

C & A CARBONE v. CLARKSTOWN: A WAKE-UP CALL FOR THE DORMANT COMMERCE CLAUSE

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INTRODUCTION

Garbage collection, transportation, and disposal have historically been the responsibility of individual towns and cities in the United States.¹ However, stringent environmental regulations, declining landfill capacity, and the implementation of costly source reduction and recycling programs have greatly increased the costs of waste management borne by towns.² For the past two decades, many local governments have relied on "flow control" ordinances to finance their solid waste management activities.³ These ordinances designate where municipal solid waste generated within the community must be managed, stored, or disposed.⁴ Recently, in *C & A Carbone, Inc. v. Town of Clarkstown*,⁵ the U.S. Supreme Court ruled that such ordinances violate the Commerce Clause of the U.S. Constitution. In this decision, the Court misapplied the dormant Commerce Clause doctrine and thereby jeopardized the financial stability of local governments that have relied on flow control ordinances to finance their waste management programs.

Flow control ordinances dictate where a community's garbage must be processed or disposed.⁶ By enabling a local government to control its garbage, flow control helps the town meet its environmental goals, such as ensuring that recyclable materials are properly

1. *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1697 (1994) (Souter, J., dissenting).

2. 140 CONG. REC. H10302 (daily ed. Sept. 29, 1994) (statement of Rep. McMillan).

3. *Id.* at H10301 (statement of Rep. Pallone).

4. HOUSE COMM. ON ENERGY & COMMERCE, STATE CONTROL OF MANAGEMENT OF MUNICIPAL SOLID WASTE, H.R. REP. NO. 738, 103d Cong., 2d Sess. 7 (1994) [hereinafter HOUSE REPORT]. Prior to *Carbone*, approximately 43 states had authorized local governments to institute flow control ordinances. *Id.*

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

6. HOUSE REPORT, *supra* note 4, at 7.

separated.⁷ Typically, garbage processing and disposal facilities charge a fee per ton of garbage handled, known as a "tipping" fee.⁸ By requiring all municipal waste to be shipped to a designated facility, flow control guarantees a stream of revenue to that facility.⁹ Local governments have relied on this revenue to fund activities such as recycling, composting, hazardous waste collection, and construction of state-of-the-art processing and disposal facilities.¹⁰

The *Carbone* Court invalidated a flow control ordinance enacted by Clarkstown, New York, under the dormant Commerce Clause doctrine.¹¹ The dormant Commerce Clause applies to state and local regulations that impact interstate commerce and that are not authorized by Congress.¹² Two tests of the constitutionality of state and local laws have evolved under this doctrine. First, courts apply the strictest scrutiny to state or local regulations that benefit local interests at the expense of out-of-state economic interests. Such regulations are "virtually per se" invalid under this test.¹³ Second, for state and local regulations that do not discriminate against interstate interests and that only *incidentally* affect interstate commerce, courts balance the burden imposed on commerce against the benefits provided to local interests.¹⁴

In *Carbone*,¹⁵ the Court found Clarkstown's flow control ordinance to be a protectionist measure that discriminated against out-of-state interests and therefore applied the virtually per se invalid test.¹⁶ Under the strict scrutiny standard mandated by this test, the Court ruled that the flow control ordinance was unconstitutional.¹⁷

7. See Rufus C. Young, *Municipal Landfill Financing: Solid Waste "Flow Control" Killed*, C930 A.L.I.-A.B.A. LAND USE INST. 213, 216 (1994).

8. *Id.*

9. HOUSE REPORT, *supra* note 4, at 7.

10. HOUSE REPORT, *supra* note 4, at 8.

11. *Carbone*, 114 S. Ct. at 1680.

12. 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 11.1 (2d ed. 1992 & Supp. 1994) [hereinafter ROTUNDA & NOWAK].

13. *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, 114 S. Ct. 1345, 1350 (1994).

14. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

15. *Carbone*, 114 S. Ct. at 1677.

16. *Id.* at 1683.

17. *Id.* at 1680.

By so ruling, the Court greatly expanded the class of cases to which the virtually per se invalid test applies.¹⁸

Had the *Carbone* Court properly applied the more appropriate balancing test, it should have concluded that the local benefits of the flow control regulation exceeded its incidental impact on interstate commerce, rendering the ordinance constitutional. Flow control ordinances benefit communities by enabling local governments to finance costly solid waste management facilities that safely manage garbage in compliance with federal law.¹⁹ Moreover, in many communities, the revenues generated from flow control regulations finance such critical environmental programs as recycling, composting, household hazardous waste collection, and source reduction initiatives.²⁰ Without flow control, many governments may be forced to abandon these costly, yet environmentally-beneficial, programs.²¹

The Supreme Court's decision in *Carbone* cripples local governments' ability to finance solid waste management activities and jeopardizes financing already in place for existing facilities.²² Congress must respond to this problem. It should override the Supreme Court's decision in *Carbone* by enacting enabling legislation that authorizes flow control regulation by municipalities.²³

This Note first provides an overview of the dormant Commerce Clause doctrine. Part II reviews the *Carbone* decision. The impact of this decision on the dormant Commerce Clause doctrine is analyzed in Part III, and an alternative more consistent with the purpose of the Commerce Clause is proposed. Finally, Part IV discusses the impact of *Carbone* on solid waste management activities in the United States and recommends a federal law authorizing local governments to implement flow control.

18. See *Carbone*, 114 S. Ct. at 1692 (Souter, J., dissenting) (stating that majority "[struck] down an ordinance unlike anything [the Supreme Court] has ever invalidated" and "greatly extend[ed] the Clause's dormant reach").

19. HOUSE REPORT, *supra* note 4, at 7.

20. HOUSE REPORT, *supra* note 4, at 8.

21. HOUSE REPORT, *supra* note 4, at 8.

22. HOUSE REPORT, *supra* note 4, at 7-8.

23. The Commerce Clause affirmatively grants Congress power over interstate commerce. U.S. CONST. art. I, § 8. Pursuant to this power, Congress may pass legislation that authorizes local regulations that would otherwise be barred by the Commerce Clause, thus "overruling" the Supreme Court. ROTUNDA & NOWAK, *supra* note 12, § 11.11(a).

I. OVERVIEW OF DORMANT COMMERCE CLAUSE DOCTRINE

The U.S. Constitution provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States."²⁴ The Court has defined this grant of power broadly, encompassing all commercial intercourse that touches on interstate commerce.²⁵ Moreover, the Supreme Court has determined that congressional power over commerce "among the several states" does not "stop at the external boundary line of each State, but may be introduced into the interior."²⁶

This broad definition of congressional power, decreed by Chief Justice Marshall in 1824, has enabled the federal government to grow and respond to the extraordinary changes in our nation's economy since its founding. Because of its broad sweep, however, the congressional commerce power often conflicts with otherwise legitimate exercises of a state's police power. When a state regulation conflicts with a federal statute, the Supremacy Clause makes clear that the state regulation must give way.²⁷ However, the Constitution is silent as to the power states have over interstate commerce in the absence of controlling federal legislation.²⁸

Establishing the limitations imposed on states by the Commerce Clause has proven particularly divisive for the Court, and no clear principles emerged until this century.²⁹ Under the modern doctrine, the Court has focused on the purpose of the Commerce Clause and has sought to effectuate that purpose.³⁰

The Commerce Clause was included in the Constitution in reaction to the economic balkanization that had plagued the nation under the Articles of Confederacy.³¹ The purpose of the clause was to prevent states from taking partisan actions designed to gain an economic advantage over neighboring states, as had occurred under

24. U.S. CONST. art. I, § 8.

25. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824).

26. *Id.* at 194.

27. U.S. CONST. art. VI.

28. ROTUNDA & NOWAK, *supra* note 12, § 11.1 ("Whether or not the commerce power is exclusive or to what extent concurrent state regulation may coexist in the absence of an articulated Congressional judgment is not textually demonstrable.")

29. ROTUNDA & NOWAK, *supra* note 12, § 11.1.

30. ROTUNDA & NOWAK, *supra* note 12, § 11.1.

31. See THE FEDERALIST No. 22, at 191-92 (Alexander Hamilton) (Benjamin F. Wright ed., 1961); THE FEDERALIST No. 42, at 304-306 (James Madison) (Benjamin F. Wright ed., 1961).

the Articles.³² The Framers were concerned that such biased actions would “nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquillity.”³³ In his *Federalist No. 42*, James Madison wrote of his particular concern that commercial states, motivated by “immediate and immoderate gain,” would seek to collect revenue from their noncommercial neighbors by imposing tariffs on trade through their lands.³⁴ This illustrates that the Framers viewed federal “superintending authority over the reciprocal trade of confederated States” as a “necessity.”³⁵

Under the dormant Commerce Clause doctrine, the Supreme Court has sought to prevent the factionalism the Framers strove to impede when they included the Commerce Clause in the Constitution. Thus, the Court has been particularly critical of state regulations that benefit the enacting state to the detriment of other states.³⁶

This critical approach has led the Court to adopt two tests of the validity of a state regulation affecting interstate commerce. State regulations that do not discriminate against interstate interests and that only incidentally affect interstate commerce are valid unless “the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”³⁷ In contrast, state regulations that discriminate against interstate commerce are “virtually per se” invalid.³⁸ In this context, discrimination means “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”³⁹

The first step of the dormant Commerce Clause analysis, therefore, is to determine whether the statute is discriminatory. In making this determination, the Court considers whether a statute is “basically a protectionist measure” or is a law directed to legitimate local concerns with only incidental effects upon interstate commerce.⁴⁰ The Court looks to both the purpose and the effects of the state legislation.⁴¹ To qualify for consideration under the more

32. See THE FEDERALIST No. 42, at 305 (James Madison) (Benjamin F. Wright ed., 1961).

33. *Id.*

34. *Id.* at 305-306.

35. *Id.* at 306.

36. See, e.g., *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928).

37. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

38. *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, 114 S. Ct. 1345, 1350 (1994).

39. *Id.*

40. *Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978).

41. *Id.* at 623.

flexible balancing test, the questioned state activity must credibly advance legitimate local interests and must not patently discriminate against interstate trade.⁴²

The balancing test for nondiscriminatory state regulations recognizes that legitimate exercises of the state's police power may unavoidably create incidental burdens on interstate commerce.⁴³ Such regulations are valid unless their local benefit is clearly exceeded by the burden on interstate commerce.⁴⁴ In evaluating such regulations under this test, the Court considers the nature of the burden on interstate commerce,⁴⁵ the nature of the local interest involved, and whether an equally effective alternative with a lesser impact on interstate commerce exists.⁴⁶

In contrast, statutes that *clearly* discriminate against out-of-state interests must pass the virtually per se invalid test.⁴⁷ Under this test, the discriminatory regulation must be invalidated unless it advances a legitimate local purpose unrelated to economic protectionism that cannot be adequately served by reasonable nondiscriminatory alternatives.⁴⁸ Such regulations must undergo the "strictest scrutiny" by the Court.⁴⁹ Indeed, facial discrimination against out-of-state economic interests may itself be fatal.⁵⁰

The Court has advanced two justifications for this virtually per se invalid test. First, economic protectionism is not a valid local purpose justifying discriminatory regulations.⁵¹ This justification is supported by the underlying purposes of the Commerce Clause—to create a national economy and to prevent economic balkanization of the nation.⁵² When discrimination exists, therefore, the Court is suspi-

42. *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2014 n.5 (1992) (citing *Philadelphia*, 437 U.S. at 624).

43. *Philadelphia*, 437 U.S. at 621.

44. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

45. *Id.* at 144.

46. *Id.* at 142.

47. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan*, 112 S. Ct. 2019, 2024 (1992).

48. *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, 114 S. Ct. 1345, 1351 (1994).

49. *Id.*

50. *Id.*

51. *ROTUNDA & NOWAK*, *supra* note 12, § 11.8; *see, e.g., Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10-11 (1928) (holding states do not have power to prevent interstate shipment of goods simply because goods are needed locally).

52. *See THE FEDERALIST* No. 42 (James Madison).

cious of any purported local purpose and imposes the strictest scrutiny.⁵³

The Court's second justification for the virtually per se invalid test is that there has been no true legislative weighing of all the benefits and costs of the statute to justify the Court's usual deference to the judgment of a legislature.⁵⁴ Out-of-state interests are forced to bear the burden of local discriminatory legislation, yet those interests were not represented in the enacting state's political processes. Due to the absence of this political check, the Court has applied the strictest scrutiny to discriminatory regulations.

Clearly, then, the Court's choice between applying the balancing test or the virtually per se invalid test frequently determines the outcome of dormant Commerce Clause cases. State or local regulations that face the virtually per se test must clear a very high hurdle and are often invalidated. The balancing test represents a lower standard and is easier to satisfy. The ability of a state or locality to convince the Court to apply the balancing test, then, is often the deciding factor in defending a regulation from a dormant Commerce Clause attack.

II. THE CARBONE DECISION

The Supreme Court most recently applied the dormant Commerce Clause doctrine in *C & A Carbone v. Town of Clarkstown*.⁵⁵ Finding that a Clarkstown flow control ordinance discriminated against out-of-state interests, the Court applied the virtually per se invalid test and held that the ordinance violated the dormant Commerce Clause.⁵⁶ The flow control ordinance at issue in *Carbone* typifies those enacted in other states and municipalities across the United States.⁵⁷ This part describes the origins of the Clarkstown dispute and the Supreme Court's decision.

53. *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2014 (1992).

54. *See, e.g., Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767 n.2 (1945); *ROTUNDA & NOWAK*, *supra* note 12, § 11.11.

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

56. *Id.* at 1680.

57. *See* HOUSE REPORT, *supra* note 4, at 7-8.

A. *Background of the Dispute*

From the 1950's until 1990, Clarkstown owned its own solid waste landfill.⁵⁸ Environmental concerns regarding this landfill led to litigation brought by the New York Department of Environmental Conservation (DEC). The town and the DEC entered into a consent decree, which required the town to close its landfill and to build a transfer station capable of properly processing and shipping the town's solid waste.⁵⁹

Clarkstown then entered into a contract with Clarkstown Recycling Center, Inc., to build a transfer facility and operate it for five years, after which the town would purchase the facility for one dollar.⁶⁰ The facility was designed to accommodate the quantity of waste generated within Clarkstown. To induce the operator to commit capital to the project, the town authorized a tipping fee of \$81 per ton and guaranteed the facility a minimum waste flow of 120,000 tons per year.⁶¹ The town was obligated to compensate the operator for any shortfall in waste tonnage at the regular tipping fee rate.⁶² As part of Clarkstown's overall plan to ensure proper handling of its solid waste and to enable the town to meet its guaranteed tonnage to the operator, Clarkstown enacted a flow control ordinance, Local Law 9.⁶³

The effect of Local Law 9 was to require all waste within Clarkstown to proceed at some point through the town's transfer station. Any person and any permitted recycling center were allowed to separate recyclables from the town's solid waste and sell such recyclables anywhere they chose.⁶⁴ The non-recyclable remainder,

58. Respondent's Brief at 8, *Carbone* (No. 92-1402).

59. *Id.*

60. *Town of Clarkstown v. C & A Carbone, Inc.*, 587 N.Y.S.2d 681, 683 (N.Y. App. Div. 1992).

61. *Carbone*, 114 S. Ct. at 1680.

62. *Id.*

63. Respondent's Brief at 9, *Carbone* (No. 92-1402). Section 3(C) of Local Law 9 provides that

[a]ll 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 . . . or to . . . recycling centers. . . . 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.

Local Laws, 1990, No. 9 of the Town of Clarkstown, New York, § 3(C), *reprinted in Carbone*, 114 S. Ct. at 1686.

64. Respondent's Brief at 9, *Carbone* (No. 92-1402).

however, had to be delivered to the Clarkstown transfer station,⁶⁵ and the normal tipping fee of \$81 per ton still applied, even though the waste had already been sorted. The Clarkstown facility also accepted waste from out-of-town and out-of-state sources,⁶⁶ which was subject to the same tipping fee.

C & A Carbone was a local Clarkstown recycler holding a special recycling center permit.⁶⁷ Under Local Law 9, C & A Carbone was authorized to receive Clarkstown's solid waste for the purpose of separating and selling any recyclables. Local Law 9 required C & A Carbone to deliver the non-recyclable residue to the town's transfer station.⁶⁸ C & A Carbone asserted that, rather than pay the \$81 per ton tipping fee charged by the Clarkstown transfer station, it could dispose of its non-recyclable residue elsewhere for \$70 per ton.⁶⁹

In 1991, Clarkstown officials discovered that C & A Carbone was illegally shipping non-recyclable residue out of town when a tractor-trailer owned by C & A Carbone and containing 46,440 pounds of solid waste was involved in a traffic accident.⁷⁰ A police investigation revealed that the load included non-recyclable garbage originating from Clarkstown, a neighboring town, and New Jersey.⁷¹ Police subsequently observed other tractor-trailers carrying non-recyclable residue leaving the C & A Carbone site, headed for locations in Illinois, Indiana, West Virginia, and Florida.⁷²

Clarkstown commenced proceedings against C & A Carbone in New York Supreme Court, seeking preliminary and permanent injunctions prohibiting violations of Local Law 9.⁷³ The company contended that the flow control ordinance violated the Commerce

65. Local Laws, 1990, No. 9 of the Town of Clarkstown, New York, § 3(C), *reprinted in Carbone*, 114 S. Ct. at 1686.

66. Respondent's Brief at 10, *Carbone* (No. 92-1402).

67. Initially, Clarkstown refused to issue a recycling permit to C & A Carbone. The town subsequently issued the permit pursuant to a New York Supreme Court order dated February 27, 1991. *Town of Clarkstown v. C & A Carbone, Inc.*, 587 N.Y.S.2d 681, 684 (N.Y. App. Div. 1992). In 1991, the New York Department of Environmental Conservation threatened to revoke C & A Carbone's permit upon finding permit violations. Respondent's Brief at 10, *Carbone* (No. 92-1402).

68. Local Laws, 1990, No. 9 of the Town of Clarkstown, New York, § 3(C), *reprinted in Carbone*, 114 S. Ct. at 1686.

69. *Town of Clarkstown v. C & A Carbone, Inc.*, 587 N.Y.S.2d 681, 682 (N.Y. App. Div. 1992).

70. *Id.* at 684.

71. *Id.*

72. *Id.*

73. *Id.*

Clause.⁷⁴ The New York Supreme Court granted summary judgment in favor of the town, finding Local Law 9 valid.⁷⁵ On appeal by C & A Carbone, the Appellate Division affirmed.⁷⁶ C & A Carbone then petitioned the U.S. Supreme Court, which granted certiorari.⁷⁷

B. *The Majority Opinion*

In a five to three decision, with one concurrence, the Supreme Court declared Local Law 9 invalid because it discriminated against interstate commerce in violation of the Commerce Clause.⁷⁸ The majority opinion, authored by Justice Kennedy, held that the flow control ordinance discriminated against interstate commerce on its face and was therefore subject to the virtually per se invalid test.⁷⁹

The majority found that, although the immediate effect of Local Law 9 was local, its economic effects reached across state lines.⁸⁰ First, the ordinance required local recyclers such as Carbone to pay the higher tipping rate charged by the Clarkstown facility. Since Carbone also processed waste from out of state, the higher tipping fee increased the cost for Carbone's out-of-state customers to dispose of their waste.⁸¹ Second, because the ordinance prevented all but the Clarkstown transfer station from processing Clarkstown's solid waste, the ordinance deprived out-of-state interests of access to the local market for solid waste processing.⁸² Justice Kennedy found these

74. *Id.*

75. *Id.* C & A Carbone instituted a separate action in the United States District Court for the Southern District of New York for injunctive relief and damages. The District Court dismissed C & A Carbone's antitrust claims but preliminarily enjoined the town from enforcing Local Law 9 as to out-of-town waste, finding it likely that this provision violated the Commerce Clause. *C & A Carbone, Inc. v. Town of Clarkstown*, 770 F. Supp. 848, 855 (S.D.N.Y. 1991). Following the New York Supreme Court's summary judgment order, the federal court dissolved its injunction. *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1681 (1994).

76. *Town of Clarkstown v. C & A Carbone, Inc.*, 587 N.Y.S.2d 681, 688 (N.Y. App. Div. 1992).

77. *C & A Carbone, Inc. v. Town of Clarkstown*, 113 S. Ct. 2411 (1993).

78. *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1680 (1994).

79. *Id.* at 1683.

80. *Id.* at 1681.

81. *Id.* The Court failed to recognize that an increase in the fees C & A Carbone charged its customers due to Clarkstown's higher tipping fees might, if above market price, result in Carbone's out-of-state customers finding a different recycler rather than paying the higher Carbone rates.

82. *Id.*

two economic effects to be “more than enough to bring the Clarkstown ordinance within the purview of the Commerce Clause.”⁸³

According to the majority, these two economic effects of Local Law 9 disadvantaged interstate commerce in favor of local business, making the ordinance a protectionist measure.⁸⁴ The majority opinion described the flow control ordinance as “hoard[ing] solid waste . . . for the benefit of the preferred processing facility.”⁸⁵ According to Justice Kennedy, the fact that the ordinance favored only one preferred facility rather than local interests in general “just makes the protectionist effect of the ordinance more acute.”⁸⁶

After finding that Clarkstown’s flow control ordinance discriminated against interstate commerce on its face, the majority applied the virtually per se invalid test, strictly scrutinizing the ordinance to determine if any alternative means existed to advance the town’s legitimate local interests.⁸⁷ The majority found that such alternatives were available.

The majority rejected arguments that the flow control ordinance was “necessary to ensure the safe handling and proper treatment of solid waste.”⁸⁸ Justice Kennedy suggested that the town could achieve these goals by enacting uniform safety regulations, which would allow facilities such as Carbone to process local waste while ensuring the town’s health and safety.⁸⁹ Furthermore, using a flow control ordinance to direct the town’s garbage away from out-of-town landfills that the town deemed harmful to the environment would impermissibly extend the “town’s police power beyond its jurisdictional bounds.”⁹⁰ Local governments may not use their regulatory power to attach restrictions on interstate commerce.⁹¹

Justice Kennedy suggested that Clarkstown’s true purpose for enacting Local Law 9 was to finance its transfer station.⁹² The Court declared that such a financial motive alone cannot justify a regulation

83. *Id.* at 1681.

84. *Id.* at 1682.

85. *Id.* at 1683.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

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

92. *Id.* at 1684.

that discriminates against interstate commerce.⁹³ Moreover, the Court determined that the town could have used an alternative scheme, such as subsidizing the facility through general tax revenues or municipal bonds, to ensure the financial viability of its transfer station without discriminating against interstate commerce.⁹⁴ Having found viable alternatives to Clarkstown's protectionist flow control ordinance, the Court declared Local Law 9 unconstitutional.⁹⁵

C. *The Concurrence*

Justice O'Connor delivered a concurring opinion in *Carbone* in which she ultimately agreed with the majority's conclusion that Clarkstown's Local Law 9 violated the Commerce Clause.⁹⁶ In her view, however, the flow control ordinance should have been evaluated under the balancing test rather than the virtually per se invalid test applied by the majority.⁹⁷

Justice O'Connor determined that the virtually per se invalid test did not apply to Local Law 9 because the ordinance did not discriminate against interstate commerce.⁹⁸ She pointed out that Clarkstown's flow control ordinance, unlike other regulations invalidated by the Court under the Commerce Clause, did not discriminate on the basis of geographic origin.⁹⁹ Local Law 9 did not treat in-town interests as a group more favorably than out-of-town or out-of-state economic interests.¹⁰⁰ Rather, in-town processors, such as C & A Carbone, and out-of-town processors were equally denied access to the local solid waste processing market; in-state and out-of-state interests were treated evenhandedly.¹⁰¹

Applying the balancing test explained in *Pike v. Bruce Church, Inc.*,¹⁰² Justice O'Connor nonetheless found the flow control ordinance unconstitutionally imposed an incidental burden on interstate commerce that clearly exceeded the local benefits.¹⁰³ Justice

93. *Id.*

94. *Id.*

95. *Id.* at 1680.

96. *Id.* at 1687 (O'Connor, J., concurring).

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

98. *Id.* at 1689 (O'Connor, J., concurring).

99. *Id.* at 1688-89 (O'Connor, J., concurring).

100. *Id.* at 1689 (O'Connor, J., concurring).

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

102. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

103. *Carbone*, 114 S. Ct. at 1691 (O'Connor, J., concurring); see *Pike*, 397 U.S. at 142.

O'Connor identified two local interests furthered by the flow control ordinance, and agreed with the majority that both these interests could have been achieved through alternative means with less impact on interstate commerce.¹⁰⁴

First, O'Connor found that the town had a legitimate interest in ensuring proper disposal of its solid waste.¹⁰⁵ The town could have protected this interest without discriminating against interstate commerce, however, by requiring all processors to comply with specific health and safety standards.¹⁰⁶

Second, O'Connor found that Local Law 9 was enacted to further the town's interest in securing the financial viability of its transfer station. However, the town could have achieved this goal with less impact on interstate commerce through the use of general tax revenues or municipal bonds.¹⁰⁷

Finally, Justice O'Connor found the incidental effect on interstate commerce of Clarkstown's flow control ordinance to be excessive. In so concluding, she considered not just the impact of Clarkstown's ordinance, but also the collective impact of the proliferation of flow control ordinances enacted throughout the country.¹⁰⁸ Such a proliferation, she determined, would severely impair the free movement of waste in the stream of commerce.¹⁰⁹ Especially problematic would be conflicts among flow control ordinances of different localities, which might make it impossible for a recycler such as C & A Carbone to comply with all applicable legislation.¹¹⁰ Justice O'Connor concluded that such "pervasive flow control would result in the type of balkanization the [Commerce] Clause is primarily intended to prevent."¹¹¹

D. *The Dissent*

The dissent, authored by Justice Souter, also concluded that the balancing test, rather than the virtually per se invalid test, should be applied to Clarkstown's Local Law 9.¹¹² Unlike Justice O'Connor,

104. *Carbone*, 114 S. Ct. at 1690 (O'Connor, J., concurring).

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

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

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

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

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

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

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

112. *Id.* at 1698-99 (Souter, J., dissenting).

however, Justice Souter found that the legitimate local interests furthered by the flow control ordinance outweighed any incidental impacts on interstate commerce.¹¹³

The dissent identified two characteristics of the Clarkstown ordinance that precluded application of the virtually per se invalid test. Justice Souter found that each of these factors operated to bring the ordinance "outside that class of tariff or protectionist measures that the Commerce Clause has traditionally been thought to bar States from enacting against each other."¹¹⁴

First, the law did not differentiate between all local providers of a service and all out-of-town providers, but rather between *one* local provider and all other providers, regardless of their location.¹¹⁵ This distinguished Clarkstown's ordinance from other ordinances held invalid by the Court, which favored in-town interests as a class over out-of-state interests based on geographic criteria.¹¹⁶ Unlike the Clarkstown ordinance, these other ordinances were struck down because they exemplified "the economic protectionism the dormant Commerce Clause jurisprudence aims to prevent."¹¹⁷ Although the Clarkstown ordinance was anti-competitive, the dissenting justices asserted it was not a protectionist measure.¹¹⁸

Justice Souter responded to the majority's claim that favoring one local facility is discriminatory.¹¹⁹ He acknowledged that the statute created a monopoly, but pointed out that this monopolistic effect had no constitutional significance.¹²⁰ The prohibition against monopolies arises from statutes, not from the Constitution.¹²¹ As Justice Souter explained, "[t]he only right to compete that [the Commerce Clause] protects is the right to compete on terms independent of one's location."¹²²

The second characteristic that the dissent argued rendered the virtually per se test inapplicable to Local Law 9 is that the one local entity favored under the ordinance is essentially a municipally-owned

113. See *id.* at 1699-1702 (Souter, J., dissenting).

114. *Id.* at 1692 (Souter, J., dissenting).

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

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

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

118. *Id.* at 1696 (Souter, J., dissenting).

119. *Id.* at 1683.

120. *Id.* at 1699 (Souter, J., dissenting).

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

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

facility.¹²³ The transfer station was built and administered under contract with the town of Clarkstown, and the town was to take complete ownership of the facility in five years.¹²⁴

Justice Souter distinguished laws favoring local private interests, which rarely serve a purpose other than economic protectionism, from laws favoring a governmental entity.¹²⁵ The government, in contrast to private economic actors, enters the market to further the public interest.¹²⁶ Consequently, laws favoring such a public actor are much more likely to serve a public interest independent of naked protectionism.¹²⁷ Because the justification for subjecting clearly discriminatory regulations to the virtually per se invalid test is the near certainty that such laws serve no legitimate, nonprotectionist purpose, laws favoring a governmental entity, for which a valid public interest can be presumed, should be subjected instead to the less searching balancing test.¹²⁸

The dissent concluded that, because these two characteristics militate against finding the ordinance discriminatory, the balancing test should be employed to weigh the law's incidental burdens on interstate commerce against the local benefits it confers.¹²⁹ In performing this balancing, the dissent considered "the nature of the burden on interstate commerce, the nature of the local interest, and the availability of alternative methods for advancing the local interest without hindering the national one."¹³⁰

The dissent found virtually no burden imposed on interstate commerce by the Clarkstown ordinance. Rather, the dissent asserted that any burden imposed by Local Law 9 fell only on Clarkstown's residents, who were forced to pay higher tipping fees.¹³¹ Justice Souter pointed out that the record failed to identify any out-of-state interest harmed by Local Law 9 or any disruption in the flow of Clarkstown garbage to out-of-state landfills.¹³² Any loss of business

123. *Id.* at 1696 (Souter, J., dissenting).

124. *Id.* at 1680.

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

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

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

128. *Id.* at 1698 (Souter, J., dissenting).

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

130. *Id.* at 1699 (Souter, J., dissenting) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 145 (1970)).

131. *Id.* at 1700 (Souter, J., dissenting).

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

by C & A Carbone or other Clarkstown businesses did not offend the Commerce Clause¹³³ and was justified by the benefits of the ordinance.¹³⁴

In addition to finding only a minimal burden imposed by the ordinance, the dissent concluded that Local Law 9 furthered substantial local interests.¹³⁵ Unlike the majority, the dissent determined that ensuring the financial viability of the transfer station was a considerable and legitimate local interest.¹³⁶ Justice Souter emphasized the need for assuring efficient and safe waste removal as well as the significant capital investment required to establish a transfer station.¹³⁷ He also recognized the limitations on a municipality's ability to finance such expenditures through debt or general tax revenues.¹³⁸ Justice Souter also pointed out an additional benefit not acknowledged by the majority: by allocating the burden of financing the transfer station among Clarkstown residents based on the quantity of waste each resident generated, the ordinance provided a direct and significant incentive for reducing waste generation.¹³⁹

Justice Souter found that the alternatives relied upon by the majority and the concurrence in striking down this ordinance were inadequate. As mentioned above, he questioned the ability of municipalities to finance solid waste facilities through general tax revenues or debt.¹⁴⁰ Furthermore, he asserted that such alternatives would themselves produce burdens on commerce equivalent to any produced by the flow control ordinance.¹⁴¹ At the same time, these alternatives would fail to provide an incentive for reducing waste generation, one of the benefits of Local Law 9.¹⁴² Thus, under the balancing test, the dissent concluded that Local Law 9 should withstand constitutional scrutiny under the dormant Commerce Clause.¹⁴³

133. *Id.* at 1701 (Souter, J., dissenting).

134. *Id.* at 1702 (Souter, J., dissenting).

135. *Id.* at 1701-02 (Souter, J., dissenting).

136. *Id.* at 1701 (Souter, J., dissenting).

137. *Id.* at 1701 (Souter, J., dissenting).

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

139. *Id.* at 1702 (Souter, J., dissenting).

140. *Id.* at 1701 (Souter, J., dissenting).

141. *Id.* at 1702 (Souter, J., dissenting).

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

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

III. CRITIQUE OF *CARBONE*

In concluding that the Clarkstown flow control ordinance violated the Commerce Clause, the *Carbone* Court applied the virtually per se invalid test instead of the more appropriate balancing test. In so doing, the Court greatly expanded the use of the virtually per se invalid test and departed from the purpose of the Commerce Clause—preventing states from enacting predatory protectionist measures. The ultimate result of this expansion will be the invalidation of legitimate and important local health and safety regulations that only incidentally impact interstate commerce.

Rather than finding the Clarkstown ordinance unconstitutional under the virtually per se invalid test, the Court should have weighed the importance of the legitimate governmental objectives achieved by the law against its burden on interstate commerce. Under this more flexible test, Clarkstown's Local Law 9 should have been found constitutional. The following discussion demonstrates the inapplicability of the virtually per se invalid test to the Clarkstown ordinance and applies the more appropriate balancing test.

A. *The Inapplicability of the Virtually Per Se Test To Carbone*

Neither of the two factors the Court has recognized as justifying use of the virtually per se invalid test are present in *Carbone*.¹⁴⁴ First, the ordinance is not a protectionist measure. Second, the costs of the ordinance are not imposed on unrepresented, out-of-state interests to the benefit of local interests. Because neither justification is present, *Carbone* represents an unwarranted expansion of the dormant Commerce Clause doctrine, an expansion that significantly departs from the purpose of the Commerce Clause itself.

First, Clarkstown's flow control ordinance is not a protectionist measure because it does not discriminate against out-of-state economic interests. This is evidenced by the lack of any geographic distinctions in the ordinance, both facially and as applied. As the dissent points out, all statutes mandating that goods be processed locally, which the Court has previously held invalid, treated local and out-of-state companies differently based solely on their geographic location.¹⁴⁵ In contrast, Local Law 9 equally disadvantages all waste

144. See *supra* notes 51-54 and accompanying text.

145. *Carbone*, 114 S. Ct. at 1694 (Souter, J., dissenting).

processors, with the exception of the town's one designated transfer station.¹⁴⁶ The fact that C & A Carbone, Inc., is a recycling center located in Clarkstown demonstrates that the ordinance disadvantaged local companies.

The majority asserted that the fact that the ordinance favors a single local facility "just makes the protectionist effect of the ordinance more acute."¹⁴⁷ In making this assertion, however, the Court misapprehends the term "protectionist" as well as the purpose of the Commerce Clause.

As the dissent persuasively points out, the Commerce Clause is not a free trade measure.¹⁴⁸ Rather, the Commerce Clause is concerned with partisan measures by one state to gain economic advantage over its neighbors.¹⁴⁹ The monopolistic nature of Local Law 9, without more, does not violate the dormant Commerce Clause.¹⁵⁰ Since Clarkstown's ordinance sought no such economic advantage, it should not trigger the application of the rigorous virtually per se invalid test under the dormant Commerce Clause.

The purpose of the Clarkstown law is also not protectionist. Clarkstown enacted the law pursuant to a consent decree with the New York State Department of Environmental Conservation, which required the town to build a transfer station capable of properly processing and shipping the town's solid waste.¹⁵¹ Local Law 9 was passed to finance this transfer station.¹⁵²

Additionally, providing for the safe handling of garbage is a traditional local governmental purpose recognized throughout the history of this country.¹⁵³ Congress implicitly recognized the authority of local governments over their waste when it enacted Subchapter IV of the Resource Conservation and Recovery Act (RCRA), governing "State or Regional Solid Waste Plans."¹⁵⁴ The stated objectives of this subchapter include achieving environmentally sound

146. *Id.* at 1695-96 (Souter, J., dissenting).

147. *Id.* at 1683.

148. *Id.* at 1699 (Souter, J., dissenting).

149. See THE FEDERALIST No. 42 (James Madison).

150. *Carbone*, 114 S. Ct. at 1699 (Souter, J., dissenting).

151. Respondent's Brief at 8, *Carbone* (No. 92-1402). The decree settled charges brought against the town for environmental violations stemming from the town's landfill, which the Clarkstown transfer station replaces. *Id.*

152. *Carbone*, 114 S. Ct. at 1697 (Souter, J., dissenting).

153. *Id.* at 1697 n.10 (Souter, J., dissenting).

154. Resource Conservation & Recovery Act (RCRA), 42 U.S.C. §§ 6941-6949 (1988).

disposal of solid waste through federal assistance to the states.¹⁵⁵ This subchapter also encourages states to develop solid waste management plans,¹⁵⁶ which in turn must ensure that local governments are not prohibited from “entering into long-term contracts for the supply of solid waste to resource recovery facilities . . . [or] for the operation of such facilities.”¹⁵⁷ These provisions of RCRA demonstrate that Congress contemplated that state and local governments would have authority to govern solid waste management in their regions.¹⁵⁸

As to the Court’s second justification for application of the virtually per se invalid test, here the regulation’s costs are not imposed on unrepresented, out-of-state interests. Clarkstown’s residents bear the full cost of the ordinance by paying higher tipping fees for their garbage.¹⁵⁹ Because the costs and benefits of Local Law 9 are borne by local residents, the town’s legislative process ensures that the law’s costs are justified by the resulting benefit to the public welfare. The ordinance should therefore be entitled to the customary deference courts give to legislative decisions.¹⁶⁰ The balancing test inherently provides this deference.

The heightened scrutiny provided under the virtually per se invalid test is justified only when the costs of a regulation are borne by unrepresented, out-of-state interests.¹⁶¹ The local legislature may fail to consider such external costs and therefore not fully evaluate the value of the enactment. Under such circumstances, courts impose the strictest scrutiny to ensure that the rights of these out-of-state interests have not been violated.¹⁶² By applying heightened scrutiny to the Clarkstown ordinance, however, the Court failed to recognize

155. *Id.* § 6941.

156. *Id.* § 6943.

157. *Id.* § 6943(a)(5).

158. Amicus argued that these provisions of RCRA authorize local flow control ordinances, thus making the dormant Commerce Clause arguments inoperative. Although not specifically addressed in the majority opinion, the Court implicitly rejected this argument by analyzing the ordinance under the dormant Commerce Clause doctrine. *See Carbone*, 114 S. Ct. at 1691-1692 (O’Connor, J., concurring).

159. *Carbone*, 114 S. Ct. at 1699 (Souter, J., dissenting).

160. *See, e.g., Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767 n.2 (1945); *Carbone*, 114 S. Ct. at 1689 (O’Connor, J., concurring); *ROTUNDA & NOWAK*, *supra* note 12, § 11.11.

161. *See, e.g., Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 444 n.18 (1978); *see ROTUNDA & NOWAK*, *supra* note 12, § 11.11.

162. *ROTUNDA & NOWAK*, *supra* note 12, § 11.11.

that both the costs and benefits of Local Law 9 were local. In this misapplication, the Court compromised both legislative discretion and federalist principles.

Prior to *Carbone*, the virtually per se invalid test applied only to state laws that *clearly* discriminated against out-of-state economic interests.¹⁶³ The attenuated definition of “discrimination” used by the Court in *Carbone* greatly expands the application of this test. The shortcoming of this expanded test is that it prevents courts from considering the import of the local governmental purpose involved or the degree of impact on interstate commerce. Vital, non-protectionist local legislation that has only an inconsequential impact on interstate commerce may therefore be held invalid under the Court’s logic in *Carbone*.

B. *Application of the Balancing Test To Carbone*

As recognized by the concurrence and the dissent, the appropriate test for evaluating the constitutionality of the Clarkstown ordinance is the balancing test articulated by the Court in *Pike v. Bruce Church, Inc.*¹⁶⁴ This test applies to statutes that do not discriminate against out-of-state economic interests and only incidentally affect interstate commerce.¹⁶⁵ Such laws are considered valid unless their burden on interstate commerce is “clearly excessive” in relation to their local benefits.¹⁶⁶ In applying this test, courts must consider the nature of the burden on interstate commerce,¹⁶⁷ the nature of the local interest involved, and whether an equally effective alternative with a lesser impact on interstate commerce exists.¹⁶⁸ As the dissent recognized, consideration of these characteristics of Clarkstown’s flow control ordinance reveals that the ordinance does not violate the Commerce Clause.¹⁶⁹

The extent of the burden placed on interstate commerce by Local Law 9 is minimal. As Justice Kennedy explained, “[t]he immediate effect of the ordinance is to direct local transport of solid waste to a

163. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan*, 112 S. Ct. 2019, 2023-24 (1992).

164. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

165. *See id.* at 142.

166. *Id.*

167. *See id.* at 145.

168. *Id.* at 142.

169. *Carbone*, 114 S. Ct. at 1692-93 (Souter, J., dissenting).

designated site within the local jurisdiction.”¹⁷⁰ Because local recyclers such as C & A Carbone are forced to pay the higher tipping fees charged by the Clarkstown transfer station, they may have to increase their prices¹⁷¹ or else suffer lower profits. If private recycling centers choose to increase prices in response to the higher tipping fees, they may lose customers to less expensive competitors who do not face Clarkstown’s high tipping fee. Thus, the result of the Clarkstown ordinance may well be an *increase* in business to out-of-state competitors. In this respect, the majority’s concerns about the negative impact Local Law 9 would have on interstate commerce appear to be unfounded.

As Justice Souter emphasized in his dissenting opinion, no evidence was presented that showed that any harm was done to any out-of-state interests by Local Law 9.¹⁷² Under this ordinance, the Clarkstown transfer station may send the waste it collects to any facility for treatment or disposal, and the transfer station does in fact send its solid waste to landfills in other states.¹⁷³ Thus, the interstate flow of solid waste cannot be said to be hampered by the ordinance. These circumstances demonstrate that Clarkstown’s flow control ordinance only minimally burdens interstate commerce.

At the same time, Local Law 9 furthers legitimate and substantial local governmental interests. The ordinance enabled Clarkstown to build and operate a transfer station, as the town was required to do by order of the New York State Department of Environmental Conservation.¹⁷⁴ The Clarkstown transfer station plays an important role in ensuring the safe handling of the town’s solid waste, a traditional and legitimate local governmental purpose.¹⁷⁵ The transfer station also ensures that recyclable materials are separated from the waste stream and safely recycled, furthering an important national policy established by Congress in RCRA.¹⁷⁶ Because the station is financed through tipping fees under Clarkstown’s ordinance, the price of the station is equitably borne by those who use it in proportion to their usage. This financing mechanism provides a

170. *Id.* at 1681.

171. *Id.*

172. *Id.* at 1700 (Souter, J., dissenting).

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

174. *Id.* at 1680.

175. *Id.* at 1697 n.10 (Souter, J., dissenting).

176. RCRA, 42 U.S.C. § 6941 (1988).

significant incentive for the town's residents to reduce their waste generation, thereby encouraging efficient use of resources, conserving diminishing landfill space, and preventing pollution, all of which are legitimate local interests.

Finally, no equally effective alternatives exist that would have a lesser impact on interstate commerce, despite the majority's finding to the contrary. Financing the transfer station through general tax revenues, as the *Carbone* Court suggests,¹⁷⁷ is not a viable alternative for two reasons. First, a tax increase would not achieve the pollution prevention objectives furthered by the flow control ordinance. Second, a general tax increase lacks the equity achieved by having local residents pay for the services they consume.

The Court's other suggested financing alternative is that Clarkstown issue municipal bonds to finance its transfer station.¹⁷⁸ In practice, however, flow control regulations are often required by lenders as a prerequisite to obtaining such bond financing, as the bonds are otherwise considered too risky.¹⁷⁹ Flow control ordinances assure an adequate quantity of waste for a solid waste management facility to maintain economic viability.¹⁸⁰ This minimum quantity is required because of the huge cost of environmental controls at such facilities and economies of scale in operating them.

Local Law 9 provides an effective and efficient means of ensuring safe and effective waste handling, recycling, and pollution prevention. The ordinance is a creative solution to Clarkstown's environmental problems and to the often enormous cost of local solid waste management. The Court should not apply the dormant Commerce Clause to squelch such innovative public policies.

IV. A WAKE-UP CALL TO CONGRESS

The *Carbone* decision threatens to create a financial crisis for many local governments.¹⁸¹ These communities have collectively

177. *Carbone*, 114 S. Ct. at 1684.

178. *Id.*

179. See Joan Biskupic, *Waste Hauling Rules Dumped; High Court Opinion Imperils Municipally Funded Disposal Plants*, WASHINGTON POST, May 17, 1994, at A8.

180. See, e.g., Timothy Phelps, *High Court Ruling on Trash; It Throws Out Local Laws That Ban Export Of Garbage*, NEWSDAY, May 17, 1994, available in LEXIS, Nexis Library, Papers File (discussing *Carbone's* impact on municipal solid waste incinerators, which demand a continuous source of fuel to operate efficiently and generate a reliable source of electricity).

181. See Nancy Peterson, *Trash-Disposal Case Is Ready to Go to Trial*, PHILADELPHIA INQUIRER, Sept. 11, 1994, at MD1, MD6-d.

invested billions of dollars in solid waste management facilities, often relying on flow control regulations to provide adequate revenue to service the debt they incur in building these facilities.¹⁸² *Carbone* places these financing arrangements, and the local governments that have relied on them, in jeopardy.¹⁸³ Congress may solve this problem, however, by quickly enacting specific legislation authorizing localities to implement flow control ordinances.¹⁸⁴

Local governments have traditionally been responsible for the safe handling of their communities' solid waste.¹⁸⁵ As a result of greater federal regulation, the costs of environmentally-sound solid waste management have increased substantially in recent years.¹⁸⁶ At the same time, currently available landfill space meeting environmental standards is limited. Under these circumstances, flow control provides an important tool for financing solid waste management.

Towns that have used flow control to finance solid waste management facilities or have undertaken financial obligations relying on future flow control authority now face financial distress because of *Carbone*.¹⁸⁷ Many local governments have used flow control regulations to guarantee adequate revenue to service municipal bonds.¹⁸⁸ Without this guarantee, many municipalities would be unable to issue bonds for construction of solid waste facilities.¹⁸⁹

Flow control ordinances have also been enacted by many local governments that have signed long-term "put-or-pay" contracts with waste disposal facilities.¹⁹⁰ These contracts require the towns to pay the facility the cost of handling a minimum quantity of waste, whether or not that quantity is actually delivered to the facility.¹⁹¹ These

182. *Id.* at MD6-d (paraphrasing Diane Shea of the National Association of Counties); 140 CONG. REC. H10299 (daily ed. Sept. 29, 1994) (statement of Rep. Swift).

183. HOUSE REPORT, *supra* note 4, at 8.

184. ROTUNDA & NOWAK, *supra* note 12, § 11.11; HOUSE REPORT, *supra* note 4, at 10.

185. HOUSE REPORT, *supra* note 4, at 6-7; 140 CONG. REC. H10298 (daily ed. Sept. 29, 1994) (statement of Rep. Swift).

186. HOUSE REPORT, *supra* note 4, at 7; 140 CONG. REC. H10298 (daily ed. Sept. 29, 1994) (statement of Rep. Swift).

187. Indeed, an estimated \$14 billion in outstanding municipal bonds is jeopardized as a result of *Carbone*. 140 CONG. REC. H10299 (daily ed. Sept. 29, 1994) (statement of Rep. Swift).

188. HOUSE REPORT, *supra* note 4, at 7.

189. Biskupic, *supra* note 179, at A8.

190. 140 CONG. REC. H10300 (daily ed. Sept. 29, 1994) (statement of Rep. Snowe). In the state of Maine alone, 160 municipalities have signed such agreements with the understanding that they would be able to utilize flow control to meet their obligations. *Id.*

191. *Id.*

towns now "face the prospect of having to meet expensive contractual obligations without having the regulatory authority to guarantee delivery of the required amount of waste."¹⁹²

In addition to providing financial support for state-of-the-art solid waste handling and disposal, flow control is a critical tool for integrated waste management. In RCRA, Congress encouraged states to develop comprehensive solid waste management plans.¹⁹³ These integrated plans often "involve components, such as curbside recycling and household hazardous waste pickup, that are not economically self-sustaining."¹⁹⁴ Towns use the guaranteed revenues provided by flow control authority to finance these expensive and unprofitable public services.¹⁹⁵

One example of an integrated waste management plan is that of Onondaga County, California. There, the town combines a \$96 per ton tipping fee with flow control to finance its waste management activities.¹⁹⁶ Of the \$96, \$40 covers the cost of solid waste disposal.¹⁹⁷ The remaining \$56 per ton, 60% of the tipping fee, is used to finance programs such as recycling, composting, source reduction, and environmental education.¹⁹⁸ Without flow control, the county could not collect the high tipping fee that finances its integrated waste management program.¹⁹⁹ As Diane Shea of the National Association of Counties explained, "If you can't control the part of the system that makes money, you can't do the rest such as recycling. . . . [F]low control is the linchpin for the entire solid-waste system."²⁰⁰

Congress has enacted extensive environmental legislation that has pushed up the cost of solid waste management, leaving implementation to states and local governments.²⁰¹ By authorizing flow control, Congress would give back to states and local governments the tool they need to finance these costly environmental protections.

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192. *Id.*

193. HOUSE REPORT, *supra* note 4, at 7.

194. HOUSE REPORT, *supra* note 4, at 8.

195. HOUSE REPORT, *supra* note 4, at 8.

196. HOUSE ENERGY & COMMERCE COMM., FLOW CONTROL COMPROMISE PROPOSAL BACKGROUND INFORMATION, 103d Cong., 2d Sess. tab 6 (1994).

197. *Id.*

198. *Id.*

199. This is because Onondaga County would have to compete with private landfills such as that used by Orange County, which charges a tipping fee of \$60 per ton. *See id.*

200. Petersen, *supra* note 181, at MD6-d.

201. *See* 140 CONG. REC. H10298 (daily ed. Sept. 29, 1994) (statement of Rep. Swift).

During the 103d Congress, the House passed a bill, House Bill 4683,²⁰² that would have amended RCRA²⁰³ specifically to authorize state control over the transportation, management, and disposal of municipal solid waste.²⁰⁴ The amendment would have grandfathered in all existing flow control ordinances,²⁰⁵ thus protecting communities from financial crisis. Recognizing that flow control plays an important role in integrated solid waste management and that it would be inequitable to deny this tool to communities that have not yet enacted flow control ordinances, the bill also included procedures for towns to enact new flow control regulations in the future.²⁰⁶

The procedures established by the House bill addressed a number of criticisms of past flow control ordinances. First, the bill required competitive bidding for contracts to provide solid waste management services that incorporate flow control.²⁰⁷ Thus, the bill provided a means of price competition in the solid waste management industry even with flow control.²⁰⁸ Second, the bill excluded recyclable materials from flow control unless voluntarily given to the local government by the generator, so as not to stifle the market in recycling.²⁰⁹ Similarly, the bill prohibited subjecting commercial solid waste to new flow control ordinances.²¹⁰ This would leave commercial entities free to find the facility that best meets the environmental requirements of their waste.

202. H.R. 4683, 103d Cong., 2d Sess. (1994). The Senate failed to pass a similar bill.

203. RCRA, 42 U.S.C. §§ 6941-6949 (1988).

204. As discussed above, Congress has the power to authorize states to perform actions that would otherwise contravene the Commerce Clause. Section 4011(h) of the House Bill states that, "[t]he exercise of flow control authority in compliance with this section by a State or qualified political subdivision shall itself be considered a reasonable regulation of commerce and shall not itself be considered as imposing an undue burden on or otherwise impairing, restraining, or discriminating against interstate commerce." H.R. 4683, § 4011(h) (1994).

205. *Id.* § 4011(a)(2).

206. *See* 140 CONG. REC. H10298-310 (daily ed. Sept. 29, 1994).

207. H.R. 4683, § 4011(c).

208. 140 CONG. REC. H10302 (daily ed. Sept. 29, 1994) (statement of Rep. McMillan). Under the current prohibition of flow control ordinances, towns have considered collecting garbage themselves to ensure that waste goes to the designated facility without resorting to flow control. Ellen Yan, *Towns' Trash-Talk*, *NEWSDAY*, May 22, 1994, available in LEXIS, Nexis Library, Papers File. Such an outcome decreases competition in the waste management industry.

209. H.R. 4683, § 4011(b).

210. *Id.* § 4011(a)(1). Garbage generated by commercial entities that was subject to flow control before the *Carbone* decision may continue to be subject to flow control. *Id.* § 4011(a)(2).

One major criticism of flow control, even under the procedures mandated by the House bill, is that such ordinances facilitate solid waste incinerators.²¹¹ These incinerators, which burn municipal solid waste to generate energy, require a huge capital investment and a steady supply of waste to operate efficiently.²¹² Flow control ordinances satisfy both these needs by providing the necessary fuel and by allowing the town to set a tipping fee sufficient to finance the operation.

Many environmental groups have criticized incinerators out of concern for the dioxin emissions generated by the process.²¹³ Because they feel that flow control ordinances encourage incineration, these groups have also opposed flow control regulations.²¹⁴ The better solution to these legitimate concerns, however, is stricter regulation of incinerators, not prohibition of flow control. If used appropriately, flow control can play a significant role in facilitating recycling, household hazardous waste separation, composting, and other important environmental protection.

Congress should immediately pass legislation similar to House Bill 4683 to prevent the potentially significant adverse effects of the *Carbone* decision. The bill would provide crucial relief to towns that currently rely on flow control and would prevent a financial crisis for these communities. In addition, the bill gives local governments the tool they need to undertake environmentally sound, comprehensive, and financially feasible waste management.

CONCLUSION

The Supreme Court's decision in *Carbone* invalidates flow control ordinances throughout the United States. As a result, local governments that have relied on flow control regulations to finance new waste control facilities now face a financial crisis.²¹⁵ Without the revenue provided by flow control, towns may be forced to scale back their waste management services. Old, inefficient, and unsafe waste management facilities may continue to be used. Important recycling, source reduction, and household hazardous waste collection programs may also have to be eliminated or scaled down. The result will be

211. 140 CONG. REC. H10301 (daily ed. Sept. 29, 1994) (statement of Rep. Richardson).

212. See Phelps, *supra* note 180.

213. 140 CONG. REC. H10301 (daily ed. Sept. 29, 1994) (statement of Rep. Richardson).

214. *Id.*

215. HOUSE REPORT, *supra* note 4, at 8.

degradation of environmental quality, or at least a halt to improvements currently being made.

As one town's environmental commissioner has warned, low-cost private landfills will eventually fill up and close.²¹⁶ Then, "everybody's going to be knocking on local government's doors . . . reminding them they have an obligation to take [the garbage]."²¹⁷

Beyond these severe impacts on solid waste management, *Carbone's* most lasting impact may be on the dormant Commerce Clause doctrine itself. In *Carbone*, the Supreme Court expanded the virtually per se invalid test by applying it to local laws that have only an attenuated impact on interstate commerce. As a result, important local regulations with only minimal impacts on interstate commerce may be held invalid. The *Carbone* decision fails to give sufficient consideration to the states' legitimate authority over health and safety. In so doing, the Court tramples on state sovereignty. More importantly, valuable regulations that protect the public welfare may never be implemented.

216. Phelps, *supra* note 180 (quoting Peter Scully, environmental commissioner for Islip, New York). These landfills often lack the significant environmental controls of municipally-affiliated landfills.

217. Phelps, *supra* note 180.

