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How Will Carbone v. Town of Clarkstown Offset Pennsylvania's Solid Waste Management Act

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HOW WILL CARBONE V. TOWN OF CLARKSTOWN OFFSET PENNSYLVANIA'S SOLID WASTE MANAGEMENT ACT?

Each person in the United States generates approximately 4.4 pounds of solid waste per day, producing a nationwide total of 200 million tons of residential solid waste each year.[1] The burden of disposing of this exorbitant quantity of waste has long been recognized as a responsibility of the several states, as the federal government has delegated the role of regulating non-hazardous solid waste.[2]

State solid waste management strategies generally make local governments responsible for assessing their individual solid waste disposal needs and for adopting plans to accommodate those needs.[3] While solid waste disposal efforts have focused on integrated waste management (which includes source reduction, materials reuse, recycling, and incineration),[4] landfill disposal of residential waste continues to be the most frequent disposal method.[5] Because landfill space is in strong demand,[6] local governments are often required to provide for adequate, long-term disposal capacity at specifically designated sites when adopting local solid waste management plans.[7] In order to assure adequate capacity at a specifically-designated site, local governments must either assure the financial viability of an existing site or build a new site.[8]

State of the art landfills are exceedingly expensive to build and to operate,[9] and financing is difficult to attain.[10] In order for local governments to secure the bonds required for constructing these disposal facilities, they must guarantee that there will be a stable source of revenue[11] to pay the capital and operations costs of the new facility. [12] These "put or pay" bond covenants require local governments to pay for certain minimum levels of disposal services, whether or not the services are actually used.[13] Therefore, a county seeking

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[1] PAUL RELIS & ANTHONY DOMINSKI, BEYOND THE CRISIS: INTEGRATED WASTE MANAGEMENT 4 (3d prtg. 1990); *see also*, James T. O'Reilly, *After the Applause Ends, Examining the Legal Issues in Municipal Solid Waste Disposal and Recycling*, 41 FED. B. NEWS & J. 106 (1994).

[2] RELIS & DOMINSKI, *supra* note 1, at 4. In the Resource Conservation and Recovery Act, Congress determined that the collection, processing, and disposal of solid waste should remain a primary funtion of state, regional, and local agencies. *Id.*

[3] O'Reilly, *supra* note1, at 106.

[4] RELIS & DOMINSKI, *supra* note 1, at 6. *See also*, CONN. GEN. STAT. § 22a-258(b) (1985); ME. REV. STAT. ANN. tit. 38 § 2101 (West Supp. 1993); MINN. STAT.§§ 115A.01 to 115A.991 (1994); N.Y. ENVTL. CONSERV. LAW § 27-0106(1) (McKinney Supp. 1994); R.I. GEN. LAWS § 23-19-1-39 (1989).

[5] O'Reilly, *supra* note 1, at 106.

[6] *See*, James Hinshaw, *The Dormant Commerce Clause After Garcia: An Application to the Interstate Commerce of Sanitary Landfill Space*, 67 IND. L.J. 511 (1992) ("Because sanitary landfill space is rapidly diminishing, it is quickly becoming one of the United States' most sought after resources").

[7] For example, Pennsylvania's solid waste management plan requires each county within the state to implement solid waste management plans providing for adequate waste disposal for at least ten years. *See* discussion *infra* note 123.

[8] O'Reilly, *supra* note 1, at 108.

[9] Sidney M. Wolf, *The Solid Waste Crisis: Flow Control and The Commerce Clause*, 39 S.D. L. REV. 529-530 (1994). *See also*, RELIS & DOMINSKI, *supra* note 1, at 4.

[10] *See*, O'Reilly, *supra* note 1.

[11] Revenue for a landfill is derived from fees called tipping charges. O'Reilly, *supra* note 1.

[12] *See*, Public Finance Division, Smith Barney, Harris Upham & Co., *Planning For Solid Waste Management: Financing Solid Waste Management Projects* (undated); Smith Barney, Harris Upham & Co., Resource Recovery Finance (1984).

[13] Alex, Brown & Sons, Inc., *Credit Worthiness of Resource Recovery Projects* 9-10 (undated research investment report) (hereinafter "Alex, Brown & Sons").

a bond to finance a landfill must guarantee the facility delivery of a certain amount of waste or compensate that landfill operator for the waste shortfall.

In order to meet the guaranteed delivery amount of solid waste, counties find it necessary to pass legislation requiring all non-hazardous solid waste generated within a county to be processed or disposed of at the designated facility.[14]

This legislation, commonly referred to as waste flow control legislation, is controversial because of its effects on interstate commerce.[15] By requiring haulers and collectors to transport locally-generated waste to a designated facility, it denies transporters the opportunity to pay potentially lower tipping fees charged by other facilities.[16] This, in turn, may cause haulers to increase the fees for all of their customers, not just those within the local jurisdiction. If the waste flow law also covers waste generated out-of-state, this procedure will drive up the solid waste disposal costs of out-of-state residents.[17] Additionally, waste flow control effectively eliminates "non-local" competitors from local market competition.[18]

Part I of this Comment reviews the basic analysis used in determining whether a state regulation places an unconstitutional burden on interstate commerce and thereafter explains the relevant United States Supreme Court decisions which have applied this analysis to decide the constitutionality of various waste control regulations. Part II details the Court's decision in *C & A Carbone, Inc. v. Clarkstown*[19] which directly addressed the constitutionality of local waste flow control legislation. Part III analyzes the effects of the *Carbone* decision on Pennsylvania's Waste Management System, specifically addressing the effects on the provision which authorizes counties to pass waste flow control legislation. Part III also discusses recent Pennsylvania cases involving challenges to particular counties' waste flow control ordinances. Part IV concludes with a brief discussion of prosposed federal legislation following the Court's decision in *Carbone*.

I. Basic Analysis

The Commerce Clause of the United States Constitution authorizes Congress to "regulate commerce . . . among the several states."[20] Though the clause grants regulatory power to Congress,[21] it has long been interpreted as having a negative or dormant aspect which

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[14] Wolf, *supra* note 9, at 530.

[15] *See*, Rufus C. Young, Jr., *Municipal Landfill Financing: Solid Waste "Flow Control" Killed; Truck Accident Cited*, The American Law Institute, C930 ALI-ABA 213 (Aug. 1994); Ellen M. Leibovitch, *Local Government's Right to Grant an Exclusive Franchise for Waste Removal*, 68 FLA. B.J. 100 (June 1994); Samuel J. Morley, *Flow Control Ordinances and The Commerce Clause: Whose Trash Is It Anyhow?*, 67 FLA. B.J. 79 (Oct. 1993).

[16] C & A Carbone, Inc., v. Town of Clarkstown, ___ U.S. ___, 114 S. Ct. 1677 (1994).

[17] *Id.* at 1681. In *Carbone*, the designated facility processed waste from inside and outside of the state. The Court thereby determined that the ordinance increased disposal costs to out-of-state residents.

[18] *Id.*

[19] *Id.*

[20] U.S. CONST. art. I, § 8, cl. 3.

[21] The Framers of the Constitution granted Congress with plenary power over interstate commerce in order to avoid economic Balkinization tendencies similar to those which had caused difficulty in colonial and state relations under the Articles of Confederation. H.P. Hood & Sons v. DuMond, 336 U.S. 525, 533 (1949). *See also*, Oregon Waste Sys. v. Dep't of Envtl. Quality, ___ U.S. ___, 114 S. Ct. 1345 (1994); Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979). *See generally* The Federalist No. 42 (J. Madison).

prevents the states from unjustifiably discriminating against or burdening the flow of interstate commerce.[22] The key word in this analysis is "unjustifiably," as states may, as a legitimate exercise of their power to protect the general welfare of their citizens, enact legislation which will in some manner affect interstate commerce.[23]

The line distinguishing a legitimate exercise of state police powers from an excessive burden on interstate commerce is by no means a bright one. However, the central theme of the United States Supreme Court's analysis of the dormant commerce clause is that a state may not create trade barriers solely for the purpose of enhancing its own economy.[24]

When analyzing whether a specific state law violates the Interstate Commerce Clause, the first step[25] is to determine whether the law "regulates evenhandedly" or whether it "discriminates" against interstate commerce.[26] A statute which "regulates evenhandedly" regulates commerce inside the state as well as between states, without treating the two differently. A statute which "discriminates" against interstate commerce is one which benefits in-state interests while burdening out-of-state interests.[27]

If a statute is found not to discriminate, the court will apply a balancing test, under which the state must prove that the law's benefits outweigh the law's adverse affects on commerce.[28] An evenhanded regulation which only incidentally affects interstate commerce will be invalidated if "the regulation imposes a burden on interstate commerce which is clearly excessive in relation to its putative local benefits."[29]

If a statute is found to discriminate, the court will apply a strict scrutiny test, with a presumption of invalidity. The state can only overcome this presumption by proving that the statute advances a legitimate local purpose which could not be adequately served by reasonable nondiscriminatory alternatives.[30]

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[22] *Oregon Waste Sys.*, 114 S. Ct. at 1349. *See also*, Wyoming v. Oklahoma, 502 U.S. ___, ___, 112 S. Ct. 789, 799 (1992); Welton v. Missouri, 91 U.S. 275 (1875).

[23] *Oregon Waste Sys.*, 114 S. Ct. at 1349. *See also*, *Wyoming*, 112 S. Ct. at 799; *Welton*, 91 U.S. at 275.

[24] A state's erection of barriers for the purpose of enhancing its own economy is also referred to as economic protectionism. Chemical Waste Management, Inc. v. Hunt, ___ U.S. ___, 112 S. Ct. 2009, 2012 (1992). *See also*, Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978); Dean Milk Co. v. Madison, 340 U.S. 349, 356 (1951).

[25] In actuality, the first step in the analysis is to determine whether the state is in fact regulating interstate commerce. However, it has long been recognized that anything which crosses state lines is considered interstate commerce. Bowman v. Chicago & N. W. Ry. Co., 125 U.S. 465, 489 (1888).

[26] *Oregon Waste Sys.*, 114 S. Ct. at 1350. *See also*, *Hughes*, 441 U.S. at 336.

[27] *Id.*

[28] *Oregon Waste Sys.*, 114 S. Ct. at 1350. *See also*, Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); Raymond Motor Transp., Inc., v. Rice, 434 U.S. 429, 442 (1978); Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 352-54 (1977); Great A & P Tea Co. v. Cottrell, 424 U.S. 366, 371-72 (1976).

[29] *Pike*, 397 U.S. at 142.

[30] *Oregon Waste Sys.*, 114 S. Ct. at 1350; Chem. Waste Management, Inc., v. Hunt, U.S. ___, 112 S. Ct. 2009, 2015 n.6 (1992); *See also*, Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949); Toomer v. Witsell, 334 U.S. 385, 403-406 (1948); Baldwin v. Seelig, Inc., 294 U.S. 511, 525 (1935); Buck v. Kuykendall, 267 U.S. 307, 315-316 (1924). The only example of a state regulation to pass the strict scrutiny test was in Maine v. Taylor, 477 U.S. 131 (1986). In *Maine*, the Court determined that a Maine statute forbidding the importation of live baitfish into the state did not violate the dormant Commerce clause. The Court held that the statute facially discriminated against interstate commerce, but accepted Maine's argument that the ban on importation served a legitimate local objective. The specific goal of the statute was to protect Maine's native species from foreign parasites which might have been found in imported shipments of baitfish. The Court agreed with the state of Maine that the particular goal could not be adequately attained by nondiscriminatory means. *Maine*, 477 U.S. at 131.

The strict scrutiny test has been applied in four waste cases which implicated the dormant commerce clause.[31] For example, in *Philadelphia v. New Jersey*,[32] the Supreme Court invalidated a New Jersey statute which prohibited solid waste originating outside the state from being imported into or disposed of in New Jersey.[33] The Court declared solid waste to be a "legitimate subject of trade and commerce meriting commerce clause protection."[34]

The Court then found that the New Jersey statute banished out-of-state waste solely because of its origin and thereby treated in-state interests preferentially.[35] Thus, the Court found the statute to be discriminatory and a presumption of invalidity arose.[36] The Court found that New Jersey had passed the law in an effort of economic protectionism saddling out-of-state individuals with the burden of slowing the waste flow into its remaining landfill sites.[37] While the Court recognized the difficulties posed by the never ending waste flow crossing state borders, the Court declared that states cannot segregate themselves from the waste problem by "shutting their doors to other's garbage." [38]

A similar situation faced the Court several years later in *Fort Gratiot Sanitary Landfill, Inc., v. Michigan Dep't of Natural Resources*,[39] where amendments to Michigan's Solid Waste Management Act (SWMA) prohibited counties from accepting for disposal solid waste generated in other counties, states, or countries unless explicitly authorized by the receiving county's plan.[40] The Court applied the *Philadelphia* framework to determine that the SWMA amendments fell within the purview of the Commerce clause.[41] Similar to the statute invalidated in *Philadelphia*, the amendments directly addressed the transport and disposal of non-local waste and classified this waste based solely on its origin.[42] The Court found that the amendments were discriminatory and applied a presumption of invalidity.[43]

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[31] *Philadelphia*, 437 U.S. at 623. *See also*, Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, ___ U.S. ___, 112 S. Ct. 2019 (1992); Oregon Waste Sys. v. Dep't, of Envtl. Quality ___ U.S. ___, 114 S. Ct. 1345 (1994); Chemical Waste Management v. Hunt, ___ U.S. ___, 112 S. Ct. 2009 (1992).

[32] *Philadelphia*, 437 U.S. at 623.

[33] *Id.*

[34] *Id.* at 623-24.

[35] *Id.*

[36] *Id.* at 627.

[37] Philadelphia v. New Jersey, 437 U.S. 617 (1978).

[38] *Id.*

[39] Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, ___ U.S. ____, 112 S. Ct. 2019 (1992). For a detailed explanation of Fort Gratiot Sanitary Landfill and its ramifications *see generally*, 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).

[40] *Fort Gratiot Sanitary Landfill*, 112 S. Ct. at 2019. Fort Gratiot Landfill (Landfill) had been owned and operated within St. Clair County, Michigan. The Landfill submitted an application to the county requesting permission to dump waste which had been imported from outside of the county. Even though the Landfill guaranteed the county that it would reserve enough landfill space to meet the county's waste disposal needs, the county denied the application. *Id.*

[41] *Id.* at 2021.

[42] *Id.*

[43] *Id. See also*, Hughes v. Oklahoma, 441 U.S. 322, 336 (1979). The Court stated that whatever a state's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside of the state unless there is a reason for treating them differently other than simply their origin. The Court discounted both the state's and county's claim that the statute regulated evenhandedly. The Court also determined that a State (or one of its political subdivisions) cannot avoid the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself. *Fort Gratiot Sanitary Landfill*, 112 S. Ct. at 2024.

The burden shifted to Michigan to prove that the amendments advanced legitimate health and safety concerns which could not be adequately addressed by less discriminatory means.[44] The Court was not persuaded by the state's argument that waste generated outside of the county posed greater health problems than waste generated inside the county and that the amendments therefore advanced health and safety concerns which could not be otherwise met.[45] The amendments were therefore invalidated.[46]

Another state's differential treatment of out-of-state waste was found to violate the commerce clause in *Chemical Waste Management, Inc. v. Hunt*.[47] The Alabama legislature had passed an act which imposed a disposal fee on out-of-state waste shipped into the state for disposal, but failed to impose a fee on in-state waste.[48] By its very words, the act purported to treat in-state interests more favorably than out-of-state interests and was therefore found to facially and effectively discriminate against waste generated outside of the state.[49] Thus, the Court applied the strict scrutiny test. The state failed to prove that the law advanced legitimate health and safety concerns which could not be adequately met by less discriminatory alternatives.[50]

Similarly, in *Oregon Waste Sys. v. Dep't. of Envtl. Quality*,[51] the Court invalidated an Oregon statute which imposed a higher fee for disposal of out-of-state waste than in-state waste.[52] The surcharge was "obviously discriminatory" because it subjected out-of-state waste to a fee almost three times greater than the fee imposed on in-state waste.[53]

In trying to withstand the strict scrutiny test, Oregon offered two justifications. Oregon initially contended that the surcharge served as a compensatory tax which was necessary in order to make shippers pay their fair share of disposal costs.[54] The Court rejected this notion stating that the state had failed to identify a specific charge on intrastate commerce equal to or exceeding the surcharge.[55]

Oregon also asserted that it held a valid interest in spreading only state waste disposal costs to its residents as opposed to spreading out-of-state waste disposal costs.[56] The Court rejected this contention because the statute resulted in out-of-state shippers bearing the full costs of disposal.[57] It deemed this to be an illegitimate protectionist objective of the state.[58]

Each of these commerce clause cases involved a local law that regulated the local transportation and disposal of waste which originated outside of the local jurisdiction.

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[44] Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, ___ U.S. ___, 112 S. Ct. 2019 (1992).

[45] *Id.* The Court also found no relevance to the fact that the statute permitted counties to adopt a waste management plan which would allow acceptance of out-of-state waste. The Court stated that "it [was] the discrimination itself, and not the degree of discrimination which was illegitimate." *Id.*

[46] *Id.*

[47] Chemical Waste Management, Inc., v. Hunt, ___ U.S. ___, 112 S. Ct. 2009 (1992).

[48] *Id.*

[49] *Id.* at 2013.

[50] *Id.* at 2013-14.

[51] Oregon Waste Sys. v. Dep't of Envtl. Quality ___ U.S. ___, 114 S. Ct. 1345 (1994).

[52] *Id.*

[53] *Id.* at 1350-51.

[54] *Id.*

[55] *Id.*

[56] Oregon Waste Sys. v. Dep't. of Envtl. Quality ___ U.S. ___, 114 S. Ct. 1345 (1994).

[57] *Id.*

[58] *Id.*

Carbone involved a local ordinance which regulated the local transport and disposal of waste which originated inside the locality.[59] Even though waste flow control statutes deal specifically with the transportation of waste within a local jurisdiction and not with the transportation of waste from state to state, the interstate commerce clause is implicated.[60] This is because the article of commerce is not the solid waste, but rather the service of transferring and disposing of the solid waste.[61]

Prior to *Carbone*, the constitutionality of waste flow legislation was an issue which had created a split among the courts of appeal[62] and had plagued state and county solid waste management planning committees.

II. *C & A Carbone, Inc. v. Town of Clarkstown*

A. The Facts

In *Carbone*, the town of Clarkstown allowed a private contractor to construct a solid waste transfer station within town limits and to operate the facility for a period of five years, after which the town was to buy the facility for one dollar.[63] To finance the cost of the transfer station, the town guaranteed the facility a minimum waste flow for which the contractor could charge haulers a tipping fee which exceeded the disposal cost of unsorted solid waste in the private market.[64] The town also agreed to pay any revenue deficit which might result if the station received less than the guaranteed minimum flow.[65] In order to meet the minimum flow, the town adopted a so-called flow control ordinance requiring all non-hazardous solid waste within the town to be deposited at the transfer station.[66]

Recyclers, like petitioner C & A Carbone, acted much like the transfer station in that they received bulk solid waste, sorted and baled the waste, and shipped it to other facilities.[67] Under the ordinance, recyclers could continue to receive solid waste at their sorting facilities, but were required to bring the non-recyclable residue to the transfer station.[68] The ordinance not only prohibited the recyclers from shipping the waste themselves but also required them to pay a tipping fee on waste which had already been sorted.[69]

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[59] C & A Carbone, Inc. v. Town of Clarkstown, ___ U.S. ___, 114 S. Ct. 1677 (1994). Although the court in *Carbone* embarked on a "new chapter" of solid waste treatment cases, the Court rested its decision on the well-settled principles of Dormant Commerce Clause jurisprudence. *Id.*

[60] *Id.*

[61] *Id.*

[62] Prior to *Carbone* the U.S. Circuit Courts were divided over the issue of flow control laws. *See*, Waste Sys. Comp. v. County of Martin, 985 F.2d 1381 (8th Cir. 1993) (striking down a local ordinance which directed waste to the county facility); Devito Jr. Trucking Inc. v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 755 (D. R.I. 1991) *aff'd* 947 F.2d 1004 (1st Cir. 1991) (striking down a state regulation which directed waste to a state-owned facility); *but see*, J. Filiberto Sanitation Inc. v. N.J., 857 F.2d 913 (3d Cir. 1988) (upholding a county plan which directed waste to the county's facility).

[63] *C & A Carbone, Inc.*, 114 S. Ct. at 1677.

[64] C & A Carbone, Inc. v. Town of Clarkstown, ___ U.S. ___, 114 S. Ct. 1677, 1680 (1994).

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] C & A Carbone, Inc. v. Town of Clarkstown, ___ U.S. ___, 114 S. Ct. 1677, 1681 (1994).

B. Procedural History

Clarkstown police discovered that Carbone was violating the ordinance by transporting nonrecyclable waste to an out-of-state landfill.[70] Clarkstown sued Carbone in a New York Supreme Court for violating the ordinance.[71] Carbone responded by suing in the U.S. District Court to enjoin enforcement of the ordinance.[72] The district court granted Carbone's injunction, finding a sufficient likelihood that the ordinance violated the Commerce Clause of the Constitution.[73] Four days later, the state court declared the flow control ordinance to be constitutional and enjoined petitioners to comply with it.[74] (The federal court thereby dissolved its injunction.)[75]

The state Appellate Division affirmed, finding that the ordinance did not discriminate against interstate commerce because it operated evenhandedly, applying to all solid waste processed within the town regardless of origin.[76] The New York Court of Appeals denied petitioner's motion for leave to appeal.[77] The United States Supreme Court granted certioari and reversed.[78]

C. The Majority Opinion

The U.S. Supreme Court immediately confirmed that the flow control ordinance regulated interstate commerce and thereby rejected the town's contention that the ordinance, reaching only waste within its jurisdiction, effectively acted as a quarantine.[79]

The court then determined that because the transfer station received and processed waste from other towns and states, the ordinance had a two-fold effect on interstate commerce.[80] First, the ordinance increased solid waste disposal costs for out-of-state interests by requiring recyclers to send their non-recyclable residue to the transfer station at an additional cost.[81] Second, the ordinance deprived out-of-state businesses of local market access by allowing the town, solely, to take care of the initial processing.[82]

After discovering an "undoubted effect" on interstate commerce, the Court then considered whether the flow control ordinance could be valid despite this effect.[83] The Court acknowledged two existent lines of analysis: first, whether the ordinance discriminates

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[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] C & A Carbone, Inc. v. Town of Clarkstown, ___ U.S. ___, 114 S. Ct. 1677, 1682 (1994).
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* States have long held a broadly recognized power to protect their citizens health and safety. This power was fostered in cases addressing state quarantine and inspection laws. Asbell v. Kansas, 209 U.S. 251, 256 (1908). In *Carbone*, the town also argued that the ordinance was valid because it prevented the entrance of garbage into interstate commerce until it was made safe. The Court also rejected this argument stating that it was premised on an outdated and mistaken concept of what constituted interstate commerce. *Carbone*, 114 S. Ct. at 1681.
[80] C & A Carbone, Inc. v. Town of Clarkstown, ____ U.S. ____, 114 S. Ct. 1677, 1681 (1994).
[81] *Id.*
[82] *Id.*
[83] *Id.*

against interstate commerce, and second, whether the ordinance imposes on interstate commerce a burden that is "clearly excessive in relation to [its] putative local benefits."[84]

Clarkstown contended that the ordinance was not discriminatory because it did not differentiate solid waste on the basis of geographic origin.[85] Rather, all solid waste, regardless of origin, had to be processed at the designated transfer station before it could be transported out of town.[86]

In rejecting this argument, the Court relied partly on its initial discussion of the ordinance's effects on interstate commerce and partly on the Court's declaration that the "article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it."[87] The Court analogized the flow control ordinance to regulations previously held invalid by the Court and described the ordinance as having the same design and effect as those regulations in that the ordinance hoarded an article of commerce (here, both solid waste and the demand to get rid of it) for the benefit of the preferred processing facility.[88] The Court acknowledged that these previously invalidated regulations were distinguishable because they each favored a local group or industry whereas the flow-control ordinance in question favored only a single proprietor.[89] However, the majority believed that this distinction exacerbated the protectionist effect of the ordinance.[90]

In determining that the state failed the strict scrutiny test, the Court concentrated on the fact that the ordinance's central purpose was to finance the town-sponsored facility.[91] The Court stated that state and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities.[92] The Court also felt that the town had a number of nondiscriminatory alternatives available to address its health and environmental concerns.[93]

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[84] *Id.*

[85] C & A Carbone Inc. v. Town of Clarkstown, ___ U.S. ___, 114 S. Ct. 1677, 1682 (1994). In attempting to distinguish its ordinance from the New Jersey law invalidated in *Philadelphia*, the town pointed to the fact that the ordinance did not erect a barrier to the import or export of any solid waste but rather that the ordinance required that the waste be channeled through a designated facility. *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.* at 1683.

[89] *Id.*

[90] C & A Carbone, Inc., v. Town of Clarkstown, ___ U.S. ___, 114 S. Ct. 1677, 1683 (1994). The majority felt that by granting a monopoly to a single processor, the flow control ordinance squelched all waste processing service competition thereby leaving no room for outside investment. *Id.* This was deemed to be more protectionist than the regulation at issue in *Dean Milk* which required all milk processors to be located within five miles of the city. In the majority's view, the ordinance in *Dean Milk* allowed some access to local market competition. *Id.*

[91] *Id.* at 1684. Amicus curiae argued that flow control legislation is becoming necessary to ensure the safe handling and proper treatment of solid waste as landfill space diminishes and environmental cleanup costs escalate. Thus, amici urged that the waste flow ordinance should therefore fall into the narrow class of cases in which a municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance its objective. *Id.* Additionally, the town could not justify the ordinance as creating a way to steer solid waste away from out-of-town disposal sites it deemed harmful to the environment. This is because states may not attach restrictions to exports or imports in order to control commerce in other states. To do so would extend the town's police powers beyond its jurisdictional bounds. *Id.*

[92] *Id.*

[93] *Id.* An alternative deemed "obvious" by the Court would have been to enact uniform safety regulations to ensure that competitors like Carbone could not have underpriced the market by cutting environmental corners. *Id.*

D. *Concurrence*

Justice O'Connor reached the majority's result with the application of a different analysis.[94] In her concurrence, O'Connor determined that the ordinance regulated evenhandedly but that it was unconstitutional because it imposed an excessive burden on interstate commerce.[95]

O'Connor pointed out that the Clarkstown ordinance was distinguishable from the regulations in the commerce cases cited by the majority in that the ordinance did not discriminate against solid waste on the basis of geographic origin.[96] Rather, the ordinance effectively granted a waste processing monopoly to the transfer station.[97] The Clarkstown ordinance eliminated all competitors, both local and non-local, whereas the challenged enactments in the Court's earlier decisions effectively drew a line around a local jurisdiction, treating those inside the line more favorably than those outside the line.[98] O'Connor argued that this distinction was vital because a regulation which causes harm to substantial in-state interests is "a powerful safeguard" against legislative discrimination.[99] While O'Connor conceded that there is no bright line separating enactments which are virtually per se invalid and those which are not, the fact that in-town competitors were equally burdened by the law convinced her that the ordinance did not discriminate.[100]

O'Connor found the statute to be unconstitutional because it imposed an excessive burden on interstate trade when considered in relation to the local benefits conferred.[101] O'Connor described the local interest in proper waste disposal as "obviously significant," but noted that in this case the town's purpose was narrower than ensuring proper waste disposal.[102] In so finding, O'Connor concentrated on "the town's narrower purpose" of ensuring the financial viability of the transfer facility.[103] This benefit to Clarkstown was

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[94] *Id.* (O'Connor, J., concurring). Justice O'Connor also wrote separately to address the Amicus National Association of Bond Lawyers (NABL) who argued that Congress authorized the flow control ordinance through the Resource Conservation and Recovery Act by removing the constitutional constraints on local implementation of flow control. Although Justice O'Connor agreed with the NABL that certain references indicated a Congressional expectation that local governments would implement some form of flow control, she stated that these references did not rise to the level of explicit authorization which is required by the dormant Commerce clause. *Id.*

[95] C & A Carbone, Inc. v. Town of Clarkstown, ___ U.S. ___, 114 S. Ct. 1677, 1689 (1994) (O'Connor, J., concurring).

[96] *Id.* at 1689. Justice O'Connor illustrated this assertion with the fact that the petitioner in the case was a local recycler, physically located within the town of Clarkstown, who desired to process waste itself bypassing the town's designated transfer station. *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.* (citing Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 n.17 (1981)). Generally, the Court will defer to a state's health and safety regulations because their burden usually falls on local economic interests as well as other State's economic interests. This deference ensures that a State's own political processes will serve as a check against unduly burdensome regulations. *Carbone*, 114 S. Ct. at 1690. *See also,* Kassel v. Consolidated Freightways Corp. of Del., 450 U.S. 662, 675 (1981); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 444 n.18 (1978).

[100] C & A Carbone, Inc. v. Town of Clarkstown, ___ U.S. ___, 114 S. Ct. 1677, 1689 (1994) (O'Connor, J., concurring).

[101] *Id.* at 1680.

[102] *Id.*

[103] *Id.*

far outweighed by the ordinance's excessive burden on interstate commerce.[104]

E. Dissent

The dissent focused on the distinction between the effects of the Clarkstown ordinance and the regulations previously held invalid by the Court in describing the majority's decision as "striking down an ordinance unlike anything the Court had ever invalidated."[105] The dissent accused the majority of "greatly extend[ing] the Clause's dormant reach" by ignoring the significant fact that the ordinance directly favored a single proprietor and bestowed no benefit on a class of local private actors.[106] Since local and out-of-state investors were subject to the same constraints, the dissent did not see evidence of economic protectionism.[107]

The dissent further argued that this monopoly was essentially a municipal facility because it was built and operated pursuant to a contract with the municipality and was soon to revert to the municipality for complete ownership.[108] The dissent asserted that this was further indication that economic protectionism was not at issue because a government acts to protect public interests, unlike a private company which acts to protect private interests.[109]

Although the dissent conceded that governmental preference may have functioned as local favoritism, they contended that a more particularized inquiry is needed before the Court can determine that a law is too strongly protectionist.[110] The dissent therefore would have applied a balancing test in order to determine whether the ordinance's benefits outweighed its burden on commerce.[111] With application, the dissent felt that the ordinance directly advanced a legitimate local benefit in the protection of the public which was quite

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[104] *Id.* As an additional reason for finding an excessive burden, Justice O'Connor pointed to the high potential for conflicts between jurisdictions given the amount of jurisdictions contemplating or enacting flow control. Justice O'Connor illustrated her point as follows: In New Jersey, local waste may be removed from the State for the sorting of recyclables as long as the residual solid waste is returned to New Jersey. Under the Clarkstown ordinance, however, if haulers bring waste from New Jersey for recycling, the residual waste may not be returned to New Jersey, but must be transported to Clarkstown's transfer facility. Therefore, operations like Carbone's could not comply with the requirements of both jurisdictions. Nondiscriminatory state or local laws which actually conflict with the enactments of other States are constitutionally infirm if they burden interstate commerce. *Id.* (citing Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 526-30 (1959)).

[105] C & A Carbone, Inc., v. Clarkstown, ___ U.S. ___, 114 S. Ct. 1677, 1692 (1994) (Souter, J., dissenting). The dissent consisted of Chief Justice Souter and Justice Blackmun. Though the dissent agreed that the case fell within the most general language of the prior cases, the dissent countered that there were both analytical and practical differences between *Carbone* and earlier processing cases. *Id.*

[106] *Id.*

[107] *Id.* at 1693. The dissent determined that the ordinance fell outside of the class of protectionist measures barred by the commerce clause because the law differentiated between the one entity responsible for ensuring that the solid waste disposal service is taken care of and all other enterprises regardless of their location, rather than differentiating between all local and all out-of-town service providers. *Id.*

[108] *Id.* at 1696. The dissent specifically noted that it was up to this municipal government (unlike Carbone or other private trash processors) to ensure that waste removal occurred according to acceptable public health standards. Because of this duty, any discrimination which may have been caused by the ordinance failed to produce the favoritism which had previously been defined and condemned as protectionist conduct. *Id.*

[109] *Id.*

[110] C & A Carbone, Inc. v. Town of Clarkstown, ___ U.S. ___, 114 S. Ct. 1677, 1699 (1994) (Souter, J., dissenting).

[111] *Id.* The dissent defined "balancing test" as an assessment of whether an ordinance discriminates in practice or otherwise unjustifiably operates to isolate a State's economy from the national common market, rather than defining it as an open-ended weighing of an ordinances' pros and cons. *Id.*

unlike the generalized advantage to local businesses which had been condemned as protectionist in the past.[112]

III. The Effects of *Carbone* on Pennsylvania's Waste Management System

The holding of *Carbone*, that local flow control legislation is violative of the Commerce Clause of the United States Constitution may significantly impact legislation in many states. At least twenty-seven states expressly authorize localities or state agencies to institute flow control measures.[113] Pennsylvania is one such state. Pursuant to the amendments of the Resource Conservation and Recovery Act ("RCRA"),[114] Pennsylvania has enacted its Solid Waste Management Plan which is commonly referred to as Act 101.[115]

Act 101 directs each Pennsylvania county to develop and implement a solid waste management plan for the processing and disposal of municipal waste generated within its boundaries.[116] Act 101 also authorizes counties to require that all municipal waste generated within their boundaries be processed or disposed of at specific facilities as designated in the county's approved plan.[117] This authorization provision, which allows counties to pass flow control measures has been brought into question by *Carbone*.

The grant of authorization provided in Act 101, by its terms, addresses only locally generated waste.[118] Thus, the constitutional question does not involve discrimination against out-of-state waste. However, since the Court's declaration in *Carbone* that the service of

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[112] *Id.* In fact, the dissent specifically noted that no out-of-state trash processor had been harmed by the ordinance, and that the interstate movement or disposition of trash was not at all affected. The dissent felt that the town had financed a public improvement without transferring costs to out-of-state economic interests. The dissent viewed this result as an equitable one, with tendencies that should not disturb the Commerce clause and which should not have been disturbed by the Court. *Id.*

[113] Brief for Petitioners, *id.* (Hereinafter "Petitioner's Brief"). The Petitioner's brief listed 27 states which authorized flow control. *Id.* Statutes currently in force in those states are: COLO. REV. STAT. § 30-20-107 (Supp. 1993); CONN. GEN. STAT. ANN. § 22A-220A (West 1985); DEL. CODE ANN. tit. 7, § 6406(31)(1991); FLA. STAT. ANN. § 403.713 (West 1993); HAW. REV. STAT. § 340A-3(a) (1991); ILL. COMP. STAT. ANN. ch. 55, para. 5/5-115010 (Smith-Hurd 1993); IND. CODE ANN. §§ 36-9-31-3 to 36-9-31-4 (Burns 1993); IOWA CODE ANN. § 28G.4 (West 1989 & Supp. 1993); LA. REV. STAT. ANN. § 30:2307(9) (West 1980 & Supp. 1994); ME. REV. STAT. ANN. tit. 38, § 1304-B(2) (West Supp. 1993); MINN. STAT. ANN. § 115A, 80 (West 1987 & Supp. 1994); MISS. CODE ANN. § 17-17-319 (Supp. 1993); MO. ANN. STAT. §§ 260.201, 260.202 (Vernon 1990 & Supp. 1993); N.J. STAT. ANN. § 13:1E-22 (West 1991), § 48:13A-5 (West Supp. 1993); N.Y. ENVTL. CONSERV. LAW § 27-0703(2) (McKinney Supp. 1994); N.C. GEN. STAT § 130A-294 (1992); N.D. CENT. CODE § 23-29-06(6) & (8) (Supp. 1993); OHIO REV. CODE ANN. § 343.01(H)(2) (Anderson Supp. 1992); OR. REV. STAT. § 268.317(3) & (4) (1991); PA. STAT. ANN. tit. 53, § 4000.303(e) (Supp. 1993); R.I. GEN. LAWS § 23-19-10(40)(Supp. 1993); TENN. CODE ANN. 68-211-814 (Supp. 1993); VT. STAT. ANN. tit. 24, § 2203 a & b (1992); VA. CODE ANN. §15.1-28.01 (Michie Supp. 1993); W. VA. CODE §§ 20-5F-4, 20.5F-4a (Supp. 1993); WASH. REV. CODE §§ 35.21.120 (1990); 36.58.040 (Supp. 1993); WIS. STAT. ANN. § 159.13(3), (11) (West 1993). *See also*, Wolf, *supra* note 9, at 570.

[114] 42 U.S.C. §§6901-6992 (1988 & Supp. III 1991).

[115] Pennsylvania Municipal Waste Planning, Recycling and Waste Reduction Act of 1988, Pa. Stat. Ann. tit. 53, §§ 4000.101-1906 (Supp. 1995) [hereinafter Pa. Stat. Ann. tit. 53, is "Act 101"].

[116] Act 101 § 4000.303 (a)(2). The Act also authorizes counties to develop and implement approved plans covering the processing and disposal of municipal waste generated outside of its boundaries. Although this provision in itself may have constitutional ramifications, any are beyond the scope of this comment. Act 101 § 4000.303 (a)(3).

[117] Act 101 § 4000.303(e).

[118] Act 101 § 4000.303(e) provides: "A county with an approved municipal waste management plan . . . is also authorized to require that all municipal wastes generated within its boundaries shall be processed or disposed at a designated processing or disposal facility that is contained in the approved plan and permitted by the department under the Solid Waste Management Act."

transferring and disposing of solid waste is an article of commerce which is implicated by waste flow control legislation,[119] there can be no question that this provision clearly falls within the purview of the court's Commerce Clause analysis.[120]

If challenged under *Carbone*, the Act 101 authorization provision should fall. The provision is protectionist in nature and its burden on interstate commerce is thereby greater than its local benefits.

The flow control authorization provision does not facially discriminate against interstate commerce because it does not by its very words purport to treat out-of-state interests differently than in-state interests.[121] The provision does not effectively discriminate against interstate commerce because it does not, in practice treat in-state interests more favorably than out-of-state interests. The Act's authorization provision makes no reference regarding the geographic location of a county's designated disposal or processing facility, rather, discretion on this determination is left to the individual counties. Therefore, the authorization provision does not effectively eliminate out-of-state competitors from local market access as the Clarkstown ordinance did.[122] Further, the provision merely provides counties with the authority to control municipal waste flow, it by no means mandates that counties exercise this authority.

However, it is easy to see how counties may be "forced" to do so. Act 101 is an unfunded mandate requiring individual counties to ensure the availability of adequate capacity to fulfill their county's waste processing and disposal needs for ten years.[123] Counties may not simply demonstrate that facilities having the requisite capacity are available to them. Rather, Act 101 requires counties to implement a mechanism for ensuring waste flow to specifically designated sites.[124] The county must choose its facilities, evaluate environmental and economic factors, and justify their selection.[125] Additionally, the counties must identify the general location within the county where each municipal waste

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[119] C & A Carbone, Inc. v. Town of Clarkstown, ___ U.S. ___, 114 S. Ct. 1677 (1994).

[120] In *Carbone*, the Court also stated that even as to waste originating in Clarkstown, the ordinance prevented everyone except the favored local operator from performing the initial processing step thereby depriving out-of-state businesses access to the local market. These economic effects were sufficient to bring the Clarkstown ordinance within the purview of the Commerce clause. *Id. See also*, Empire Sanitary Landfill, Inc. v. Commonwealth, 645 A.2d 413 (Pa. Commw. Ct. 1994).

[121] *See supra* note 116 and accompanying text.

[122] The Clarkstown ordinance provided: "All acceptable waste generated within the territorial limits of the Town of Clarkstown is to be transported and delivered to the Town of Clarkstown solid waste facility at Route 303, West Nyack, New York, or to such other disposal or recycling facilities operated by the Town of Clarkstown, or to recycling centers established by special permit pursuant to Chapter 106 of the Clarkstown Town Code, except for recyclable materials which are separated from solid waste at the point of origin or generation of such solid waste, which separated recyclable materials may be transported and delivered to facilities within the Town as aforesaid, or to sites outside the town. As to acceptable waste brought to said recycling facilities, the unrecycled residue shall be disposed of at a solid waste facility operated by the Town of Clarkstown." *Carbone*, 114 S. Ct. at 1702 (Appendix to Opinion of the Court, Town of CLarkstown's Local Law No. 9 of the year 1990, entitled Solid Waste Transportation and Disposal § A-I).

[123] Act 101 § 4000.502(a); Act 101 § 4000.502(d) provides: "[Each county] plan shall estimate the processing or disposal capacity needed for the municipal waste that will be generated in the county during the next ten years." *See also*, Harvey & Harvey, Inc. v. County of Chester, No. 94-3615, 1994 WL 530676 (E.D. Pa. Sept. 27, 1994).

[124] Act 101 § 4000.502(g) provides: "The plan shall identify the general location within a county where each municipal waste processing or disposal facility and each recycling program . . . will be located, and either identify the site of each facility if the site has already been chosen or explain how the site will be chosen."

[125] Act 101 § 4000.502(d).

processing or disposal facility will be located and for any proposed facility that is to be located outside of the county, the county must explain in detail the reasons for selecting such facility.[126]

In practice, the Act as a whole requires counties to either guarantee the financial security of existing landfills or build new landfills. Therefore, counties will frequently find it necessary to adopt waste flow laws which will enable them to maintain the financial viability of existing landfills and to secure financing in order to construct new landfills. Forcing all waste to a particularly designated landfill assures the facility a certain amount of waste for which the facility can charge higher tipping fees and thereby receive increased revenue. This "guaranteed" revenue ensures the facility's financial viability.

When passing flow control legislation, counties will naturally direct waste flow to those facilities whose financial security the county needs to maintain which will be the same facilities designated as disposal sites in the county's municipal waste management plan. The disposal sites designated in the county plan are likely to be physically located within the county.[127] Since the county is going to designate waste flow to the particular facility it designated in its county plan, flow control will almost inevitably occur solely within the county. At the very least, flow control is certain to occur within the state as it is extremely unlikely that a county plan designating a facility outside of the state will even be approved.[128] This results in the effective elimination of non-local market access which the *Carbone* Court intended to prevent.

Although the strictures of Act 101 as a whole may in fact cause this scenario to result, it is not a scenario which necessarily follows from the enforcement of the Act. Additionally, the authorization provision merely allows this scenario to result, it does not mandate this result, thus the provision is not a discriminatory one.

The authorization provision should be invalidated because its "incidental burden on interstate commerce is clearly excessive in relation to [its] putative local benefits."[129] Act 101 was established pursuant to Federal mandate[130] and also in order to alleviate a trash crisis which resulted from the "inadequate and rapidly diminishing processing and disposal capacity for municipal waste."[131] Pennsylvania's legislature feared that, if not resolved, improper municipal waste practices would create public health hazards, environmental pollution and economic loss, causing irreparable harm to the public's health, safety, and welfare.[132] Of primary concern to the Assembly was the fact that due to uncontrolled use and inadequate planning virtually every county in the Commonwealth would have to replace existing municipal waste processing and disposal facilities throughout the decade.[133]

While Act 101 as a whole was enacted pursuant to a legitimate exercise of

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[126] Act 101 § 4000.502(g) also provides: "For any facility that is proposed to be located outside the county, the plan shall explain in detail the reasons for selecting such a facility."

[127] *Id.*

[128] Act 101 § 4000.502(g) calls for a detailed explanation if any waste processing facility is to be located outside of the county.

[129] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[130] Amendments to the RCRA set forth a requirement that states develop their own solid waste management plans.

[131] Act 101 § 4000.102(a).

[132] *Id.*

[133] *Id.*

Pennsylvania's police power and carries legitimate justifications for its enactment, it does not follow that the authorization provision at issue carries the same legitimate justifications for its passage.[134] Plainly and simply, the authorization provision is a means by which counties can more easily follow the mandates set out by the Act as a whole.[135] The provision allows counties to provide for the availability of adequate landfill space for the ten-year life of their respective plans by allowing them to ensure the financial viability of their designated landfills.[136] The provision clearly allows counties a means of financing designated disposal facilities and no more.[137] Thus, the provision is clearly protectionist in nature and cannot be balanced favorably against its affects on interstate commerce.

To date, there have been no challenges made against Act 101or its authorization provision. However, the Third Circuit Court of Appeals recently considered a constitutional challenge against New Jersey's solid waste regulatory scheme.[138] New Jersey's existing statutory and regulatory waste management system vests their Dep't of Environmental Protection (Department) with broad regulatory authority and delegates direct management responsibility to the twenty-two solid waste districts comprising the state.[139] Each solid waste district is responsible for developing a ten-year solid waste management plan that must be approved by the Department before it is implemented.[140] Within each waste district, solid waste disposal is managed either directly by the county government or by designated municipal authorities.[141] Each district's waste plan must provide for sufficient and suitable disposal facilities to treat and accomodate all solid waste generated within the waste district.[142] The districts may meet this obligation by contracting with public or private entities or by constructing and operating waste facilities themselves.[143]

As an integral part of the district plan and utility regulation system, both the Department and waste districts are authorized to direct the flow of waste to designated facilities.[144] It is the resultant waste flow regulations that Atlantic Coast challenged as unconstitutionally violating the dormant commerce clause. The waste flow requirements enable the waste districts to control the processing and disposal of all solid waste generated within the district.[145]

When analyzing the New Jersey regulations in light of *Carbone*, the Third Circuit

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[134] In fact, the legislative findings with regard to the flow control authorization provide: "Authorizing counties to control the flow of municipal waste is necessary, among other reasons, to guarantee the long-term economic viability of resource recovery facilities and municipal waste landfills, to ensure that such facilities and landfills can be financed, to moderate the cost of such facilities and landfills over the long term, to protect existing capacity, and to assist in the development of markets for recyclable materials by guaranteeing a steady flow of such materials." Act 101 § 4000.102(a)(10).

[135] *Id.*

[136] Empire Sanitary Landfill, Inc. v. Commonwealth, 645 A.2d 413 (Pa. Commw. Ct. 1994).

[137] *See* discussion *supra*, notes 78, 90. In *Carbone*, the town of Clarkstown advanced legitimate arguments in defense of its ordinance and the Court still found the law to be purely a financing measure.

[138] Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County, 1995 WL 62074 (3d Cir.).

[139] N.J. STAT. ANN. 13:1D-19 (West 1991).

[140] *Id.* §§ 13:1E-20, 13:1E-24 (West 1991).

[141] N.J. STAT. ANN. §§ 40:14B-1, -22.1 (West 1991 & Supp. 1994), 40:37A-103 (West Supp. 1994), 40:37C-3 (West 1991).

[142] *Id.* §§13:1E-21 to -22 (West 1991), 40:14B-19 (West 1991), 40:37A-55 (West 1991), 40:37C-5 (West 1991).

[143] *Id.*

[144] N.J. Stat. Ann. § 48:13A-4(c) (West Supp. 1994)

[145] *Id.*

Court of Appeals determined that the regulations discriminated against interstate commerce.[146] The court remanded the case to the district court to determine whether the regulations could be upheld under the heighented scrutiny analysis.[147]

While the authorization provision set out by Act 101 is likely to be held invalid if challenged under *Carbone*, most of the litigation which has ensued as a result of *Carbone* has attacked particular counties' flow control legislation passed pursuant to the authorization provision in Act 101. For example, in *Empire Sanitary Landfill, Inc. v. Commonwealth,*[148] Lehigh County's flow control ordinances were challenged under the dormant commerce clause. The Commonwealth Court determined that the county's ordinances were not discriminatory but did incidentally affect interstate commerce and that the proper test to be applied in that case was the balancing test.[149]

The court found the ordinance to be nondiscriminatory because it did not specifically state that waste generated within the county must only be disposed of at a facility within the county or state.[150] However, the ordinance did affect interstate commerce because it required the disposal of county-generated waste at specifically designated facilities and the only facilities which had been designated by the county were facilities within the county.[151] The ordinance was therefore a burden on commerce because it precluded out-of-state facilities from competing for the disposal of the county's solid waste.[152]

In invalidating the ordinance, the court stated that "although one of the local benefits of having waste disposed of at one of the designated sites is the certainty of available landfill space for the ten-year life of the county plan, that benefit does not outweigh the burden on interstate commerce."[153] The court also found relevant to its decision the fact that one of the specific purposes of the Act was to protect the economic interests of the municipalities in the Commonwealth.[154]

In *Harvey & Harvey, Inc., v. County of Chester*,[155] a solid waste collector and hauler filed suit seeking declaratory and injunctive relief claiming that *Carbone* effectively invalidated Chester county's flow control ordinance.[156] After denying plaintiff's request for injunctive relief and thereafter reviewing memoranda, the court determined that the ordinance was not discriminatory and that the proper test to be applied at trial would be the balancing test.[157]

After the court's order was issued, the parties stipulated on the day of trial, that the plaintiff hauler would be unable to meet its burden under the balancing test.[158] Accord-

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[146] Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County, 1995 WL 62074 (3d Cir.).
[147] *Id.*
[148] Empire Sanitary Landfill, Inc. v. Commonwealth, 645 A.2d 413 (Pa. Commw. Ct. 1994).
[149] *Id.*
[150] *Id.* at 417.
[151] *Id.*
[152] *Id.*
[153] Empire Sanitary Landfill, Inc. v. Commonwealth, 645 A.2d 413, 418 (Pa. Commw. Ct. 1994).
[154] *Id.*
[155] Harvey & Harvey, Inc. v. County of Chester, No. 94-3615, 1994 WL 530676 (E.D. Pa. Sept. 27, 1994).
[156] *Id.*
[157] *Id.*
[158] *Id.*

ingly, the court entered judgment for the defendant county.[159]

In determining that the Chester county ordinance was not discriminatory, the court relied on the following facts: Chester County did not have a discriminatory purpose when it enacted the flow control ordinance, the county enacted the ordinance pursuant to a command made by D.E.R.,[160] the county's ordinance permits designation of other facilities without consideration of where they are located,[161] and of the three facilities designated, only one was located entirely locally, within Chester county, and the plaintiff had never attempted to use Chester county's process to obtain designation of another facility.[162]

The court distinguished the Clarkstown ordinance at issue in *Carbone* from the Chester County ordinance because the Clarkstown ordinance made passing reference to "other sites," but the only site actually mentioned throughout the ordinance was the new transfer station.[163]

Under current constitutional attack is a waste flow ordinance passed by the city of Bethlehem.[164] Plaintiffs are corporations located in Northampton County engaged in the business of collecting and transporting municipal waste.[165] Bethlehem's waste flow ordinance requires all municipal waste generated within the city to be delivered to the Bethlehem landfill.[166] The plaintiff had moved for a preliminary injunction prohibiting the city from enforcing the ordinance until the issue of its constitutionality had been resolved. The court denied the motion, thus, the case will proceed on its merits.[167]

IV. Conclusion

Carbone could have a devastating impact on the many state and local governments whose solid waste management plans include waste flow control ordinances.[168] The invalidation of these ordinances could jeopardize the financial viability of many waste disposed facilities and thereby result in a loss of many such facilities.

Congress could exercise its authority to regulate interstate commerce[169] and render the

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[159] *Id.*

[160] Chester county provided evidence that DER conditioned its approval of the county's solid waste management plan on the passage of a waste flow control ordinance. *Id.*

[161] Chester County Ordinance No. 92-1 The ordinance specifically permitted the designation of "any other county designated Municipal Waste processing or disposal facility." *Id. See, Harvey & Harvey, Inc.*, No. 94-3615, 1994 WL 530676 (E.D. Pa. Sept. 27, 1994).

[162] Harvey & Harvey, Inc. v. County of Chester, No. 94-3615, 1994 WL 530676 (E.D. Pa. Sept. 27, 1994).

[163] *Id.*

[164] *See*, Grand Central Sanitation, Inc., v. City of Bethlehem, 1994 WL 613674 (E.D. Pa. 1994).

[165] *Id.* In addition, plaintiff Grand Central Sanitation, Inc. "Grand Central" also operates a landfill in Northampton county and plaintiff East Penn Sanitation, Inc. "East Penn" operates a processing facility in Northampton county at which recyclable or reusable products are separated from the municipal waste and sold. *Id.*

[166] *Id.* Though the ordinance also directs waste to a facility outside of Pennsylvania as designated, this provision has not received DER's approval and is therefore not enforceable and so is not at issue. *Id.*

[167] *Id.* The U.S. District Court for the Middle District of Pennsylvania has stayed Southcentral Pa. Waste Haulers Assoc. v. Bedford-Fulton-Huntington Solid Waste Authority, C.A. 93-1318, slip op., (M.D. Pa. June 24, 1994), pending the Third Circuit Court of Appeal's decision in Atlantic Coast Demolition & Recycling v. Board of Chosen Freeholders of Atlantic County, No. 94-5173 (3d. Cir. 1994). Southcentral Pa. Waste Haulers Assoc., No. 93-1318 (M.D. Pa. Dec. 15, 1994) (order staying case pending decision on similar issue by Circuit court).

[168] See *supra* note 111.

[169] White v. Mass. Council of Construction Employers, Inc., 460 U.S. 204, 213 (1983).

Carbone decision null and void. However, prospective legislation, H.R. 4683, would follow Carbone's prohibition against local waste flow control legislation unless local governments meet the requirements to be "grandfathered in."[170] The bill would "grandfather in" local governments which were in the process of designating, or had made significant financial investments in designating, a waste management facility as of May 15, 1994.[171] Designated facilities not constructed but substantially committed to could exert flow control powers if placed into operation within five years.[172]

Even under this bill absolute flow control is not an option, as future flow control authority is limited to residential solid waste.[173] Authority only extends to commercial or industrial waste if the local government already had the authority prior to May 16, 1994.[174] Additionally, future flow control could only occur if local governments designate a facility in accordance with competitive bidding procedures.[175]

If passed, the bill will relieve those local governments who have already enacted waste flow control legislation as a means of ensuring the financial viability of landfill facilities. However, the bill does nothing to help those local governments who are still trying to implement solid waste management plans.

Without Congressional action, a broad reading of the *Carbone* decision could invalidate many local government's solid waste management plans across the country. Without the option of waste flow control legislation, these governments will have difficulty obtaining financing to build new facilities and assuring the financial viability of any existent sites. Further, with the recent declaration of the unconstitutionality of flow control laws, those governments whose financing was contingent upon a guaranteed minimum amount of solid waste are likely to lose that financing. Therefore, *Carbone* could have a devastating impact on many local governments across the country. Swift Congressional action is necessary in order to enable these localities to maintain their solid waste management plans as enacted. Further, some action needs to be taken in order to alleviate the exorbitant financial burden on the states and their local governments.

Trisha DeLeo

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[170] H.R. 4683, 103d Cong., 2d Sess. (1994).

[171] *Id.* This date is significant because on May 16, 1994, the Supreme Court declared waste flow ordinances unconstitutional.

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] H.R. 4683, 103d Cong., 2d Sess. (1994).

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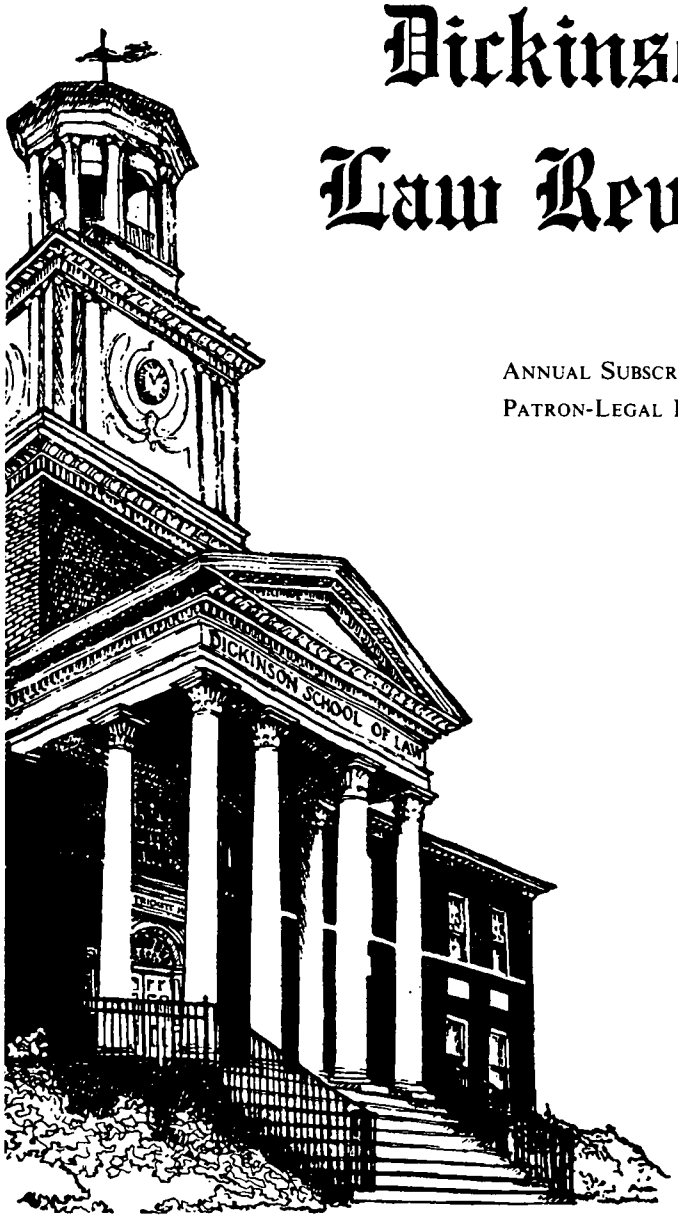

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