preempt local government standards, little environmental improvement will result from rulings such as *Empire*.

Federalism seems to dictate that state and local governments control waste disposal management.[102] Many argue that waste disposal (along with functions such as police, fire, and education) is "a valid exercise of police power traditionally reserved to state and local governments under the Tenth Amendment."[103] However, because the threat to the health and safety of the public is arguable, the burdens placed upon interstate commerce due to flow control are "clearly excessive in relation to the putative local

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100. *See Rachel D. Baker, C & A Carbone v. Clarkstown: A Wake-Up Call for the Dormant Commerce Clause*, 5 DUKE ENVTL. L. & POL'Y J. 67, 92 (1995) (arguing that the loss of revenue from flow control will force local governments to scale back their waste management services, thus leading to continued use of old, inefficient, and unsafe waste management facilities). *See also* Eric S. Peterson and David N. Abramowitz, *Municipal Solid Waste Flow Control in the Post-Carbone World*, 22 FORDHAM URB. L.J. 361, 416 (1995) (arguing that without flow control ordinances, society's flow control needs will be left to a private market that has no duty to protect public health and safety).

101. United States Envtl. Protection Agency, Office of Solid Waste, Municipal and Solid Waste Division, Report to Congress, Flow Controls and Municipal Solid Waste II -6 (March 1995).

102. 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). Diederich argues that federal courts should not be allowed to dictate how local governments manage municipal solid waste. He reasons that management of solid waste is fundamentally a local activity protected by federalist principles, and consistent with the federal/state relationship defined by Congress when it enacted the Resource Conservation and Recovery Act ("RCRA") as it applies to non-hazardous solid waste management. *Id.*

103. Jason J. Asuncion, Note, *Environmental Law — Solid Waste Disposal: The Dormant Commerce Clause and Traditional Government Functions — C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 114 S. Ct. 1677 (1994), 14 TEMP. ENVTL. L. & TECH. J. 77 (1995).

benefits."[104]

The Supreme Court of Pennsylvania determined that a Lehigh County solid waste flow control plan requiring transportation of all solid waste generated within the county to one of three designated facilities selected by the county pursuant to the County plan approved by the Pennsylvania DER violated the Dormant Commerce Clause of the United States Constitution.[105] A review of the holdings of the Supreme Court of the United States demonstrates that the rationale of the *Empire* court is in total accord. The Lehigh County flow control plan burdened interstate commerce because it prevented out-of-state waste disposal firms from competing on an even playing field.[106] The local benefit, ensuring local waste disposal space for ten years (*i.e.*, economic protectionism), was clearly insufficient to overcome the burden placed upon interstate commerce.[107]

The restrictions imposed by the Dormant Commerce Clause on the ability of state and local governments to regulate the flow of municipal waste have serious consequences for Pennsylvania. The Commonwealth imports more municipal waste, by far, than any other state.[108] Although Pennsylvania accepts waste from twenty-two states,[109] most comes from New York and New Jersey.[110] Therefore, although the Municipal Waste Planning, Recycling and Waste Reduction Act significantly increased the available municipal landfill space in Pennsylvania, it also made Pennsylvania a low-cost alternative for the out-of-state trash market.[111] Consequently, Pennsylvania landfill space is being consumed rapidly by out-of-state sources. In addition, the exporting states have no incentive to reduce waste or initiate in-state disposal strategies.

What can Pennsylvania do to slow this deluge? At this point, there appears to be very little. Governors Casey and Ridge have

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104. Pike v. Bruce Church, 397 U.S. 137 (1970).

105. *Empire*, 684 A.2d at 1056.

106. *Id.*

107. *Id.*

108. Peter J. Shelly, *Landfill Officials Dumped Cash Into PAC Law Firm's Fund, Oiled Campaigners' Wheels*, PITTSBURGH POST-GAZETTE, Oct. 22, 1997, at A1. In 1995, according to the National Solid Wastes Management Association, Pennsylvania imported 6.7 million tons of garbage, while the next largest importer, Virginia, took in only 1.7 million tons. *Id.*

109. Brett Lieberman, *Waste Imports Spark Interstate Feud // State Irked by Top-Receiver Title, Loss of Capacity*, SUN PATRIOT-NEWS [HARRISBURG, PA.], July 7, 1996, at B1.

110. *Id.* According to this article, New York accounts for 41% of imports, while New Jersey is responsible for 39%. *Id.*

111. *Id.*

implored Congress to pass legislation that would allow states to limit trash imports.[112] These efforts have failed in the face of opposition from exporting states and the waste-hauling and disposal industries.[113]

Because Pennsylvania has at least ten years of waste disposal capacity, the disposal market is flooded — consequently, Pennsylvania disposal prices have dropped. Although the Pennsylvania legislature should have foreseen this result, and the subsequent response by neighboring states with no such capacity, it did not. As a result, Pennsylvania is now the recipient of garbage from all over the country. On August 29, 1996, Governor Ridge issued an executive order designed to slow the licensing process for new landfills and expansions to existing landfills.[114] In the short term, however, it is likely that only Congress, pursuant to its constitutional authority to regulate interstate commerce, can aid waste-importing states such as Pennsylvania.

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112. Shelly, *supra* note 108, at A1; Timothy McNulty, *Interstate Waste Controls Die in the House*, PITTSBURGH POST-GAZETTE, Sept. 13, 1996, at B7.

113. Shelly, *supra* note 108, at A1.

114. Adam Bell, *Trash Reviews to Stiffen / State Seeks to Slow Landfill Growth as Imports Soar*, HARRISBURG PATRIOT, Aug. 30, 1996, at B1. Specifically, the order compels DEP to improve its review of permits and make sure all existing facilities are in compliance with current laws. *Id.* Governor Ridge also sought repeal of the nine-month deadline within which DEP is required to react to applications for permits. Maura Webber, *Plans to Limit Imported Waste Get Subdued Response*, PHILA. BUS. J., Sept. 20, 1996, at 9.