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THE FLOW CONTROL OF SOLID WASTE AND THE COMMERCE CLAUSE: CARBONE AND ITS PROGENY

JOHN TURNERT

I. INTRODUCTION

FOR well over a century, the Commerce Clause of the United States Constitution\(^1\) has served as the basis for challenges to local laws that discriminate against the import or export of commodities. Courts have recently been asked to determine the legality of flow control measures. Flow control laws and regulations seek to ensure that solid waste or recyclables are directed to one or more designated facilities. This Comment discusses flow control jurisprudence and describes the standards utilized by courts in evaluating the legitimacy of local flow control requirements.

II. THE EFFECT OF THE COMMERCE CLAUSE ON WASTE IMPORT AND EXPORT

Under the Commerce Clause,\(^2\) states and localities are barred from imposing or enforcing measures that discriminate against, or unduly impede protected commerce.\(^3\) It is now well-established that the transportation of waste is a protected activity under the

\(\text{\footnotesize \#1} \) Divisional Vice-President, Browning-Ferris Industries. J.D., Vanderbilt University (1981); B.S., University of Alabama (1978). Mr. Turner was a panelist at the Villanova Environmental Law Journal Symposium, \textit{Solid Waste in Interstate Commerce: Federal, State, and Local Roles}. This Article develops and refines many of the points set forth during Mr. Turner’s presentation. The opinions expressed in this article are those of the author.

1. U.S. CONST. art. I, § 8, cl. 3.

2. Id. The Commerce Clause provides that Congress shall have the power “\[t\]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Id.


(203)
Commerce Clause. The Commerce Clause, by vesting the power to regulate interstate commerce in Congress, was intended to prevent "economic Balkanization."

A state or local measure that discriminates against interstate commerce either on its face or in practical effect is subject to a strict standard — the discriminatory measure can survive only if it serves a legitimate local purpose and is the least discriminatory alternative to achieve local goals. The United States Supreme Court has also determined that a state or local measure that demonstrates simple economic protectionism is subject to a "virtually per se rule of invalidity." Even a measure that does not explicitly or in practical effect discriminate, or fails to evidence economic protectionism, may be invalid if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." Alexander Hamilton once warned that, without a unifying constitution and a federal government devoted to the goal of uniformity, "the competition of Commerce would be [a] fruitful source of contention. . . . Each state, or separate confederacy, would pursue a system of commercial policy peculiar to itself. This would beget discontent." Hamilton's fear was shared by many of the founders, who drafted a provision during the Constitutional Convention which granted Congress plenary authority to "regulate Commerce . . . among the several States." The Commerce Clause is not sim-

state commerce burdens that are "clearly excessive in relation to the putative local benefits." Id.


6. Id. at 336. See Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986) ("When a state statute . . . discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry."). For a brief review of the standards utilized by courts in examining "dormant" Commerce Clause challenges, see, e.g., Daniel A. Farber & Robert E. Hudec, Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause, 47 VAND. L. REV. 1401 (1994); Michael E. Smith, State Discriminations Against Interstate Commerce, 74 CAL. L. REV. 1203 (1986).


8. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). When conducting this analysis, which has become known as the "Pike test," "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." Id.


ply an affirmative grant of power, it is also an implicit limitation upon the power of states to interfere with interstate commerce. As the United States Supreme Court stated in *McLeod v. J.E. Delworth Co.*, the "purpose of the Commerce Clause was to create an area of free trade among the several States."

The Commerce Clause has consistently been viewed as prohibiting state actions which seek to impede the import or export of waste. In *Fort Gratiot*, the United States Supreme Court rejected Michigan's primary defense that "the Waste Import Restrictions — unlike the New Jersey prohibition on the importation of solid waste — do not discriminate against interstate commerce on their face or in effect because they treat waste from other Michigan counties no differently than waste from other States." The Court reasoned that "our prior cases teach that a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself." The majority concluded that Michigan sought to "authorize each of its 83 counties to isolate itself from the national economy" by "afford[ing] local waste producers complete protection from competi-

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11. 322 U.S. 327 (1944).

15. Id.
tion from out-of-state waste producers who seek to use local waste disposal areas.”\textsuperscript{16} The Court also referred to its recent decision, \textit{Wyoming v. Oklahoma},\textsuperscript{17} in which it concluded that an Oklahoma law which expressly reserves a segment of the Oklahoma coal market for Oklahoma-mined coal, to the exclusion of other states, violates the Commerce Clause even though it sets aside only a small portion of the Oklahoma coal market. “The volume of commerce affected measures only the \textit{extent} of the discrimination; it is of no relevance to the determination whether a state has discriminated against interstate commerce.”\textsuperscript{18}

\textit{Fort Gratiot} was, in large measure, a test of the present vitality of the \textit{Dean Milk} doctrine. In \textit{Dean Milk Co. v. City of Madison},\textsuperscript{19} the Court dealt with a Madison, Wisconsin ordinance that barred milk producers from selling milk in that city if the milk was not pasteurized within five miles of the city-center. The five mile limitation effectively prevented Illinois producers from competing in the Madison market against local producers.\textsuperscript{20} The majority declared that “[i]n thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce.”\textsuperscript{21} In so holding, the Court deemed it “immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce.”\textsuperscript{22}

III. \textbf{Waste Flow Control Requirements: The Controversy}

The flow control of solid waste (municipal solid waste and, more infrequently, recyclables) to designated facilities has precipitated numerous lawsuits and requests for congressional oversight. Flow control mandates frequently arise through the enactment of local ordinances that require the delivery by waste haulers of collected materials to one or more designated facilities.\textsuperscript{23} A recent study conducted by the National Economic Research Associates

\begin{itemize}
  \item 16. \textit{Id.} at 361. \textit{See also} Hughes v. Oklahoma, 441 U.S. 322, 336 (1979) (state or local measure may discriminate “either on its face or in practical effect”).
  \item 18. \textit{Id.} at 455.
  \item 20. \textit{Id.} at 352.
  \item 21. \textit{Id.} at 354 (footnote omitted).
  \item 22. \textit{Id.} at 354 n.4 (citing Brimmer v. Rebman, 138 U.S. 78 (1891)).
\end{itemize}
(NERA) summarized the historical development of flow control mandates.24 The Environmental Protection Agency (EPA) has determined that "[t]here is no evidence that flow control either positively or negatively impacts the statutorily assured level of environmental protection, because the underlying regulatory requirements are controlling."25 The United States Supreme Court

24. According to NERA's flow control study,

Flow control refers to local laws by which local governments direct that the municipal solid waste (including residential, commercial, and industrial) generated within their jurisdictions be disposed of and/or processed at designated facilities. Local governments have been imposing such controls at least since the early 1970's, principally for two reasons — to protect sizeable investments in waste facilities and to generate fee revenues to finance solid waste programs. Many local governments built and/or financed large scale waste management facilities which require substantial minimum waste flows to cover costs. Many of these facilities, for example, are resource recovery plants which operate under contracts to provide steam for industrial processes and electricity generation. Some of these plants would not be economic without these contracts, and the contracts require that they provide a specific amount of steam requiring a specific amount of waste. Consequently, local governments need to direct waste to these plants to protect their investments. In fact, according to the Resource Recovery Yearbook about 48% of the resource recovery plants constructed since 1964 benefit from flow controls. More recently, local governments have financed and built transfer stations and material recovery facilities. These facilities, especially the latter, also require substantial waste flows to be economic. Public landfills have been less reliant on flow controls, although economies of scale may encourage larger facilities. Some local governments also have turned to flow control to generate fee revenues often used to finance waste management programs such as recycling and household hazardous waste. Without flow control, waste generators could avoid such fees by turning to alternative disposal options in other jurisdictions.

Although flow controls have been imposed for over 20 years, they have only recently become a serious concern as the variety and accessibility of alternatives has increased. The private sector responded to rapidly rising disposal costs in the mid-1980s to the early 1990s by building more disposal capacity. While the number of landfills in the U.S. has dropped rather dramatically, landfill capacity has not. In fact, capacity has been increasing in many regions of the country. As a result, disposal charges are no longer increasing, but rather falling as disposal facilities compete for business. In addition, the disparity has been exacerbated by local governments relying on flow control to finance recycling and other waste management programs. Local governments have imposed fees and surcharges at flow control facilities. Third, some governments became more aggressive regarding flow control as waste streams diminished at least in part because of government regulations and programs. Paper recycling, for example, has eliminated an important fuel stock from resource recovery plants.

25. United States Environmental Protection Agency, Office of Solid Waste, Municipal and Solid Waste Division, Report to Congress, Flow Controls and Municipal Solid Waste II-6 (March 1995). EPA emphasized that "[t]here are no data showing that flow controls are essential either for the develop-
recently invalidated a Clarkstown, New York flow control ordinance pursuant to the Commerce Clause.²⁶

Flow control opponents point out that facility designation requirements are not necessary to ensure that states and localities can adhere to state-mandated, but not federally required, solid waste reduction or recycling goals. Moreover, there has been a pronounced increase in disposal and incineration capacity in many areas. Upgrading and expanding of local sites, a revolution in transportation, and the growth of a transfer station infrastructure have all led to a competitive market in which a community can contract for long-term disposal at very advantageous rates. Private companies strive to become the low-cost provider in their field. Municipalities that enter into partnerships with private companies can enjoy financial benefits and still meet their obligations to constituents.

Opponents argue, moreover, that the proliferation of flow control requirements has led to an increased number of facilities that are inefficient and not cost-effective. If every municipality instituted flow control measures and sited its own landfill, recyclery, and composting facility, there would be a great misallocation of resources and an undesirable environmental outcome. Flow control measures also often result in a significant "takings" issue, if not in the constitutional sense, at least from the standpoint of fairness. This issue can arise in the context of, and affect, both public and private facilities that are already in existence. When one jurisdiction establishes flow control, other facilities immediately have current and potential customer assets pulled away. Those customer assets could have been critical to the economic viability of the operation.²⁷ Opponents also contend, in light of EPA's findings, that there is no demonstrated correlation between flow control and environmentally protective waste disposal, recycling, or processing.²⁸

- ²⁷ Flow control requirements add about $10 per ton or 33% to the average landfill disposal charge, or "tipping fee," nationwide, about $11.50 per ton or 23% to the average incinerator disposal charge nationwide, and about $14 per ton or 33% to the average transfer station disposal charge nationwide. NERA Study, supra note 24, at 1-2.
- ²⁸ Flow control opponents argue that:
  [B]y mandating that local waste haulers use particular management facilities, the haulers are prevented from using more environmentally sound alternatives that may exist elsewhere. The Sierra Club and other environmental groups have rightly pointed out that such regulations often in-
Flow control proponents, on the other hand, point primarily to the possibility that municipal bonds may be downgraded if waste deliveries to flow control-dependent facilities are not sustained. These proponents have asked Congress to utilize its plenary authority to immunize certain flow control requirements from the reach of the dormant Commerce Clause.  

While there are numerous arguments on both sides of the debate, the purpose of this Comment is not to discuss political, envi-

hhibit the development of alternative waste management options and, in some cases, disrupt preexisting waste recovery and recycling efforts. Flow control laws unnecessarily inhibit the ability of recyclers and other ecological entrepreneurs to compete in the marketplace and provide more economical waste management options. For that reason, and because flow control has frequently been used to finance costly and inefficient incinerators, flow control is opposed by the New York Public Interest Research Group, the National Resources Defense Council, the National Wildlife Federation, Clean Water Action, and Greenpeace, among others. Those groups maintain that in practice it is likely that the environmental costs of flow control outweigh its benefits.

Jonathan H. Adler, *The Failure of Flow Control*, 18 Regulation 11, 13 (1995). See also Tom Arrandale, *The Gold in the Garbage*, Governing, Jan. 1996, at 56 ("To the mavericks' way of thinking, flow control ordinances amount to desperate measures by old-guard agencies that cling to the illusion that they can engineer their way out of solid waste problems . . . . Rather than make risky capital investments, cities and counties should develop more flexible strategies that take advantage of an expanding array of private waste-hauling ventures.").


In order for federal law to preclude application of the dormant Commerce Clause, however, the authorizing language must be "expressly stated" and "unmistakably clear." *South-Central Timber*, 467 U.S. at 91. The Court has specifically noted that "the fact that [the State] policy appears to be consistent with the federal policy — or even that state policy furthers the goals that Congress had in mind — is an insufficient indicium of congressional intent." *Id.* at 83. The Court has further emphasized that only those "[s]tate actions that Congress plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp*, 472 U.S. at 174. See New England Power Co. v. New Hampshire, 455 U.S. 331, 340-41 (1982) (explicit "savings" clause did not exempt state law from Constitution).
ronmental, or economic concerns, but rather to describe the manner in which the Commerce Clause has been employed in contested proceedings. Regardless of the outcome of the debate in Congress, the Commerce Clause continues to act as a barrier to protectionist, anti-competitive legislation and regulation. This Comment describes the process that courts should employ in examining claims brought pursuant to the Commerce Clause regarding flow control mandates.

IV. FLOW CONTROL DECISIONS BEFORE CARBONE

Before the Court's decision in Carbone, there were strong indications that the Supreme Court would invalidate flow control requirements. Flow control restrictions are difficult to justify in light of the Court's decisions in Fort Gratiot and Dean Milk. The difficulty arises since flow control requirements frequently constitute absolute restrictions on the export or import of waste beyond the boundaries of the city, county, or planning area and, by implication, the state. Export prohibitions have frequently been condemned by the Supreme Court, and although the Court has never attempted to distinguish between import and export prohibitions, it has frequently emphasized that an export restriction is as harmful to commerce as an import limitation.30

Prohibited export embargoes tend to possess three characteristics: (1) they set restrictions on the basis of state lines or other geographical boundaries; (2) they are designed to improve the position of a local economic interest; and (3) they have a protectionist effect.31 The Supreme Court's pre-Carbone decisions did not provide a basis for distinguishing between statewide and county-implemented restrictions on export or import.32 Like the ordinance


A local law that favors those within the city or county over those without it, burdens some direct competitors within the same state. The Court has properly treated these laws as categorically discriminatory and protectionist. These laws have the same tendency toward economic isolation as a statewide tariff. In theory, competitors outside the city but within the state provide some political check on protectionism. In practice, however, it is likely that their influence is channeled into creating similar trade duphies in their own cities or counties. Moreover, all protectionist
invalidated in *Dean Milk* and the Michigan waste statute struck down in *Fort Gratiot*, flow control requirements — through either a statewide planning process that imposes flow control mandates or endorses local requirements or pursuant to city or county-specific mandates — frequently categorically discriminate against protected commerce. Flow control measures may provide, expressly or implicitly, that no waste generated within the jurisdiction can be exported, except to the extent specifically tolerated. The mere fact that the requirement also restricts the flow of waste within the state or political subdivision is, as the Court noted in *Fort Gratiot*, simply irrelevant.33

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legislation benefits only favored classes of locals over outside competitors or other unorganized groups. There is no reason why cities or other local governments should be exempted from the antidiscrimination rule because of in-state losers.

The Court's decision in *Dean Milk Co. v. City of Madison* illustrates both the definition of categorical discrimination and its application to local ordinances. In *Dean Milk*, a city ordinance did not distinguish on its face between local and interstate commerce; it burdened all non-local milk producers, within and without the state. The Court nevertheless held that it discriminated against interstate commerce. This result was correct because the ordinance, like a tariff, categorically discriminated against interstate commerce.

Likewise, the Court has consistently struck down state and local "drummer" taxes on local agents of outside producers. These did not facially discriminate against imports, but had precisely the same effect as tariffs.

*Id.* at 80-81 (footnotes omitted). Professor Donald H. Regan draws the same conclusion: "A government cannot validate discrimination against a protected class . . . simply by subjecting some members of the nonprotected class to the same burden." Regan, *supra* note 31, at 1230.

33. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992). As Professor Donald H. Regan noted, in explaining the *Dean Milk* decision:

As to the fact that the geographical area does not even begin to approximate the State of Wisconsin, but rather approximates the County of Dane, and the fact that many Wisconsin milk companies are excluded from dealing in Madison quite as much as the Illinois company Dean Milk, [Justice] Clark expressly and rightly says that is irrelevant. A government cannot validate discrimination against a protected class (in this case non-Wisconsin firms) simply by subjecting some members of the nonprotected class to the same burden. (A state could not conserve gas by closing gas stations to all blacks and to whites with odd numbered license plates.) It also bears mention that if all the cities in Wisconsin did what Madison has done, then the whole state would be closed in effect to foreign milk. The entire Wisconsin market would be reserved for Wisconsin processors (and incidentally partitioned among them).

Regan, *supra* note 31, at 1230 (footnotes omitted). State law occasionally provides a basis for invalidating restrictions on the import or export of waste. The Tennessee Supreme Court recently held that the state environmental agency lacked specific statutory authority for the imposition of a "service area" limitation, i.e., a listing of counties that could deliver waste to the facility, in the permit for a solid
Earlier United States Supreme Court decisions suggested that the typical flow control requirement was inconsistent with the Commerce Clause.\(^{34}\) Several lower federal courts, furthermore, had addressed flow control requirements and had invalidated them prior to the Supreme Court's decision in *Carbone*. The most significant of the pre-*Carbone* decisions are *Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp.*,\(^{35}\) and *Waste Systems Corp. v. County of Martin*.\(^{36}\)

In an effort to increase commercial waste volumes at its state-owned landfill, the Central Landfill (CLF), Rhode Island adopted a regulation that provided that all solid waste originating in, or collected in, Rhode Island must be disposed of at licensed facilities.\(^{37}\) The regulation had the effect of preventing the plaintiff hauling company from taking waste to facilities in Massachusetts and Maine.\(^{38}\) Rhode Island attempted to defend the measure by claiming that the regulation did not discriminate because it applied to both in-state and out-of-state haulers.\(^{39}\) In addition, the state argued that a significant in-state burden fell upon generators, who would pay increased tipping fees at the state's landfill.\(^{40}\) Significantly, the court ultimately concluded that the measure was unconstitutional because

its immediate purpose and effect [was] to increase RISWMC's revenues by preventing commercially gener-

\(^{34}\) See, e.g., New Energy Co. of Indiana *v. Limbach*, 486 U.S. 269, 270 (1988) ("Where discrimination is patent ... neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown."); Bacchus Imports, Ltd. *v. Dias*, 468 U.S. 263 (1984) (invalidating special exemption from state liquor tax for locally produced alcoholic beverages, even though other locally produced beverages were subject to tax); United Bldg. & Constr. Trades Council *v. Mayor of Camden*, 465 U.S. 208, 235 n.16 (1984) (Blackmun, J., dissenting) ("[T]he Commerce Clause entails a substantive policy of unimpeded interstate commerce that is impermissibly undermined by local protectionism even when intrastate commerce is penalized as well.").

In *United Bldg. & Constr. Trades Council*, the majority opinion applied the Privileges and Immunities Clause to invalidate a Camden, New Jersey ordinance that imposed a resident-hiring preference for government jobs. The Court noted that an "exemption for all classifications that are less than statewide would provide States with a simple means of evading the strictures of the Privileges and Immunities Clause." Id. at 218 n.9.

\(^{35}\) 770 F. Supp. 775 (D.R.I.), *aff'd per curiam*, 947 F.2d 1004 (1st Cir. 1991).


\(^{37}\) *DeVito*, 770 F. Supp. at 782.

\(^{38}\) *Id.*

\(^{39}\) *Id.*

\(^{40}\) *Id.*
ated waste from being transported out of Rhode Island for disposal and requiring instead that it be deposited at the CLF. The regulation obviously was enacted in response to statistics revealing a steady decline in the quantity of commercial waste deposited at the CLF since 1987.41

The court also found that the only potentially justifiable reason for the regulation was the state’s goal of constructing a waste-to-energy facility.42 It concluded, however, that the project was neither guaranteed nor financially dependent upon flow control requirements.43 More importantly, the court reasoned that flow control was not the “least burdensome” approach to financing and construction.44 Noting that an absolute ban on importation or exportation is the single greatest indicator of the presence of illegal economic protectionism, the court invalidated the regulation.45

In Waste Systems Corp. v. County of Martin, a federal district court held that “designation” measures (i.e., flow control) adopted by two Minnesota counties violated the Commerce Clause.46 The counties, members of a solid waste management board, had developed a publicly-owned composting facility that was to accommodate all of the compostable waste generated in the counties.47 The district court’s opinion was upheld in a brief decision issued by the United

41. Id. at 781.
42. DeVito Trucking, 770 F. Supp. at 785.
43. Id.
44. Id.
45. Id.
46. 784 F. Supp. 641 (D. Minn. 1992), aff’d, 985 F.2d 1381 (8th Cir. 1993). In Waste Systems, the district court noted that the requirements were “strikingly similar” to the measure invalidated in DeVito. Id. at 644-45. As a result, the district court, emphasizing that “[t]he Ordinances impose far more than an incidental burden on interstate commerce,” struck down the flow control mandates:

The local purpose of insuring the financial viability of Prairieland [the composting facility] is not the type of compelling purpose which permits interference with interstate commerce. Prairieland has expressed an ability to survive regardless of the tipping fee revenue. The court agrees. As an alternative, the Counties could offer competitive tipping fees to ensure that the necessary waste stream is available. The difference between the market tipping fee and the cost to run the Facility could be borne by the Counties. As the DeVito court held, “while construction of a [composting facility] may be a legitimate local activity, not every means of achieving that purpose is therefore legitimate.” The Prairieland Facility may be an improvement in local waste disposal, however, financing that “good idea” on the back of interstate commerce is improper. Therefore, this court finds the Designation Ordinances are invalid under the Commerce Clause.

Id. at 645 (citations omitted).
States Court of Appeals for the Eighth Circuit. The Eighth Circuit upheld the district court's ruling, noting that the Ordinances failed to regulate even-handedly even though they included an exemption for resource recovery facilities that could be granted only if "the exclusion would not impair the financial viability of the [public] Facility." The court stressed that:

The provision regarding application for exemption is illusory. There presently are no resource recovery facilities within reasonable hauling distance of the Counties that qualify for exclusion, and the cost of constructing such a plant is astronomical, as the $8,000,000 price tag of the Plant demonstrates. As a result, the likelihood that a resource recovery plant would apply for an exclusion is virtually nonexistent.

In Container Corp. of Carolina v. Mecklenburg County, a federal district court granted an injunction prohibiting the enforcement of a flow control ordinance in the most populous county in North Carolina. Container Corp. of Carolina (CCC), the landfill operator challenging the ordinance, argued that the ordinance prevented CCC from disposing of certain wastes generated in Mecklenburg County at its landfill in South Carolina. CCC demonstrated that it served over 7,500 residential and commercial customers in Mecklenburg County, and that it dispatched more than 50 trucks to the area on a daily basis. Additionally, CCC collected roughly 10,000 tons of solid waste per month in Mecklenburg County and its annual revenues from these collection services were in excess of $12 million. The president of the CCC's South Carolina landfill operation testified that it "was 'debatable' whether [the facility] could stay in business without the ability to receive the solid waste generated in Mecklenburg County, since approximately 50-60% of the

48. 985 F.2d 1381 (8th Cir. 1993).
49. Id.
50. Id. at 1387. Commentators argue that Waste Systems was wrongly decided because the market participant doctrine was applicable; see infra notes 61-62 and accompanying text. See also Samuel R. Bloom, Note, The Need for a New Dormant Commerce Clause Test: A Time to Discard Waste Systems Corp. v. County of Martin, 18 HAMLING L. REV. 80 (1994).
52. Id. at *11.
53. Id. at *5.
54. Id.
waste which [the facility] currently receives is generated from within Mecklenburg County."\(^55\)

Citing DeVito and the district court's opinion in Waste Systems, the court applied the strict scrutiny test, commonly used in Commerce Clause challenges, and concluded that the county failed to show that flow control was the least discriminatory alternative.\(^56\)

An Alabama federal district court also recently invalidated three municipal flow control ordinances in Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority.\(^57\) Several of the plaintiffs demonstrated that before the ordinances became effective, they had either collected or disposed of thousands of tons of waste at a Florida landfill.\(^58\) Interestingly, two of the plaintiffs merely alleged that they were in the process of developing a solid waste facility, in southeast Alabama, that could accept waste which would otherwise be subject to the flow control requirements.\(^59\) The Waste Recycling court rejected the similar defenses unsuccessfully raised in DeVito and Waste Systems.\(^60\) The Waste Recycling court also

55. Id. at *6.
   In short, it appears the County has failed to prove that there are not alternative financing methods which would achieve the same goals in a manner which is less intrusive upon interstate commerce. Rather than thoroughly investigate and evaluate such alternatives, it appears that the County simply adopted its Flow Control Ordinance and entered into the contract with BFI as the most expedient alternative. However, the result is that this option appears to discriminate against interstate commerce.
   Id.
57. 814 F. Supp. 1566 (M.D. Ala. 1993), aff’d without opinion, 29 F.3d 641 (11th Cir. 1994).
58. Id. at 1569-70.
59. Id. at 1569. The standing of the plaintiffs was apparently never seriously questioned.
60. Id. at 1582-83. Specifically, the court held that:
   (1) The fact that the ordinances did not specifically discriminate against out-of-state delivery of waste was irrelevant. Id. at 1578.
   (2) Solid waste was clearly “commerce” within the meaning of the Commerce Clause. Id. at 1577.
   (3) Ordinances that were designed — either due to their wording or otherwise demonstrated by evidence in the record — to assure the economic success of a facility, infrastructure, or planning entity evidence the type of “economic protectionism” subject to invalidation under the Commerce Clause. Id. at 1581.
   (4) An ordinance that purported to allow some wastes to be disposed of out-of-state imposed restrictions that were “insurmountable.” Id. at 1579.
   (5) An exemption that “grandfather[s] existing contracts and exempts recycling” was not sufficient to save the ordinances from invalidation. Id. at 1580 (citing Wyoming v. Oklahoma, 112 S. Ct. 789, 901 (1992) and New Energy Co. v. Limbach, 486 U.S. 269, 276 (1988)). In a footnote, the court noted that it was convinced that some of the exceptions would not even reduce the scope of the discrimination. The evidence reflects that the recycling exemption will have little effect in preserving interstate commerce because of the economic realities of the
addressed at length the defendants' ill-fated attempt to utilize the so-called "market participant" Commerce Clause defense.\textsuperscript{61} The recycling business. Recycling is built around an integrated set of operations that include the collection, transfer, transport, and disposal of solid waste. The flow control ordinances, however, would dismantle several of these components. \textit{Id.} at 1580 n.17.

(6) The court determined that the goal of long-term planning was not a defense (citing Philadelphia and \textit{DeVito}), and that other, less discriminatory, alternatives were available. \textit{Id.} at 1581.

(7) Citing Wyoming v. Oklahoma, the court rejected the argument that "establishing their own facility will lessen the cities' reliance on others in the area of waste disposal." \textit{Id.} at 1582. The court noted — but placed no emphasis upon — the fact that then-existing Alabama law generally restricted contracts between cities and private companies to 3 years, while local governments could enter into contracts with regional solid waste authorities for a period of up to 45 years. \textit{Id.}

(8) The purported goal of alleviating illegal dumping was never proven — and the court cited \textit{DeVito} for the proposition that the export ban would likely increase such activity. \textit{Id.} at 1582.

(9) The requirement, contained in one of the implementing ordinances, that the title to collected waste be vested to the political subdivision was not sufficient to remove the ordinance from the reach of the Commerce Clause. \textit{Id.} at 1575. See Sidney M. Wolf, \textit{The Solid Waste Crisis: Flow Control and the Commerce Clause}, 39 S.D. L. REV. 529, 557 n.264 (1994) (describing \textit{Waste Recycling} decision and correctly predicting outcome of \textit{Carbone} litigation).


A majority of the commentators argue that the doctrine is ill-founded and should be abandoned. \textit{See, e.g., Michael J. Polelle, A Critique of the Market Participant Exception}, 15 Whittier L. Rev. 647 (1994). The doctrine is favored by those who
court rejected the defense, noting that the flow control ordinances "clearly constitute market regulation."62

62. Waste Recycling, 814 F. Supp. at 1570. The court stated that it:

[N]eed not search deeply to find compelling evidence that the three cities' claim to the doctrine is meritless — that is, that the cities are not purchasers... or sellers... or bona fide interest holders in construction projects... In signing the user contracts [upon which the ordinances were based], therefore, the three cities entered the solid waste markets not to compete for their own individual profit, as would private businesses, but rather they did so to assure the economic success of the Authority. The expressed intent behind these contracts and the three representative ordinances based on them is not individual market participation but broad market regulation.

Id. at 1572-73.


No court, furthermore, has upheld a flow control ordinance on the basis of the doctrine. However, the United States Court of Appeals for the Second Circuit utilized the doctrine to sustain contracts entered into between municipalities with flow control policies or mandates and private waste collection companies. SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2d Cir. 1995), cert. denied, 116 S. Ct. 911 (1996). See infra notes 207-09 and accompanying text.

First recognized by the United States Supreme Court in Hughes v. Alexandria Scrap Corp., 426 U.S. 278 (1976), the exception provides that public sector participants in a market can make the same types of decisions as private sector parties regarding how it will conduct business. In Hughes, the Court reasoned that "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." Id. at 810 (footnotes omitted). The Court upheld a Maryland program that offered a "bounty" for Maryland-titled automobiles in a manner that benefited in-state processors. Id. Likewise, in Reeves, Inc. v. Stake, 447 U.S. 429 (1980), the Court applied the exemption to sustain the ability of a state-owned cement plant to confine its sales to residents of the state. The Court observed that "the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace." Id. at 436-37. "There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." Id. at 497. The Court cited "the long recognized right of trader or manufacturer... freely to exercise his own independent discretion as to parties with whom he will deal," Reeves, 447 U.S. at 438-39 (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)).

The exemption has long been applied to sustain deliberate efforts by political subdivisions to restrict the importation of extraterritorial waste into publicly-owned
landfills. In County Comm'rs of Charles County v. Stevens, 473 A.2d 12, 14 (Md. 1984), a Maryland court upheld an ordinance that provided that no waste "collected outside the territorial limits of Charles County shall be disposed of in any Public Trash Disposal Area of Charles County." The court found that the city-owned landfill could properly accept only locally-generated waste, and that the city did not actually prevent any private party from purchasing land and obtaining necessary permits for the operation of a landfill. *Id.* In Shayne Bros., Inc. v. District of Columbia, 592 F. Supp. 1128, 1133 (D.D.C. 1984), the court sustained a prohibition on the acceptance of extraterritorial waste at a publicly owned landfill, concluding that "no matter the commercial context or the manner of its acting, when the state itself is merchant or customer," the Commerce Clause does not apply. The court reasoned that:

The District is expending a public resource, as much so as the money in its treasury or the services of its police, firefighters and teachers, albeit upon terms which prefer its citizens over others, and that is precisely what the Supreme Court has thrice now held that a state is entitled to do without offending the Commerce Clause.

*Id.* at 1134.

The court in Lefrancois v. Rhode Island, 669 F. Supp. 1204, 1212 (D.R.I. 1987), also held that a public entity could expressly prohibit the acceptance of extraterritorial waste at its landfill. The court refused to construct a monopoly exception to the market participant exception, and declared:

While Rhode Island admittedly holds a monopoly in landfill services, I can see no distinction between this monopoly and the monopoly the State and its municipalities hold in educational services, or in police and fire protection. Certainly Rhode Island is not expected to extend these services to out-of-state residents; the same is true of landfill services.

*Id.*

*County Comm'rs, Shayne Bros., and Lefrancois* also unmistakably demonstrate that a public entity that "has done nothing more than purchase a natural resource, i.e., the landfill site, and offer to its customers the service of waste processing," *id.* at 1211, is entitled to an exemption from the reach of the Commerce Clause.

In a controversial decision, the United States Supreme Court addressed the acceptability of restrictions that arise during the process of financing a public project. *White v. Massachusetts Council of Constr. Employers, 460 U.S. 204 (1983).* The Court approved an order issued by the mayor of Boston that required publicly-funded construction projects to be manned by crews that included city residents. *Id.* at 214. The Court concluded that Boston's activity was immune from the Commerce Clause even though the city itself was not actively engaged in the construction business. *Id.* It noted that "we think the Commerce Clause does not require the city to stop at the boundary of formal privity of contract... Everyone affected by the order is, in a substantial if informal sense, 'working for the city.' " *Id.* at 211 n.7. In other words, the exemption potentially applies even if the public entity is not providing the product or service, as long as it furnishes the financing. *White* was cited with approval by the United States Court of Appeals for the Second Circuit in a decision that rejected a Commerce Clause claim regarding a generic contract to facilitate the implementation of an admittedly invalid flow control ordinance. *SSC Corp., 66 F.3d at 502.*

Other courts, however, have emphatically rejected the doctrine when the municipality acts as both a regulator and a participant. See, e.g., *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County, 48 F.3d 701, 717 (3d Cir. 1995)* ("When a public entity participates in a market, it may sell and buy what it chooses, to or from whom it chooses, on terms of its choice; its market participation does not, however, confer upon it the right to use its regulatory power to control the actions of others in that market."). A number of commentators have sharply criticized the rationale of the *White* holding. See, e.g., Jonathan D. Varat, *State "Citizenship" and Interstate Equality,* 48 U. Chi. L. Rev. 487,
V. CARBONE AND THE POST-CARBONE DECISIONS

On May 16, 1994, the United States Supreme Court issued an opinion that, in broad terms, invalidated flow control. Clarkstown, New York, enacted an ordinance that required that all waste "generated or collected" within the town be disposed of at a designated disposal facility. The town contracted with a private company to operate the facility and entered into a "put or pay" contract with an option to purchase the facility after five years for one dollar. C & A Carbone, Inc., another local solid waste processor, however, had been sending approximately 150 tons of non-recyclable wastes each week from its New York and New Jersey customers to out-of-state landfills, which were charging $11 per ton less than the city's designated facility. The Supreme Court, in a broadly worded opinion, declared that the flow control requirement violated the Commerce Clause.


The doctrine should not apply if: (1) the governmental entity actively seeks to require that waste haulers deliver collected waste to a designated facility; or (2) in the event that efforts by private parties to develop a private facility were purposefully precluded. In other words, for the exemption to apply, the defendant must have acted solely as a market participant, rather than as a regulator or as a participant/regulator. Flow control mandates, by their very nature, typically have a regulatory purpose and effect.


64. Carbone, 114 S. Ct. at 1686.

65. Id. at 1680.

66. Id. at 1680-81.

67. Id. at 1699 (Souter, J., dissenting).

68. Id. at 1680. The Court determined that the ordinance blocked out-of-state businesses from participating in the local market, creating economic effects that invoked the Commerce Clause. Id. at 1681. The Court held that although Clarkstown's protectionist ordinance did not facially propose to regulate interstate commerce, its clear effect was to totally eliminate competition in the market. The Court concluded 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." Id. at 1684.


Commentator reaction has been varied. Philip Weinberg of St. John's University argued that Congress should not exercise its plenary authority over commerce
Since Carbone, several courts have issued rulings concerning the validity of flow control mandates. The large portion of these courts have either permanently or preliminarily prohibited the enforcement of flow control measures. A federal district court in Ohio issued a temporary restraining order against enforcement of a flow control requirement in Mid-American Waste Systems, Inc. v. Fisher.69 A Pennsylvania court also invalidated a flow control provision in Empire Sanitary Landfill, Inc. v. Commonwealth.70 In Southcentral Pennsylvania Waste Haulers Ass'n v. Bedford-Fulton-Huntingdon Solid Waste Authority,71 a federal court concluded that the defendant's flow control policy discriminated against interstate commerce and must be judged against the per se invalidity test. A District of Columbia court, citing Carbone, permanently enjoined the enforcement of a transfer station licensing requirement that effectively acted as a flow control mandate.72

The United States Court of Appeals for the Third Circuit recently remanded a decision regarding a New Jersey flow control mandate. The court noted that as a result of Carbone and the obvious "facial" discrimination caused by the measure, the Pike test was inapplicable.73 A New York state court struck down the Village of Westbury's flow control ordinance in Town of North Hempstead v. Vil-

to partially overturn Carbone. Philip Weinberg, Congress, The Courts, and Solid Waste Transport: Good Fences Don't Always Make Good Neighbors, 25 ENVTL. L. 57, 64 (1995). Kirsten Engel, while not critical of Carbone, suggested that Congress should employ interstate compacts, fashioned after the highly controversial and difficult to implement Low-Level Radioactive Waste Policy Act, to address the "national market" in solid waste. Kirsten Engel, Reconsidering the National Market in Solid Waste: Trade-Offs in Equity, Efficiency, Environmental Protection, and State Autonomy, 73 N.C. L. REV. 1481 (1995). William Eskridge and Philip Frickey, on the other hand, argued that Carbone was wrongly decided, noting that Clarkstown's need to centralize local trash processing was not protectionist in nature, and that the case "involved what appears to have been a classic allocative measure. The ordinance did discriminate against out-of-state processors, but also against competitors within the locality. It struck Justice Souter, and strikes us, as the sort of lawmaking that need not be regulated by the Supreme Court." William N. Eskridge, Jr. & Philip F. Frickey, Law As Equilibrium, 108 HARV. L. REV. 26, 51-52 (1994). See also Richard J. Roddewig & Glenn C. Sechen, Municipal Solid Waste: The Uncertain Future of Flow Control, A Municipal Perspective, 26 URB. LAW. 801, 801 (1994) (broadly criticizing Carbone as a mechanism for "effectively eliminat[ing] the ability of local government to plan for their solid waste needs").

70. 645 A.2d 413 (1994) (currently on appeal to the Pennsylvania Supreme Court).
73. Atlantic Coast Demolition and Recycling, Inc. v. Board of Chosen Freeholders, 48 F.3d 701 (3d Cir. 1995).
lage of Westbury.74 A federal court in Georgia issued an injunction against enforcement of a flow control requirement that adversely affected in-state facilities.75 Another Georgia federal court concluded that restrictions on the movement of medical waste between counties — particularly in the form of a demonstration of need requirement — was inconsistent with Carbone.76 A Massachusetts district court struck down a Barnstable flow control ordinance.77 Similarly, a Pennsylvania federal court invalidated a Mercer County flow control ordinance.78 Finally, a federal court in Minnesota recently refused to dismiss a claim involving the intrastate transport of flow-controlled waste.79

Post-Carbone decisions that have upheld, at least in part, flow control requirements include Vince Refuse Services, Inc. v. Clark County Solid Waste Management District,80 Delaware County v. Raymond T. Opdenaker & Sons,81 Grand Central Sanitation, Inc. v. City of Bethle-


The rule announced in Freeman v. Hewit, 329 U.S. 249, 252 (1946), that commerce must remain "free from interference by the States," strongly supports the conclusion that the measures that directly or indirectly foster the "hoarding" of waste by political subdivisions are impermissible.
Harvey & Harvey, Inc. v. County of Chester, and Waste Management, Inc. v. Metropolitan Government of Nashville and Davidson County. The Delaware County, Grand Central Sanitation, and Harvey & Harvey decisions were issued before the Third Circuit's ruling in Atlantic Coast Demolition, and the opinion in Harvey & Harvey was subsequently vacated and remanded by the appellate court.

The decision in Perkins v. District of Columbia exemplifies the unmistakable judicial trend in this area. In Perkins, the Superior Court of the District of Columbia, applying Carbone, held that an ordinance which prohibited the operation of private transfer stations violated the Commerce Clause by eliminating private competition in order to control the flow of waste and waste money. The court stated that:

Having entered into the open market of commercial waste flow, the District can not by application of a statute or legislation reserve exclusively to itself, absent a demonstration that no other means exists to foster a legitimate state interest, which the District has wholly failed to do in this case, the flow of commercial solid waste in derogation of the right to engage in such business activities in and out-of-jurisdiction private concerns in a cost effective manner, which should be inherent in a free and competitive market.

84. No. 3-94-0411 (M.D. Tenn. May 17, 1995) (flow control did not create public monopoly).
85. Atlantic Coast Demolition and Recycling, Inc. v. Board of Chosen Freeholders, 48 F.3d 701 (3d Cir. 1995); Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788 (3d Cir. 1995).
87. Perkins, No. 94-6736, slip op. at 16.
88. Id. at 17 (emphasis added). The court also concluded that:

By eliminating access to public waste transfer stations by private commercial collectors and haulers and by eliminating, by the force of a statute and related legislation, private waste transfer and processing stations, through the threat of exorbitant fines, forfeiture of vehicles and criminal prosecutions, the District has unequivocally required that such private contractors either use its Lorton facility or other out-of-jurisdiction facilities to dispose of their commercial solid waste without the benefit of the initial processing step and at an increased cost to the private concerns. . . . There is no case which this Court has discovered which legitimates such conduct.

Id.
Carbone also effectively overruled several earlier decisions. In Harvey & Harvey, Inc. v. Delaware Solid Waste Authority, a federal district court had upheld a statewide flow control requirement similar to the Rhode Island ban invalidated in DeVito. Although the court's reasoning is difficult to follow, Delaware Solid Waste Authority (DSWA) apparently prevailed because the plaintiff misunderstood the burden of proof in Commerce Clause cases. Accordingly, DSWA was able to rely upon the legislative findings contained in the state's solid waste management legislation. Since the case turned on the burden of proof issue, Harvey & Harvey has limited application in subsequent flow control litigation.

Several of the pre-Carbone New Jersey decisions frequently cited in support of flow control requirements did not directly involve Commerce Clause claims. In A.A. Mastrangelo, Inc. v. Commissioner of Department of Environmental Protection, the plaintiffs challenged the interdistrict flow control regulations on the basis that: (1) the regulations were promulgated in violation of the procedural requirements of New Jersey's Solid Waste Management Act; (2) the regulations inappropriately bypassed county decision-making rights; (3) the state's environmental agency improperly assumed the power to create waste collection and disposal franchises; and (4) the flow control regulations were unfairly and irrationally burdensome. Not surprisingly, the plaintiffs failed to convince the New Jersey Supreme Court to totally invalidate the regulations, although

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89. Commerce Clause issues were briefly mentioned in the Hybud antitrust litigation involving an Akron, Ohio, flow control requirement. Glenwillow Landfill, Inc. v. City of Akron, Ohio, 485 F. Supp. 671 (N.D. Ohio 1979). The plaintiff failed to demonstrate that the requirement had affected or would likely affect any interstate commerce — and the limited briefing on the subject clearly demonstrated the plaintiff's concentration upon an antitrust argument. Id. at 679.


91. Id. at 1381. No attempt was made to rebut the assertions set forth by the defendant in affidavits. Id.

92. Id. at 1380.


94. 449 A.2d 516 (N.J. 1982).

portions of the rules were stricken. Since *Mastrangelo*, the New Jersey environmental agency has frequently referred to the decision as the basis of its authority to issue flow control directives.

In *Borough of Glassboro v. Gloucester County Bd. of Chosen Freeholders*, the New Jersey Supreme Court examined the legality of an injunction that permitted certain New Jersey communities to use a landfill that was nearing capacity, on an "emergency health" basis. The City of Philadelphia sued, claiming that an injunction was contrary to the Commerce Clause. Although the court concluded that the Commerce Clause had not been violated, it is important to note that a true flow control directive was not at issue in *Glassboro*. The court did, however, refer to flow control by noting that "state and local legislators have created the legal expectation that state and local governments will manage the disposal of solid waste." The court did not determine the validity of flow control requirements in *Glassboro*, but instead, concluded that the injunction could "fairly be viewed as a reasonable measure taken to resurrect [the landfill] for former users that have no other place to dump their garbage." The court also emphasized that states are generally only permitted to provide in-state preferential treatment in certain circumstances.

The decision that flow control advocates in New Jersey have relied upon, in the face of *Carbone*, is *J. Filiberto Sanitation, Inc. v. New Jersey Department of Environmental Protection*. In *Filiberto*, the Third Circuit upheld Hunterdon County's flow control plan. The *Filiberto* decision essentially rested on two determinations. First, the plaintiff-hauler failed to demonstrate that interstate commerce (commerce protected by the Commerce Clause) was affected. Second, the court accepted the defendant's arguments

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98. 495 A.2d 49 (N.J. 1985).  
99. *Id.* at 50-51.  
100. *Id.* at 57.  
101. *Id.* at 58.  
103. 857 F.2d 913 (3d Cir. 1988).  
104. *Id.* at 923.  
105. *Id.* at 922.
that flow control requirements provide several planning benefits.\textsuperscript{106} In addition, the \textit{Filiberto} court took a position regarding the proper role of economic benefit — flow control as necessary to provide economic support to a particular facility or infrastructure — as a justification for flow control that is diametrically opposed to the philosophy advanced in \textit{DeVito, Waste Systems}, and, most importantly, \textit{Carbone}.\textsuperscript{107} The court rejected the application of a line of Commerce Clause cases that applied the “virtual per se” rule against facial discrimination.\textsuperscript{108} It noted that “the discrimination prohibited by these cases was the state’s direct interference with the market either for the purpose or with the effect of favoring home-state interests against out-of-state competitors.”\textsuperscript{109} Significantly, however, the court also emphasized the plaintiff’s failure to demonstrate a prima facie case.\textsuperscript{110}

In \textit{Filiberto}, the county asserted several justifications for the flow control mandate, all of which were accepted by the court in the absence of any kind of rebuttal.\textsuperscript{111} The county argued that the requirement would reduce truck traffic, provide a long-range planning benefit resulting from a change in the destinations of exported waste over time, and stabilize in-county operations while the export operations changed.\textsuperscript{112} The court found that these vague assertions overcame the allegation of illegality.\textsuperscript{113} The court noted that the hauler had failed to show either that the mandate “effected some discrimination against out-of-state economic interests in order to fall under the \textit{per se} invalidity [standard] of the

\textsuperscript{106} \textit{Id.} Chief among the planning benefits provided by flow control regulation is the financial assurance that a public facility can continue to operate.

\textsuperscript{107} \textit{Filiberto}, 857 F.2d at 913. The \textit{Filiberto} panel discussed at length the record developed in the matter. The hauler asserted injury to itself and its customers because of the doubling of disposal costs effected by the flow control requirement. The hauler had, before flow control, been bypassing the designated transfer station and had taken wastes directly to the same out-of-state disposal site that was the ultimate destination of wastes processed at the transfer station. \textit{Id.} at 921. \textit{See infra} notes 111-17 and accompanying text.

\textsuperscript{108} \textit{Id.} at 921-22.

\textsuperscript{109} \textit{Id.} at 920.

\textsuperscript{110} \textit{Id.} at 921. The court noted that:

\textit{Filiberto} has failed to make a showing that the Rule requiring processing of trash at the transfer station was protectionist in purpose. It has rested on the bare allegations of its complaint, while the uncontested affidavits of the defendants show that the Rule serves numerous legitimate, nonprotectionist purposes.

\textit{Id.}

\textsuperscript{111} \textit{Id.} at 920.

\textsuperscript{112} \textit{Filiberto}, 857 F.2d at 920.

\textsuperscript{113} \textit{Id.} at 922.
processing cases," or that the requirement was an impermissible incidental burden on interstate commerce.\textsuperscript{114} The court reasoned that since the recipient landfill in Pennsylvania received the same material with or without the transfer station, the brunt of the "discrimination" was felt in-state in the form of added costs for using the transfer station in lieu of direct hauling to Pennsylvania.\textsuperscript{115} In finding the flow control requirement to be nondiscriminatory, the Third Circuit relied upon the well-established maxim of Commerce Clause jurisprudence that the existence of substantial in-state interests harmed by a requirement is a powerful safeguard against legislative discrimination.\textsuperscript{116}

\textit{Filiberto} came down to two points, both of which weighed against the plaintiff and dealt with economic concerns: (1) the plaintiff wanted to ship waste directly to the out-of-state landfill without paying transfer station charges; and, (2) the financial success of the transfer station depended upon the flow control requirement. While the plaintiff can certainly be criticized for selecting a flow control requirement that involved ultimate out-of-state disposal, the bottom line in \textit{Filiberto} was the court's acceptance of the premise that financial benefit to the county was an acceptable goal of flow control. In that regard, it is very difficult to reconcile \textit{Filiberto} with Devito, Waste Systems, Fort Gratiot, and Carbone. Indeed, the view that Carbone implicitly overruled \textit{Filiberto} was accepted by most commentators and the Third Circuit in Atlantic Coast Demoli-

\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 921. See also Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 n.17 (1981). Although the \textit{Filiberto} court concluded that the hauler had shown "no cognizable burdens on interstate commerce," it went on to note that the requirement was justified even under the balancing test utilized when a requirement regulates even-handedly and imposes merely incidental burdens on commerce. \textit{Filiberto}, 857 F.2d at 922. The court stressed the economic justification for flow control:

The local benefits of the Rule are substantial. The transfer station is the county's only disposal facility. As such it is irreplaceable. As a centralized depository, it is the basis of the county's ability to plan and execute long- and short-term disposal arrangements. As such, it is indispensable. On the record before us, there can be no doubt that the transfer station could not adequately perform these functions without the Rule, and that the Rule therefore directly promotes the county's effective response to the crisis in solid waste management.

tion & Recycling, Inc. v. Board of Chosen Freeholders, in which that court unambiguously determined Filiberto's status.117

VI. THE THIRD CIRCUIT INTERPRETS CARBONE IN ATLANTIC COAST DEMOLITION

At issue in Atlantic Coast Demolition was the Commerce Clause standard to be applied in examining the constitutionality of New Jersey's flow control system.118 Atlantic Coast, a Pennsylvania company, was licensed by the Commonwealth of Pennsylvania Department of Environmental Resources119 to process various types of construction and demolition waste.120 The company unsuccessfully attempted to be designated as an approved facility in a district waste management plan in order to dispose of wastes in New Jersey.121 The federal district court, in an opinion issued before Carbone, de-

117. 48 F.3d 701, 713 n.17 (3d Cir. 1995). The Filiberto decision was troubling, and incorrect, for another reason. Typically, courts in Commerce Clause cases have permitted plaintiffs to demonstrate "interstate injury" with very little proof of actual impact. Then, the "strict scrutiny" approach (the "virtual per se" rule), which applies upon a finding that discrimination exists, thrusts the burden of proof upon the defendant. In Filiberto, however, the court seemingly placed a substantial burden upon the plaintiff. Primarily because the waste received at the transfer station was ultimately from out-of-state, the court concluded that the plaintiff had failed to demonstrate economic injury sufficient to justify a finding of improper protectionism. Filiberto, 857 F.2d at 922. The Court noted that "the essential [discrimination] question is whether the challenged regulation confers an advantage upon in-state economic interests — either directly or through imposition of a burden upon out-of-state interest—vis-a-vis out-of-state competitors." Id. at 919 (emphasis added). The additional costs created by flow control were borne principally by in-state, rather than out-of-state, interests. Similar arguments were advanced, and rejected, in DeVito and Waste Systems.

The DeVito court instead utilized much the same arguments to strike down the Rhode Island flow control requirement. The mandate at issue in DeVito had a negative economic effect on in-state garbage haulers who desired to transport waste out-of-state, and similarly, negatively impacted Rhode Island commercial and industrial generators of solid waste who had to pay a substantially higher tipping fee at the state-owned landfill than if they had disposed of the waste in facilities located in Massachusetts and Vermont. Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775, 781-82 (D.R.I. 1991). Filiberto, however, during its tenure, did not necessarily present an insurmountable challenge to plaintiffs in flow control cases. Moreover, no other federal circuit, pre-Carbone, suggested that a Filiberto-like analysis was acceptable.

For a pre-Carbone analysis that supports the Filiberto reasoning, see Blair P. Bremberg & David C. Short, The Quarantine Exception to the Dormant Commerce Power Doctrine Revisited: The Importance of Proofs in Solid Waste Management Cases, 21 N.M. L. Rev. 63, 86-88 (1990).

118. 48 F.3d 701, 703 (3d Cir. 1995).

119. The Pennsylvania Department of Environmental Resources is now the Pennsylvania Department of Environmental Protection.

120. Atlantic Coast Demolition, 48 F.3d at 708.

121. Id. at 708-09.
terminated that "the flow control regulations did not impose an unconstitutional burden on interstate commerce."\textsuperscript{122}

The United States Court of Appeals for the Third Circuit, finding that \textit{Carbone} was clearly applicable, reversed the district court's opinion and remanded the case for further findings.\textsuperscript{123} The court found that New Jersey's process of designating facilities "is intended to favor operators that have facilities already located within, or those that are willing to construct a facility within, the state."\textsuperscript{124} The court emphasized the deficiencies in the state's process of selecting disposal and treatment facilities, noting that the procedure was not truly open and competitive. Further, the court recognized that out-of-state facilities were discriminated against due to the state's avowed goal of ensuring self-sufficiency and the statutory restraint on the selection of an out-of-state facility.\textsuperscript{125} The Third Circuit also overruled the \textit{Filiberto} decision in a footnote.\textsuperscript{126} Significantly, the court did not determine whether New Jersey's sys-

\footnotesize{122. Id. at 703.  
123. Id. at 718. Circuit Judges Stapleton, Alito, and Lewis reasoned that New Jersey's district-wide flow control regulations were substantially congruent to Clarkstown's local regulations in \textit{Carbone}. Id. at 712. The court, furthermore, likened the circumstances in this case to those in \textit{Dean Milk} where the regulations permit an out-of-state firm to compete, so long as it builds its facility in-state. Id. The court also emphatically rejected the argument that New Jersey's flow control system for the disposal of waste could be upheld pursuant to the market participant doctrine. Id. at 717. \textit{See also J.F. Shea Co. v. City of Chicago}, 992 F.2d 745 (7th Cir. 1993); Swin Resource Sys., Inc. v. Lycoming County, 883 F.2d 245 (3d Cir. 1989), \textit{cert. denied}, 493 U.S. 1077 (1990) (doctrine does not apply when defendant acts, even partially, as regulator to impose requirement upon private party). It is difficult to square the Third Circuit's reasoning—which is consistent with most federal circuits—with the Second Circuit's recent rulings dealing with "economic" flow control and waste hauling contracts. Id. at 713-18. 
124. \textit{Atlantic Coast Demolition}, 48 F.3d at 708.
125. New Jersey law mandates that solid waste districts seeking to utilize an out-of-state facility must certify to the state environmental agency that there are no suitable alternatives within the state. \textit{N.J. Stat. Ann. § 13:1E-21} (West 1991).
126. \textit{Atlantic Coast Demolition}, 48 F.3d at 713 n.17. The court justified its determination by noting that the district court correctly relied upon \textit{Filiberto}, the prevailing law of the circuit, when it made its decision, and thus need not determine whether the state demonstrated that it had no alternative to its flow control regulations. Id. at 717-18. The court acknowledged that the district court, having considered a substantial amount of testimony and evidence, was in a better position to address the feasibility of alternative measures. Id. at 718. At the same time, however, the court stated:

\begin{quote}
We are mindful of the fact that New Jersey has vowed not to abandon its present system until compelled to do so and of Atlantic Coast's contention that it suffers more irreparable injury with each passing month. . . . After \textit{C & A Carbone}, the likelihood of success issue is a materially different one from that which the district court previously addressed.
\end{quote}

\textit{Id.}
tem could survive the type of per se scrutiny applicable in Carbone.\textsuperscript{127}

On remand, the district court applied the traditional four-part standard for evaluating requests for preliminary injunctions, including the "reasonable probability of eventual success in the litigation."\textsuperscript{128} The court noted that "under the 'heightened scrutiny' adopted by the Third Circuit, 'the burden falls on the State to demonstrate both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available non-discriminatory means.' "\textsuperscript{129} Judge Irenas emphasized that the Carbone Court had employed an even stricter form of the test by "requiring the state to prove 'that it has no other means to advance a legitimate local interest.' "\textsuperscript{130} The defendants clearly failed to meet the Carbone "per se invalidity" test.\textsuperscript{131}

The application, by the district court, of the remaining preliminary injunction criteria did not diminish the fact that the court was convinced, as a result of Carbone and the Third Circuit's ruling, that "Atlantic Coast has made a strong showing of likelihood of success on the merits," and the court conditionally granted a preliminary

\textsuperscript{127} Id. at 718.

District Judge Irenas granted Atlantic Coast's motion for preliminary injunctive relief conditioned on the court's obtaining further input from the parties. Additional input would allow New Jersey "to submit a proposed alternative, nondiscriminatory plan to the current waste flow regulations governing the flow of the type of waste within Atlantic Coast's PaDER [now DEP] permit, along with a study of the possible impact of the proposed system on the state and the public." Atlantic Coast, 893 F. Supp. at 312.

\textsuperscript{129} Id. at 307 (quoting Atlantic Coast Demolition, 48 F.3d at 717).
\textsuperscript{130} Id. (citing Carbone, 114 S. Ct. at 1683).
\textsuperscript{131} Id. at 307-08. The court noted:

Defendants also point to a number of arguably legitimate state interests served by the waste flow regulations, such as avoiding out-of-state waste disposal liability, financing, inspecting solid waste, maintaining sufficient disposal capacity, waste management planning, and maintaining incinerators. However, while invited to reopen the record, defendants have not offered any expert or other testimony to show that no feasible nondiscriminatory alternatives could adequately serve these goals. Instead, defendants simply state why systems adopted by other states would not work in New Jersey, and that it is not clear that feasible alternatives exist to the current scheme. These arguments do not meet the 'onerous' burden of showing that even the relatively simple [some would say simplistic] alternatives suggested by the Supreme Court in C & A Carbone, the "unobstructed flow of interstate commerce" and "general taxes or municipal bonds," would be infeasible alternatives to the current discriminatory regime.

Id. at 308 (citations omitted).
injunction. On November 28, 1995, Judge Irenas issued a preliminary injunction that implemented a New Jersey development plan for the non-discriminatory inspection of mixed construction/demolition debris materials destined for either in-state or out-of-state facilities.

VII. THE THIRD CIRCUIT REVISITS CARBONE: HARVEY & HARVEY AND TRI-COUNTY INDUSTRIES, INC.

On October 20, 1995, the United States Court of Appeals for the Third Circuit issued an opinion in consolidated cases that concerned the validity of the Pennsylvania flow control system. Harvey & Harvey, Inc., a Delaware-based waste hauler, brought suit against Chester County, the local solid waste authorities, and the Pennsylvania environmental agency. Chester County, pursuant to Pennsylvania law, utilized a competitive bidding process to designate three landfills, including one privately owned site. The district court, in an opinion issued before Carbone, held that Filiberto governed, and that, for reasons not expressly stated in the opinion, the Pike standard was applicable due to the absence of discrimination in purpose or effect. The district court chastised the plaintiff for failing to introduce "evidence suggesting that the designation process, had it been used, would have been conducted in a discriminatory manner," and, in fact, for not taking steps to ensure that the process would be conducted in a non-discriminatory manner.

132. Atlantic Coast, 893 F. Supp. at 308, 316.
135. Harvey, 68 F.3d at 791.
136. Id. at 795.
138. Id. The court stated, "[t]o the contrary, H & H conceded that it never participated in Chester County's planning process or attempted to utilize the process described in the ordinance [regarding the alternative disposal sites] to attempt to designation of another facility." Id. The court also concluded, in the absence of any evidentiary proceeding, that Chester County did not exhibit a protectionist or discriminatory purpose in adopting and enforcing its flow control ordinance. Id. The court pointed to the County's argument that it did not adopt an ordinance until it became clear that the state agency would not accept the County's solid waste management plan without a flow control mandate. Id.
The Third Circuit, however, vacated and remanded the district court's opinion in *Harvey*. In so doing, the court expanded upon the designation procedure concept articulated in *Atlantic Coast Demolition*. The court made clear that, particularly, in instances in which a flow control system is implemented through a procedure involving the selection or designation of particular facilities (which may be a mix of public and private sites, in or outside of the city, county, or state), coupled with an ordinance for enforcement purposes, an analysis of the process in which the system was adopted and implemented is necessary. The court emphasized that the mere fact that an ordinance "requires the use of the selected facility, thus prohibiting the use of non-designated facilities (which may be out of state), does not itself establish a Commerce Clause violation." The court instead ruled that lower courts should, particularly in examining cases involving site designations or approvals, "closely examine: (1) the designation process; (2) the duration of the designation; and (3) the likelihood of an amendment to add alternative sites, for signs that out-of-state bidders do not in practice enjoy equal access to the local market."

Most of the post-*Carbone* decisions have involved flow control ordinances in which a local government mandates that waste haulers deliver waste to a single, frequently government-owned or financed, facility. In those cases, the ordinance acts as an export embargo, prohibiting the delivery of waste to any other facility. Typically, no competitive, or even nominal, facility selection process was utilized. The government-owned or financed site was simply referred to in the ordinance or license. The courts have had little difficulty applying the per se invalidity rationale of *Carbone* to those actions.

Courts have, however, struggled to articulate a coherent approach to flow control resulting from a competitive, or at least publicly-noticed, approach of selecting one or more disposal sites. Pennsylvania law does not require counties to utilize flow control. Moreover, it "directs the county to use a fair, open and

139. *Harvey*, 68 F.3d at 791.
140. *Id.* at 801.
141. *Id.* at 798.
142. *Id.* at 801.
143. *Id.* at 793 (citing 53 Pa. Cons. Stat. § 4000.102(b)(3) (1995)). Neither plaintiff in the consolidated cases challenged the facial validity of the Commonwealth's "Act 101" legislation. Nonetheless, the court observed that certain aspects of the legislation, specifically the reference to flow control as a "necessary" aspect of solid waste management planning, *Harvey*, 68 F.3d at 793, and the provision that states that "[p]roper and adequate processing and disposal of municipal waste gen-
competitive process” to select its providers. Most Pennsylvania counties, in implementing the legislation, utilize some form of competitive bidding.

In *Tri-County Industries, Inc. v. County of Mercer Pennsylvania*, the district court ruled that a flow control arrangement that resulted from a solid waste management plan which was the subject of public hearing and resulted in competitive bidding was still unconstitutional. The Third Circuit held that an ordinance which enforces the results of a designation procedure “does not necessarily violate the dormant Commerce Clause unless out-of-state businesses did not compete on an even playing field for the designation.”

erated within a county requires the generating county to give first choice to new processing and disposal sites located within that county,” 53 PA. CONS. STAT. § 4000.102(a)(6), “resemble policies we found offensive in Atlantic Coast,” Harvey, 68 F.3d at 804, and “evidence some intent to favor in-state sites.” *Id.* at 793.

144. *Harvey*, 68 F.3d at 793 (citing 53 PA. CONS. STAT. 4000.502(f)(2) (1995)).

145. No. 93-592 (W.D. Pa. 1994), vacated and remanded sub nom. Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788 (3rd Cir. 1995), cert. denied sub nom. Tri-County Indus., Inc., No. 95-1127, 1996 WL 26315 (U.S. Mar. 18, 1996). There, the court noted that the absence of protectionist intent does not end the Commerce Clause inquiry:

Mercer County has no financial interest in the designated landfill or its owner. In fact, the landfill is located in a neighboring county. The absence of a protectionist purpose was the key factor in the court's conclusion after the preliminary injunction hearing that plaintiff had failed to establish its likelihood of success on the merits of its Commerce Clause claim. Upon further consideration, however, the court concludes that the lack of such a purpose does not necessarily preclude a finding that the ordinance unlawfully discriminates against interstate commerce.

*Id.* at 4 n.3. Moreover, the Mercer County ordinance, according to the court, did not facially discriminate against interstate commerce. *Id.* at 5. Nonetheless, the court found that the “practical effect of the ordinance is to discriminate against interstate commerce by precluding the transportation of Mercer County waste to out-of-state facilities.” *Id.* at 6. Significantly, the court discounted the fact that the Northwest Sanitary Landfill was not discriminatorily designated by the Authority.

*Id.* at 8.

The evidence established that the Request for Proposals process was conducted in an open, fair and competitive manner as required by Act 101. Although no out-of-state facilities ultimately bid on the contract, bids were solicited by the Mercer County Solid Waste Authority from across the country. Further, the same specifications applied to in-state facilities as well as out-of-state facilities. However, defendants' focus on the manner in which the Request for Proposals process was conducted is misplaced. It is the designation of a single, in-state landfill, rather than the process by which it was designated, that has resulted in the discrimination against interstate commerce.

*Id.* at 8. The Third Circuit, however, reached the opposite conclusion. The court recognized it is particularly important in instances in which a designation process is utilized to determine winners and losers through flow control that the process and its application be critically reviewed. *Harvey*, 68 F.3d at 805-07.

146. *Harvey*, 68 F.3d at 802. The court reasoned that:

While the process in Atlantic Coast clearly favored in state bidders, not every process used to select a single provider is necessarily infected
Thus, this court recognized that the existence of a competitive bidding process, which often entails the selection of one or more private facilities or a mix of public and private sites, presents issues that do not exist when the local government simply compels waste haulers to utilize a public facility.\textsuperscript{147}

Emphasizing that discrimination "may reside in either purpose or effect," the Third Circuit acknowledged the difficulty for plaintiffs demonstrating that the designation process favors, either directly or indirectly, in-state service providers, evidence of favoritism, corruption, specified proximity requirements, incentives to protect municipal investments, long designation service rights, and the "absence of any real possibility for the designation of additional, potentially out-of-state sites" were among the factors that might demonstrate impermissible discrimination.\textsuperscript{148} The court insisted that defendants rebut a "putative showing of discrimination" by presenting substantial evidence that "the designation process was open, fair, and competitive, i.e., determined by objective criteria which do not have the effect of favoring in-state interests."\textsuperscript{149}

with this same parochialism. We believe, in fact, that a local authority could choose a single provider—without impermissibly discriminating against interstate commerce—so long as the selection process was open and competitive and offered truly equal opportunities to in- and out-of-state businesses.

\textit{Id.} The court's analysis suggests that it would apply the same standard in examining the constitutionality of flow control that results, not from an ordinance, but from the operation of a franchise or contract arrangement. \textit{Id.} at 800.

\textsuperscript{147} See \textit{id.} at 802.

\textsuperscript{148} \textit{Id.} The court noted:

We recognize the difficulties of ascertaining whether long-term designations are really necessary, and whether the selection criteria are truly objective. Courts considering flow control schemes where only in-state facilities are designated must therefore keep this difficulty in mind when scrutinizing the allegedly discriminatory criteria proffered by challengers. Admittedly, we cannot cite any authority for the sort of inquiry we describe, but this area of law is nascent, and we are constrained to draw upon notions of reasonableness to effectuate the relevant policies.

\textit{Id.}

\textsuperscript{149} \textit{Id.} at 802-03. The court noted that:

Such evidence might include bid solicitation, selection criteria, evaluation of bidders, et alia, but such evidence alone might be insufficient to provide the flow control scheme's neutrality. The government defendants in these cases might also present additional evidence, such as statistical evidence or expert testimony, demonstrating that different aspects of the designation process are as neutral to out-of-state interests as they appear on their face.

\textit{Id.} at 803. The court's reasoning was employed in \textit{Barker Brothers Waste, Inc. v. Dyer County Legislative Body}, No. 95-2942 (W.D. Tenn. Jan. 16, 1996), to dismiss a complaint brought by an unsuccessful bidder. The court concluded that the plaintiff had presented no evidence of discriminatory motive, noting that "[a] number of considerations favored the BFI (the successful bidder) proposal. BFI promised
Although the Third Circuit did not invalidate the Chester County system in *Harvey & Harvey*, given the district court’s application of a repudiated standard of review, it emphasized that “the current record creates the strong impression that the Chester County process was not sufficiently open, and that there was no real potential for amendment that could offer out-of-state bidders a fair chance at Chester County’s business.” The court referred to several criteria including: the legislative history of the solid waste management plan, the apparent intention of planning agents to ensure that in-county facilities were selected, the strong economic incentive for the county to retain waste volumes at a site owned by the county, the absence of any meaningful public notification process regarding the selection of disposal facilities, the selection of a private alternative facility long after the bidding process was concluded, and the significant restrictions upon selection of additional alternative disposal sites as strong evidence of “home cooking.” Additionally, the court pointed to landfill financing documents, in which the county agreed to maintain the existing plan without reducing the county’s service area or restricting the definition of municipal waste, to support its belief that the flow control system was designed and implemented to preclude a “level playing field.”

Utilizing this same approach, the Third Circuit reversed and remanded the district court’s opinion in *Tri-County Industries*, declaring that a “further development” of the record was necessary to justify a finding of discrimination. Despite an incomplete record, the court acknowledged the possibility that the selection of a single privately-owned site through the Pennsylvania Act 101

150. *Id.* at 803 (footnote omitted). The court observed that “[i]t is true that one cannot draw any inferences about the equity of the designation process from its description in the Chester ordinance.” *Id.* However, the court stated that portions of the solid waste management plan indicated that the county intended to maintain the waste disposal business in the county. *Id.* at 805. “We believe that the County’s economic interest in keeping the business at home and the Plan’s legislative history . . . suggest that the designation process did not offer a level playing field.” *Id.*

151. *Harvey*, 68 F.3d at 806.

152. *Id.* at 807.

153. *Id.*
designated process could have resulted from in-state prejudice.\textsuperscript{154} While Mercer County advertised its request for bids nationwide and furnished specifications to over twenty companies (including landfill operators as far away as Louisiana), only four companies submitted bids.\textsuperscript{155} "That a number of out-of-state companies requested the [Request for Proposals (RFP)] package but not a single out-of-state interest submitted a bid raises the concern that some aspect of the RFP discouraged out of state interests."\textsuperscript{156}

In addition, certain aspects of the planning process were apparently not conducted pursuant to a truly participatory process.\textsuperscript{157} The Third Circuit noted that the selection scheme would be "less problematic if a realistic opportunity existed for an out of state landfill to compete for at least some of the county's business within a reasonable period."\textsuperscript{158} Due to the absence of this opportunity for out-of-state landfills in the Mercer County scheme, the court found that "[t]he designation of the site in this case . . . effectively amounts to the grant of a monopoly for the period of the designation."\textsuperscript{159} The Third Circuit instructed the district court to examine whether the contracted tipping (disposal) fee "was so high" relative to the spot market or the rate that the parties "would [otherwise] be willing to fix for the entire period" that "it would suggest an attempt to confer some extraordinary, super-monopolistic profit on the chosen landfill operator."\textsuperscript{160}

The Third Circuit's opinion in the consolidated \textit{Harvey} \& \textit{Harvey} cases illustrates the court's unwillingness to invalidate all flow control systems that result from a designation or competitive selection process. On the other hand, the criteria developed by the court demonstrate the difficulties faced by local governments in attempting to justify schemes that were, through design or implementation and effect, efforts to promote in-state economic actors while disadvantaging out-of-state parties.\textsuperscript{161}

\footnotesize{\textsuperscript{154} \textit{Id.}  
\textsuperscript{155} \textit{Id.} at 808.  
\textsuperscript{156} \textit{Harvey}, 68 F.3d at 808.  
\textsuperscript{157} \textit{Id.}  
\textsuperscript{158} \textit{Id.} at 809. According to the court, "realistic opportunities" include the possibility of an amendment to designate an additional site and a shorter contract duration. \textit{Id.}  
\textsuperscript{159} \textit{Id.}  
\textsuperscript{160} \textit{Id.}  
\textsuperscript{161} In a discussion of flow control decisions rendered by the other federal circuits, the majority opinion referred to Blue Circle Cement, Inc. \textit{v.} Board of County Comm'rs, 27 F.3d 1499 (10th Cir. 1994). \textit{See Harvey}, 68 F.3d at 801. The opinion characterized \textit{Blue Circle} as having "upheld flow control ordinances." \textit{Id.} In fact, \textit{Blue Circle} did not involve any form of flow control mandate. At issue was
VIII. Application of Carbone to "Economic Flow Control"

Recent decisions have suggested that certain "economic flow control" measures (i.e., when the community lowers the tipping fee at the public landfill and institutes a "generator fee" or user fee to make up for the potential revenue loss) may be unconstitutional. In West Lynn Creamery, Inc. v. Healy, the United States Supreme Court invalidated a Massachusetts regulation that imposed a tax on all milk sold within the Commonwealth. A subsidy program was established which rebated the tax payments from a special fund for distribution to in-state milk producers based on their overall share of total milk production. Companies that did not process milk within Massachusetts did not receive a rebate or subsidy, even though they were subject to the tax. The Court noted that "[t]he paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State." It stressed that such measures "are so patently unconstitutional that our cases reveal not a single attempt by any State to enact one." Instead, the court noted, the cases usually involve state laws that invoke more subtle means of provid-

the constitutionality of a local zoning ordinance that was interpreted to require a conditional use permit for the construction of a hazardous waste-burning cement kiln. Blue Circle, 27 F.3d at 1509. The ordinance did not seek to restrict the market area served by particular facilities or to ensure that waste generated in the community was treated or disposed of at a designated site. The court noted that the ordinance did not distinguish between hazardous waste based on the place of generation. Id. at 1511-12. Consequently, particularly in light of the absence of any evidence of discriminatory intent, the court applied the Pike balancing test and ultimately rejected the Commerce Clause claim. Id. at 1512. Blue Circle is an example of the numerous decisions that have addressed measures that purportedly seek to restrict the siting or operation of facilities that would receive extra-territorial waste.


163. Id. at 2210.
164. Id. at 2212.
165. Id. at 2211.
166. Id. at 2212.
ing the benefits of tariffs. The Court concluded that a rebate or subsidy to in-state processors is one of those impermissible alternatives occasionally advanced by states.

Similarly, "economic flow control" subsidies could run afoul of the principles set forth by the Court in West Lynn Creamery. Carbone has already led to an increased willingness by courts to question economic subsidies affecting waste materials. In Mid-American Waste Systems, Inc. v. Fisher, a federal district court granted a temporary restraining order against enforcement of a $49 per ton "generation fee." The fee was specifically intended to avoid the reach of Carbone through an "economic flow control" arrangement. As a result of this decision, the parties reached an out-of-court compromise which eliminated the disputed fee. The court concluded that

167. West Lynn Creamery, 114 S. Ct. at 2212. A federal district court cited West Lynn Creamery for the additional proposition that "non-integrated statutes can be unconstitutional as [an overall] scheme even if they are separately constitutional." WLR Foods, Inc. v. Tyson Foods, Inc., 861 F. Supp. 1277, 1283 (W.D. Va. 1994), aff'd, 65 F.3d 1172 (4th Cir. 1995) (regarding constitutionality of several statutes that purportedly restricted hostile takeover attempts in Virginia). See also National Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124, 1131 (7th Cir. 1995) (referring to Carbone and West Lynn Creamery as examples of decisions utilizing the "per se" analysis to invalidate "laws that explicitly discriminate against interstate commerce").

168. West Lynn Creamery, 114 S. Ct. at 2212.


170. Id. at 9. The Solid Waste Authority of Central Ohio (SWACO), by a resolution, established a "generation fee on all in-district generated solid wastes of forty-nine dollars per ton, with disposal rates at SWACO's facilities of $0.00 per ton, and tipping fees at SWACO's three in-district solid waste transfer stations of $0.00, $0.00 and five dollars per ton." Id. at 3. The resolution specifically authorized transport of materials to out-of-state facilities. Id. The court, in preventing the implementation of the fee, noted that:

"The economic effect of resolution 53-94 eliminates competition by other waste disposal or processing facilities that desire to receive waste in-district. The $49 generation fee, in and of itself, does not offend the Commerce Clause. The generation fee, however, is used to artificially lower the fees for tipping and disposal. The net result effectively eliminates competition by anyone who would seek to provide disposal services for in-district generated wastes at a facility within the state. The provision of such services in competition with SWACO comes within the ambit of interstate commerce.

Id. at 9. See also Sanifill, Inc. v. Kandiyohi County, Minnesota, No. C4-95-1363, slip op. at 17 (Kandiyohi County 8th Jud. Dist. Feb. 8, 1996) (finding that a "waste management service fee," which "is used to subsidize the county-owned landfill, thus enabling the landfill to artificially lower its Facility Fee," id. at 10, was purposefully designed to "impede the interstate competition posed by the Plaintiff.").

"Once the garbage has been collected by the hauler, the lower tip fee at the County landfill, made possible by a subsidy from the service fee, renders other landfills uncompetitive, essentially forcing all haulers to either utilize the services of the County landfill or incur higher total costs due to transportation expenses and/or higher tip fees at other facilities." Id. at 18.

171. Id.
the fee did not deliberately seek to restrict interstate commerce, or otherwise direct waste to certain facilities, but was nonetheless impermissible because it acted as an economic subsidy.172

The Second Circuit, in USA Recycling, Inc. v. Town of Babylon,173 reached a contrary result based on an elaborate discussion of the factual background. Under a service agreement, the hauler (the town had contracted waste collection services to a single vendor) was allowed to dispose of the waste it collected free of charge, as long as it did so only at the designated incinerator.174 The cost of disposal was comprised of a mandatory annual user fee of $1,500 per parcel of commercial property and a “user charge” for amounts generated in excess of a base amount.175 The court characterized the taxing scheme as non-discriminatory because, unlike West Lynn Creamery, Babylon’s financing scheme did not subsidize either the contract hauler or the private operator of the incinerator.176 The Second Circuit determined:

Instead, the Town spends its tax revenues to purchase services for town residents — a traditional, and unexceptionable, municipal activity. Babylon buys garbage collection services from BSSCI and incinerating services from Ogden. Nor . . . does the town subsidize [the waste hauler] by letting it dump town garbage for ‘free’ at the Incinerator; rather, the Town pays less to [the hauler] in the first place for collecting garbage because [the hauler] does not have to pay for garbage disposal. If anyone is ‘subsidized’ by the user fees, it is the municipal treasury—not any private business. And that, of course, is the point of every tax.177

172. Id.
173. 66 F.3d 1272 (2d Cir. 1995).
174. Id. at 1276.
175. Id.
177. USA Recycling, 66 F.3d at 1292. The court further noted that:
[Al]though we agree that the Town’s tax system constitutes “regulation,” we disagree that it has any discriminatory effect, or that it impermissibly burdens interstate commerce. To the contrary, we believe that the Town of Babylon has taken to heart the Supreme Court’s admonition in Carbone that if “special financing is necessary to ensure the long-term survival” of the incinerator, then “the town may subsidize the facility through general taxes or municipal bonds.” Babylon has employed both taxes and bonds. It levies a $1500 flat tax on all improved commercial properties in the district, as well as a “user fee” for each cubic yard of garbage generated on each parcel above a fixed base amount. We believe
To the extent that subsequent courts view USA Recycling as establishing an axiomatic rule that precludes Commerce Clause challenges of taxes or fees used to promote the facility, the possibility that West Lynn Creamery stands in the way of "economic flow control" is substantially reduced.\textsuperscript{178} It is, however, more likely that courts may be willing, particularly in instances in which there is evidence of discriminatory motivation, to invalidate fees and surcharges that were created for the specific purpose of ensuring that collected waste be directed to a designated facility. Courts have traditionally invalidated measures, using a per se invalidity approach, that have the practical effect of "hoarding" commodities. The courts have also placed particular emphasis upon ensuring that fees and taxes do not impede commerce.\textsuperscript{179} The Supreme Court's rulings in the tax cases are consistent with a long line of decisions that have held that both of these fees qualify as the sort of taxes the Supreme Court had in mind in Carbone.

\textit{Id.} (citations omitted).

The court likewise rejected the notion that the arrangement for the contract hauler to "dump town garbage at the Incinerator for free" was an unlawful subsidy:

\begin{quote}
Although a customer normally pays its garbage hauler for two services, collection and disposal, Babylon has purchased those services separately. The Town pays BSSCI to collect town garbage, and Ogden to incinerate it. If Babylon had so desired, it could have charged BSSCI "tipping fees" to dump town trash at the Incinerator—as the neighboring town of Smithtown has done. By charging fees at the Incinerator, the Town could eliminate its hauler's arguable incentive to insinuate non-contract garbage into the garbage it dumps for free at the Incinerator. But if BSSCI had to pay to dispose of town garbage, it would have passed those costs back to Babylon in a higher bid. The Town therefore saves money in its contract with BSSCI by letting it dump for free at the Incinerator. The disposal component of the contract is therefore a wash — not a subsidy — for BSSCI.
\end{quote}

\textit{Id.} at 1289-90 (citations omitted).

178. Of course, even if no Commerce Clause issues are implicated, there may be questions raised pursuant to other local, state, or federal provisions. For example, shortly after the Second Circuit ruling, a state court invalidated the resolutions that created the Babylon commercial refuse districts on the ground that the city, in violation of local law, failed to hold a public hearing. Eads St. Corp. v. Town of Babylon, 631 N.Y.S.2d 878 (N.Y. App. Div. 1995).

179. In two recent cases, the United States Supreme Court invalidated taxes or fees on waste. In Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992), the Court specifically invalidated a tax that adversely affected interstate commerce. The State of Alabama had adopted a disposal fee of $25.60 per ton for in-state generated hazardous waste, and a $72 per ton fee for imported waste. \textit{Id.} at 338-39. When the statute went into effect in 1990, the volume of hazardous waste disposed of at Chemical Waste's Emelle facility decreased from 791,000 tons in 1989 to 290,000 tons in 1991. \textit{Id.} at 342 n.4. The Court held that, since the imported waste was physically indistinguishable from in-state wastes, the Alabama statute discriminated against imported waste in violation of the Commerce Clause. \textit{Id.} at 344. Justice White's majority opinion for the Court noted that the State could have instead imposed one or more of several nondiscriminatory options, such as a generally applicable per-ton fee on all waste disposed of within Alabama,
a per-mile tax on all vehicles transporting waste across Alabama roads, or an even-handed cap on the total tonnage landfilled at Emelle. *Id.* at 344-45.

In a subsequent decision, the United States Supreme Court invalidated an Oregon differential fee that was specifically designed to pass constitutional muster. Oregon Waste Sys., Inc. *v.* Department of Envtl. Quality, 114 S. Ct. 1345 (1994). The State of Oregon imposed an in-state waste disposal tax of $.85 per ton, and a tax on imported solid waste of $2.25 per ton. *Id.* at 1348. The Court, in striking down the tax in spite of the justifications advanced by the state, noted that the tax was essentially identical to the measure invalidated in *Chemical Waste.* *Id.* at 1350.

Economic and environmental regulatory measures may violate the Commerce Clause for another reason. It is clear that a state may not seek to extend its jurisdiction to out-of-state parties. One of the cardinal principles set forth in the Supreme Court's Commerce Clause jurisprudence is that state requirements may not directly regulate interstate commerce. *See, e.g.,* Shafer v. Farmers Grain Co., 268 U.S. 189, 199 (1925). The Court has consistently defined "direct regulation" as regulation that has the practical effect of attempting to control the conduct of other states. Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982).

The Court explicitly struck down an "extraterritorial" state statute as a direct regulation of interstate commerce in Brown-Forman Distillers v. New York State Liquor Auth., 476 U.S. 575 (1986). A New York law required that liquor distillers who sold to New York wholesalers "affirm" that the prices charged were no higher than those assessed in other states. *Id.* at 575. The Court declared that "[w]hile New York may regulate the sale of liquor within its borders, ... it may not 'project its legislation into [other states] by regulating the price' to be paid for liquor in those states." *Id.* at 582-83 (citing Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521 (1935)). The breadth of the ruling is fairly remarkable, considering that the requirement addressed only in-state sales. *Id.* at 575. The Court reasoned that the "direct regulation" test was applicable because the mandate had the "practical effect" of controlling the price of liquor in other states. *Id.* at 583.

In Edgar v. MITE Corp., 457 U.S. 624 (1982), moreover, the Court invalidated an Illinois statute that granted state officials the power to delay corporate acquisitions of companies with certain Illinois ties, and to block so-called "inequitable" tender offers. The Court, in striking down the provision, concluded that it impermissibly sought to regulate tender offers on a national basis. *Id.* at 641. Similarly, the Seventh Circuit recently remanded a decision upholding Wisconsin's "effective recycling program" statute, finding that the law (which prohibited importation of waste from out-of-state communities that failed to adopt recycling programs approved by the Wisconsin agency) impermissibly directly regulated commerce. National Solid Wastes Management Ass'n *v.* Meyer, 63 F.3d 652 (7th Cir. 1995) (citing, at note 9, Old Bridge Chems., Inc. *v.* New Jersey Dep't of Envtl. Protection, 965 F.2d 1287, 1293 (3d Cir. 1992) ("The Supreme Court has invalidated state statutes where a state has 'projected' its legislation into other states and directly regulated commerce therein, thereby either forcing individuals to abandon commerce in other states or forcing other states to alter their regulations to conform with the conflicting legislation."). *Cert. denied,* 113 S. Ct. 602 (1992). *See also* Cotto Waxo Co. *v.* Williams, 46 F.3d 790, 793 (8th Cir. 1995) (per se test applicable to invalidate extraterritorial regulation that "has the practical effect of controlling conduct beyond the boundaries of the state"); Instructional Sys., Inc. *v.* Computer Curriculum Corp., 35 F.3d 813, 824 (3d Cir. 1994) (noting "extraterritoriality" was factor in per se analysis but finding doctrine inapplicable in case involving New Jersey Franchise Practices Act since "it is the parties' own agreement [rather than the statute] which operated to project the New Jersey law outside of New Jersey's borders" pursuant to choice-of-law analysis).

In Connecticut Carting Co. *v.* Town of East Lyme, No. 3:95CV1493, — WL — (D.Conn. Dec. 14, 1995) the court concluded that a mandatory per-ton fee assessed against waste haulers, in order to support a put-or-pay agreement between the municipality and the operator of a waste to energy facility, was an unconstitu-

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that discrimination, however slight, against interstate commerce will not be tolerated.\footnote{180}{Id.}

In the so-called “drummer” cases, the United States Supreme Court did not hesitate to invalidate seemingly “local” fees and taxes because of their impact on protected commerce. In Robbins \textit{v. Taxing Dist. of Shelby County, Tenn.} \footnote{181}{Id. for example, the Court invalidated a “drummers” license tax. The tax applied to all salesmen who sold by use of samples and who did not have a licensed place of business in the county.\footnote{182}{Although the measure applied equally to all out-of-county and out-of-state “drummers,” the Court found that interstate interests were affected. In \textit{Best \& Co. v. Maxwell}, \footnote{183}{the Court struck down a $250 “privilege tax” on “drummers.” The tax applied to all non-resident itinerant sellers.\footnote{184}{In its practical effect, however, the tax discriminated against out-of-state sellers.\footnote{185}{The Court noted that “[t]he Commerce Clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.”\footnote{186}{Similarly, in \textit{Nippert v. Richmond},\footnote{187}{an annual tax imposed on all those “engaged in business as solicitors” was de-

\textit{tional form of “economic flow control.” The fee was imposed after \textit{Carbone} rendered inoperable a flow control ordinance. The town had engaged in “economic flow control” by simply converting the prior disposal charge to a tonnage fee that was calculated on the basis of the amount of waste collected by the hauler. The hauler was not obligated to deliver the waste to the preferred facility, but had no practical alternative given that it could utilize the facility at no extra charge. In order to dispose of its waste at another site, the hauler would have to pay both the town’s tonnage fee and the disposal charge assessed by the alternative facility. The court reasoned that:

\begin{quote}
By setting the fee to cover the cost to the town of disposal at \textit{[the facility]}
the hauler pays a fee equal to a tipping fee. The hauler must then choose
to use the Preston facility or pay an additional fee for disposal at another
site. Adding the town’s fee to the cost of using other facilities discourages
their use because it is cost prohibitive.
\end{quote}

\textit{Id.} (unpublished decision is on file with the Villanova Environmental Law Journal).


181. 120 U.S. 489 (1877).
182. \textit{Id.} at 490-91.
183. 311 U.S. 454 (1940).
184. \textit{Id.} at 455.
185. \textit{Id.} at 456-57.
186. \textit{Id.} at 455-56.
clared unconstitutional. The Court found that out-of-state sellers would be burdened, particularly due to the risk of multiple taxation.

In several additional instances, the Court has invalidated seemingly local restrictions in light of the concern that such restrictions could proliferate and “balkanize” commerce. In *Lockheed Air Terminal, Inc. v. City of Burbank*, a federal district court invalidated a local ordinance which imposed restrictions on air traffic at a privately owned airport. The court emphasized that “[c]onsidering singly, such an Ordinance might not impose an unlawful interference with interstate commerce in all cases. However, considered on a national level, the Ordinance could not stand.”

188. *Id.* at 418.
189. *Id.* at 429. The Court reasoned that:

It is no answer . . . that the tax is neither prohibitive nor discriminatory on the face of the ordinance; or that it applies to all local distributors doing business as appellant has done. Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern. To ignore the variations in effect which follow from application of the tax, uniform on the face of the ordinance, to highly different fact situations is only to ignore those practical consequences.

*Id.* at 431 (footnote omitted).


These decisions, along with Commerce Clause rulings such as Nippert v. Richmond, 327 U.S. 416 (1946), signal the broad reach of the Commerce Clause and suggest that a wide variety of flow control measures may be subject to judicial invalidation. See also Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991) (conspiracy regarding operating privileges for surgeon affected interstate commerce because: (1) some procedures were performed on out-of-state residents, and (2) some medications and supplies were purchased from out-of-state); F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621 (1992) (agreement to set fees for local title searches affected interstate commerce, so that Sherman Act was applicable); McClain v. Real Estate
The United States Supreme Court has established that protectionistic practices can be manifested by legislative means or legislative ends, so that even a presumably legitimate goal cannot be accomplished "by the illegitimate means of isolating the State from the national economy."\textsuperscript{192} The Court's decision in \textit{Carbone} is consistent with the long-held maxim that isolationist or protectionist measures, including actions that illustrate a protectionist intent or purpose, are violations of the Commerce Clause.\textsuperscript{193} The Court has made it unequivocally clear that a finding of protectionist purpose, motivation, or effect, upon evidence derived from a variety of sources, is fatal.\textsuperscript{194} Local programs or revenue-enhancing measures that evidence protectionism are invalid, even if they neither facially discriminate nor impose, in fact, a disproportionate burden on interstate commerce.\textsuperscript{195}

\textit{Bd. of New Orleans, Inc., 444 U.S. 232 (1980)} (remanded dismissal of antitrust complaint regarding price fixing allegation; case involved fixed rates on brokerage commissions; court referred to \textit{Goldfarb} and held that whatever stimulates or retards residential sales affects demand for financing and title insurance, and that those two commercial activities are in interstate commerce); \textit{Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)} (held unconstitutional minimum fee schedule for lawyers involved in real estate sales; fee schedule was "interstate commerce" because portion of funds for purchasing of homes came from loans guaranteed by Federal agencies); \textit{Katzenbach v. McClung, 379 U.S. 294 (1964)} (Court applied Title II to "Ollie's Barbecue," family owned restaurant in Birmingham, Alabama, because Ollie's had purchased meat from supplier that had received it from out-of-state sources); \textit{Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)} (since places of public accommodation use products that have moved in interstate commerce, statute is within Commerce Clause power).

\textit{Cf. Russell v. United States, 471 U.S. 858 (1985)} (federal enforcement against arson); \textit{Perez v. United States, 402 U.S. 146 (1971)} (loansharking may be controlled even though activity does not involve interstate activity); United States v. Bishop, 66 F.3d 569 (3d Cir. 1995) (carjackings appropriate subject of federal enforcement, even if offense occurred wholly within one state).


\textsuperscript{194} Healy v. Beer Inst., Inc., 491 U.S. 324, 337 (1989) (invalidating a Connecticut beer pricing affirmation statute as "just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude").

\textsuperscript{195} \textit{See, e.g., Bradley v. Public Util. Comm'n, 289 U.S. 92, 95 (1933); Buck v. Kuykendall, 267 U.S. 307, 315 (1927)}. 
Invalid statutes, laws, regulations, or other measures typically indicate some legislative intent to protect certain parties. As one commentator noted, the Supreme Court’s "focus, in practice, prohibits laws motivated by protectionist sentiments or a desire to enrich citizens at the expense of outsiders." Another commentator concluded that the Commerce Clause essentially constitutes "a check against the [mere] possibility of covert protectionism." Professor Donald H. Regan, the author of an oft-cited and extensive article on Commerce Clause jurisprudence, opined that "in the central area of dormant commerce clause jurisprudence . . . the Court has been concerned exclusively with preventing states from engaging in purposeful economic protectionism."

The decision in Boston Stock Exchange v. State Tax Commission is illustrative of the judicial practice of striking down measures that, while seemingly neutral, were designed to accomplish a protectionist objective. There, the Court addressed the legality of a New York State transfer tax on the sale of securities. The purpose of the tax, to insulate the New York Stock Exchange and other in-state exchanges from out-of-state competition, was clear. The Court, looking no further, unanimously concluded that the statute violated the "fundamental principle" that no state or locality may seek to restrict the effects of free trade — directly or indirectly.

A North Carolina statute governing the labeling of apples was likewise invalidated because of its protectionist purpose. The legislation did not seek to categorize apples on the basis of their

198. Regan, supra note 81, at 1092 (emphasis added). See also CTS Corp. v. Dynamics Corp., 481 U.S. 69, 87 (1987) (concluding that Indiana Control Shares Acquisition Act did not contravene Commerce Clause, Court stated that "[t]he principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce," i.e., laws and regulations that evidence protectionist intent).
200. Id. at 319.
201. Id. at 321, 325-26.
202. Id. at 329.
state of origin. The Court found, however, that despite the neutral language used in the legislation, the purpose of the statute was to protect in-state farmers, who were the driving force behind the enactment of the law. The Court utilized evidence of discriminatory intent from a variety of sources, including legislative history, as justification for application of the per se analysis, and accordingly invalidated the legislation.

"Economic flow control" is an aptly named, but questionable, concept. Quite simply, it frequently achieves flow control in the same manner as an ordinance that compels, under threat of sanctions, the delivery of waste to a designated facility — with the same constitutional result. Similarly, franchise programs, unless created and implemented so as to promote hauler involvement in the development process, through a fair and open process of negotiations, and a non-coerced willingness by haulers to deliver wastes, are simply Carbone-type measures in disguise.

IX. Flow Control Resulting from Franchises or Contracts

If purely "economic" flow control arrangements violate the Commerce Clause, it is possible that mandates requiring a franchisee to take waste to a particular facility are violative as well. Yet, in SSC Corp. v. Town of Smithtown, the United States Court of Appeals for the Second Circuit, while finding that a flow control ordinance violated the United States Constitution, upheld a garbage hauling contract modeled after the ordinance pursuant to the market participant doctrine. The court reversed the district court's decision which had invalidated portions of a collection contract that required the disposal of waste at a particular facility.

204. Id. at 349.
208. Id. at 505-06.
209. Id. at 506. Smithtown enacted, in 1991, an ordinance that provided that "[n]o person authorized to collect or transport acceptable waste within the Town of Smithtown shall dispose of acceptable waste generated within the Town of Smithtown except at a solid waste management facility designated by the Town Board pursuant to this section." Id. at 507. The plaintiff did not challenge the city's ability to create districts for the purpose of contracting for solid waste collection services, but did contest the city's contract requirement that the hauler bring
its garbage to a designated waste disposal facility. *Id.* at 508 n.15. The court had little difficulty concluding that the ordinance was, in light of *Carbonel*, unconstitutional. *SSC Corp.*, 66 F.3d at 513-14. The court, however, reached a different conclusion regarding a waste collection contract that resulted from a solicitation of competitive bids in 1991. *Id.* at 516. The bidders were required to sign a "standard form contract" that obligated them "to dispose of residential garbage" at the designated facility. *Id.* at 507. "Under the terms of the contract, the haulers were required to bring that garbage to the incinerator." *Id.* at 505.

The ordinance, the court concluded, was not shielded by the market participant doctrine because of the city's ability to impose criminal penalties. *Id.* at 512. Although the court found that the ordinance was an unconstitutional restraint on commerce, it bifurcated the city's actions in implementing the ordinance through a "generic" contract that required adherence to the contract, finding that the contract was an exercise of municipal participation in the waste management market pursuant to the market participant doctrine. *SSC Corp.*, 66 F.3d at 506. In so holding, the court rejected the reasoning of the *Waste Recycling* court that contracts that are utilized to implement a flow control ordinance are uniformly subject to the dormant Commerce Clause, by placing particular emphasis upon the manner in which the plaintiff's successful bid had itemized "disposal" and "collection" charges. *Id.* at 516. See supra note 62 and accompanying text. The court emphasized the specific financing arrangement that undergirded the contract, finding that:

Because Smithtown pays the disposal portion of the bid to reimburse SSC for tipping fees at the Huntington incinerator, the disposal costs are 'passed through' SSC to town residents — who ultimately foot the bill for disposal through user fees assessed on their annual property tax bill. . . . That SSC pays tipping fees to the incinerator does not detract from the reality that Smithtown is the one consuming—and ultimately paying for—those disposal services. *Id.* at 515.

In addition, the court suggested that the market participant doctrine is not restricted to situations in which the municipality acts exclusively as a participant, while acknowledging that the opinion ought not be read broadly:

That Smithtown has favored itself, rather that some private company, as the provider of disposal services does not affect our analysis. As discussed earlier, it is true that Smithtown "participates" in the waste disposal market not only as a buyer of disposal services from SSC, but also as a buyer of services from [the incinerator operator] and a reseller of those services to SSC. But while these latter two forms of doing business may constitute "market participation" on the part of Smithtown, they do not necessarily determine whether another town action — buying disposal services through the improvement contract — also constitutes market participation. Smithtown could not force SSC or anyone else to do business with the town as a seller of disposal services at the Huntington incinerator, without resorting to its police powers — and thereby acting as a market regulator. But because Smithtown is substantially the buyer (and consumer) of those services, it can dictate by contract where SSC must purchase the waste disposal services provided to the town. *Id.* at 516-17.

The reach of the decision will, of course, be determined in subsequent rulings of courts within the Second Circuit. Whether courts in other circuits, particularly those that have traditionally looked askance at the market participant doctrine, follow the court's reasoning is an open question. The court's reliance upon a liberal interpretation of *White v. Massachusetts Council of Const. Employers, Inc.*, 460 U.S. 204 (1983), is arguably inconsistent with the notion that governments should not be able to utilize the market participant doctrine as a "subterfuge to regulate the activities of other markets" and non-governmental entities. Ann B.
Carbone did not specifically address the fate of franchise arrangements and contracts between municipalities and private service providers, and the franchise laws vary considerably from state to state. Nonetheless, an argument can be made that the conditioning of franchise awards upon the franchisee's "agreement" to utilize a particular facility may be impermissible. The decision that would likely be advanced in opposition to a Commerce Clause claim is California Reduction Company v. Sanitary Reduction Works. This case involved a grant, to the California Reduction Company, of a fifty


Similarly, the interpretation of White by the Second Circuit seems at odds with the long-held maxim that coercive measures should be subject to heightened judicial scrutiny. United States v. Butler, 297 U.S. 1, 71 (1936) ("The power to confer or withhold unlimited benefits is the power to coerce or destroy. . . . This is coercion by economic pressure."). See also New Orleans S.S. Assoc. v. Plaquemines Port, Harbor & Terminal Dist., 874 F.2d 1018, 1021 (5th Cir. 1989); Annanjane Freeman, Note, White v. Massachusetts Council of Construction Employers, Inc.: State or Local Governments Acting as Market Participants Are Not Subject to Commerce Clause Restraints, 10 J. Contemp. L. 217, 222-23 (1984) (arguing that White was based on "cursory" and superficial examination of market participant doctrine); Richard Raskin, Note, Constitutional Law — Commerce Clause — A Mayor's Executive Order Requiring That At Least Half The Workers On All Construction Projects Financed In Whole Or In Part By City Funds Or Federal Funds That The City Administrators Must Be City Residents Does Not Violate The Commerce Clause—White v. Massachusetts Council of Construction Employers, 53 U. Cin. L. Rev. 649, 663 (1984) ("White stretches the market participant exemption to encompass activities that are analogized more aptly to state regulation than transactions engaged in by private traders."); Adam B. Schiff, Comment, State Discriminatory Action Against Nonresidents: Using the Original Position Theory as a Framework for Analysis, 22 Harv. J. on Legis. 583, 586 (1985) ("[I]f all state actions characterized as market participation are taken out of the strictures of the Commerce Clause, then only time prevents the states from structuring many, if not most, discriminatory actions in the form of market participation.").

Other criticisms of White abound. See, e.g., Pelican Chapter, Associated Builders & Contractors, Inc. v. Edwards, 901 F. Supp. 1125 (M.D. La. 1995) (questioning whether doctrine has validity); Robert M. Cover, The Supreme Court, 1982 Term, 97 Harv. L. Rev. 70, 75 (1983) (describing Court's analysis as "amorphous" and "ad hoc").

Professor Coenen, a proponent of the doctrine, has likewise described the outcome in White as "puzzling." Dan T. Coenen, Untangling the Market-Participant Exemption to the Dormant Commerce Clause, 88 Mich. L. Rev. 395, 467 (1989) (noting that "[u]nder a commodious reading of White itself, for example, the 'class' of economic activity exempted from commerce-clause scrutiny might embrace all purchases [as well as all hirings] by all suppliers [as well as all contractors and subcontractors] on all state and municipal construction projects"). Coenen asserts that White should be limited "essentially to cases involving hiring by construction contractors." Id. at 468. See also Paul S. Kline, Publicly-Owned Landfills and Local Preferences: A Study of the Market Participant Doctrine, 96 Dick. L. Rev. 331, 344-46 (1992).

year exclusive franchise or "privilege" (contract) to dispose of garbage generated in the City/County of San Francisco at a designated incinerator to be built within two years of the franchise award.\textsuperscript{211} The franchisee had the right to collect fees from haulers, and received no compensation from the city.\textsuperscript{212} All generated waste was directed to the designated facility.\textsuperscript{213} Violations were punishable by fines and imprisonment.\textsuperscript{214} In several respects, the ordinance which established the system was more restrictive than that of the city of Clarkstown, in the \textit{Carbone} case. The court, however, upheld the system, rejecting a takings claim by referring to the police power of the city to regulate garbage collection in order to ensure protection of the public health.\textsuperscript{215}

In another case, the Second Circuit refused to interfere with a waste collection contract in \textit{USA Recycling, Inc. v. Town of Babylon, New York}.\textsuperscript{216} Citing \textit{California Reduction}, the court found that a five year service arrangement with a private hauler, which allowed the hauler to "dispose of up to 96,000 tons of garbage per year at the Incinerator and unlimited amounts of recyclable material at the town recycling facility, all at no charge,"\textsuperscript{217} was valid.\textsuperscript{218} The court refused to immunize the city's "decision to eliminate the commercial garbage collection market" pursuant to the market participant doctrine.\textsuperscript{219}

\textsuperscript{211} \textit{California Reduction}, 199 U.S. at 306-07.
\textsuperscript{212} \textit{Id.} at 308-09.
\textsuperscript{213} \textit{Id.} at 310.
\textsuperscript{214} \textit{Id.} at 309.
\textsuperscript{215} \textit{Id.}, at 321-23.
\textsuperscript{217} 66 F.3d at 1279.
\textsuperscript{218} \textit{Id.} at 1292-95.
\textsuperscript{219} \textit{Id.} at 1283. The court noted that:

\begin{quote}
[T]he Town's decision to hire an outside firm to provide services on the Town's behalf is quite unremarkable. State governments have turned to the private sector to "contract out" or "outsource" numerous governmental functions, including services in correctional facilities, the management of concessions in public parks, the operation of mental health facilities, the training of displaced workers, and the operation of toll roads. The same is true of local governments, including in the field of waste disposal. As environmental regulations proliferate, towns may find that their staffs lack the requisite expertise to provide sanitation services in compliance with state and local mandates. Such expertise may be more readily available in the private sector, from firms that specialize in waste removal.
\end{quote}

\textit{Id.} at 1284 (citation omitted). The opinion described several of the economic advantages of private collection pursuant to contracts or franchise agreements. As one commentator concluded:
Moreover, the court stressed that the Town conducted an open bidding process to award the hauling contractor and "aggressively solicited proposers from a national audience, by sending out bid packages to sixty-nine companies across the country, twenty-four of which were based outside New York." The court also recognized that the Town had engaged in other solicitation activities, indicat-

Data on the cost to supply municipal solid waste collection services is conspicuously absent from the public works literature because most cities simply do not know what these services cost. Yet clearly, current cost of service information is essential, if a city wants to make a rational decision to minimize costs by forming larger markets, changing contract arrangements, or initiating a bidding system.

Numerous studies concur that cities and municipalities providing waste collection services often do not employ enterprise accounting and therefore do not know the real costs of solid waste collection or how these costs may have changed in recent history.


Another writer observed that:

The reasons governments fail to account for costs are numerous. Many governments do not account for items such as capital costs, interest on bonds issued to fund services, fuel supply costs, labor costs, and more. However, the root cause of such faulty cost accounting rests with the structure and incentives innate to government bureaucracies. Private firms must account for costs in order to ensure a profit. In contrast, public officials are more likely to focus on an overall budget in where costs for numerous, and sometimes overlapping, programs may be centralized into one budget line item or split among many department budgets. Public budgets must also serve a number of political interests.


Lynn Scarlett of the Reason Foundation recently wrote that:

Garbage rates have also typically been unrelated to actual cost of service. In a seminal study of municipal refuse collection, E.S. Savas found that "public officials themselves are also ignorant of the true cost of a particular municipal program." In a 1971 study of refuse collection in New York City, Savas found "that the full cost [of service] was 48 percent greater than the cost indicated in the city's budget." In subsequent studies of other cities Savas confirmed this finding that municipal budgets understated service cost by an average of 22 percent.


220. USA Recycling, 66 F.3d at 1290.
ing that there was no protectionist intent. The court found, furthermore, that Babylon “did not impose any geographical eligibility limitations on those who bid to provide collection services in the District.” In light of the absence of any evidence that the town had a protectionist motivation, or that the contracting process was flawed, the court rejected the Commerce Clause claim.

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221. Id. It had “notified national trade publications of the bidding process, spoke with representatives of industry trade groups such as the Solid Waste Association of North America, and contacted national waste handling firms by telephone to generate interest in bidding.” Id.

222. Id.

223. Id. at 1294. Curiously, the court, while emphasizing throughout its lengthy opinion a narrow set of facts, used sweeping language in its conclusion:

This case boils down to two simple propositions. First, towns can assume exclusive responsibility for the collection and disposal of local garbage. Second, towns can hire private contractors to provide municipal services to residents. In neither case does a town discriminate against, or impose any burden on, interstate commerce. The local interests that are served by consolidating garbage service in the hands of the town — safety, sanitation, reliable garbage service, cheaper service to residents — would in any event outweigh any arguable burdens placed on interstate commerce.

Id. at 1295.

The court’s analysis, however, neither justifies such broad language nor explains how the conclusion can be reconciled. For example, a municipality determines that it wishes to flow control waste to a particular facility, creates a contract for haulers to sign in which the haulers “agree” to provide waste, and threatens haulers with removal from the jurisdiction unless the contract is signed. In those cases, admittedly far removed from the facts in USA Recycling, the “threat” might, in and of itself, be justiciable as an “unconstitutional condition.” Professor Sullivan notes that the “doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.” Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1415, 1415 (1989) (emphasis added).

In other words — and Sullivan’s point is important — even if the municipality could otherwise condition the operation of private waste haulers, or exclude them entirely, it may not take steps that force haulers to forego their ability to engage in protected commerce in exchange for the “privilege” of doing business.

The right to engage in protected commerce is inherent in the judicial application of the dormant Commerce Clause, and haulers faced with the threat of removal arguably are potentially deprived of a right, which the local government seeks to force them to exchange “for a valuable privilege which the [City] threatens otherwise to withhold.” Frost v. Railroad Comm’n, 271 U.S. 583, 593 (1926). In Perry v. Sinderman, 408 U.S. 593, 597 (1972), the Court stated that:

For at least a quarter-century, this Court has made clear that even though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are sound reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.

Id. at 597. See also South Carolina v. Baker, 485 U.S. 505, 516 (1988) (rejecting as “mischievous proposition of law” claim that “[t]he United States [could] convert an unconstitutional tax into a constitutional one simply by making the tax conditional. Whether Congress could have imposed the condition by direct regulation is irrelevant; Congress cannot simply employ unconstitutional means to reach a
Franchise or contract agreements that are competitively bid, negotiated, and freely entered into will likely survive a challenge under the Commerce Clause. It is of considerable importance, however, that any franchise program, whether exclusive or nonexclusive in nature, avoids conditioning the submission and review of applications or the execution of a franchise upon the hauler’s agreement to deliver waste to a designated facility. An express or implied stipulation that only those haulers who agree to flow control-collected waste will be considered, or the inclusion of a flow control requirement in a franchise agreement in the absence of negotiation and good-faith bargaining would likely contravene the Commerce Clause. Such a “franchise” program would, for all practical purposes, be a licensing scheme indistinguishable from the ordinance invalidated in Carbone.

constitutional end.”); Thomas v. Review Board of Indiana Employment Sec. Div., 450 U.S. 707 (1981) (state requirement that person be disqualified from receiving unemployment benefits if he or she failed to accept work without good cause; plaintiff was denied benefits after failed to accept job in munitions factory due to religious objections to war); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits cannot be conditioned on waiver of procedural due process rights); Shapiro v. Thompson, 394 U.S. 618 (1969) (state law that deterred influx of poor people for welfare benefits was impermissible because it chilled exercise of constitutional right to travel); Sherbert v. Verner, 374 U.S. 98, 404 (1963) (holding that Free Exercise Clause bars conditioning of unemployment benefits on agreement to work on Sabbath and noting that “not only is it apparent that appellant’s declared ineligibility derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable”); Spieser v. Randall, 357 U.S. 513 (1958) (first amendment bars conditioning of tax exemption on showing that taxpayer had not engaged in subversive advocacy); United States v. Butler, 297 U.S. 1 (1936) (Court struck down part of Agricultural Adjustment Act of 1933, which subsidized farmers who reduced their crop production; refusal meant loss of benefits, and noted that legislation was “coercion by economic pressure,” and that “asserted power of choice is illusory”); Clarke v. United States, 886 F.2d 404 (D.C. Cir. 1989), vacated as moot, 915 F.2d 699 (D.C. Cir. 1990) (invalidated federal legislation that conditioned appropriations to District of Columbia on local incorporation of certain federal legislation and finding that federal law impermissibly “coerces [D.C.] Council members’ votes on a particular piece of legislation, and because none of the interests asserted . . . justify the abridgement of . . . members’ free speech rights,” measure was unconstitutional). Justice Holmes in Western Union Tel. Co. v. Foster, 247 U.S. 105, 114 (1918), noted that “[a]cts generally lawful may become unlawful when done to accomplish an unlawful end, and a constitutional power cannot be used by way of condition to attain an unconstitutional result.”

Sullivan calls for strict judicial scrutiny of “any government benefit condition whose primary purpose is to pressure recipients to alter a choice about exercise of a preferred constitutional liberty in a direction favored by government.” Sullivan, supra at 1499-1500. In rare instances, the hauler is presented with, essentially, a Hobson’s Choice—take the “benefit” of being allowed to do business in the city, but with the inability to exercise a right to engage in otherwise protected commerce. See also Courts May Settle Flow Control Issue Before Congress Can Pass Oxley Bill, SOLID WASTE Rep., Nov. 2, 1995, at 345 (quoting criticisms of decisions in Babylon and Smithtown).
It is unlikely that federal courts will view inappropriately conceived or executed franchising arrangements as acceptable exercises of the "police power" in light of Carbone for several reasons. First, the California Reduction decision was issued well before the ascendency of modern Commerce Clause analysis. The case was recently mentioned in the dissenting opinion in Carbone and, with regard to a "takings" issue, in a decision issued by the Maine Supreme Court, but not squarely with regard to the relationship between franchising or municipal contracting and flow control. The decision was obviously known to the Court, although the majority opinion did not mention it, just as it did not mention prior flow control decisions.

Second, Commerce Clause issues were never raised in the California Reduction litigation. At the time there was no real likelihood that San Francisco wastes could be managed at an out-of-state (or, for that matter, an Oakland) facility. The case really dealt with the issue of whether the franchise resulted in a taking or violated the 14th Amendment's due process clause. At best, the decision currently stands for the simple proposition that, to the extent that provisions do not violate other constitutional guarantees, local regulations may grant or create monopolies with respect to public services that are accomplished wholly within the jurisdiction.

Third, the standard utilized for review in California Reduction — "if a regulation enacted by competent public authority avowedly for the protection of the public health has a real, substantial relation to that object, the courts will not strike it down merely on grounds of public policy or expediency" — is not the standard used to evaluate claims under the Commerce Clause. The Court, in California Reduction, used a highly deferential standard, finding that the police power was broad. In modern cases, however, the Court has squarely held that the police power cannot legitimize a local measure that interferes with protected commerce.

Fourth, recent decisions, as noted above, have strongly suggested that certain "economic flow control" measures (e.g., when

224. 114 S. Ct. at 1697, n.10.
226. See also Gardner v. Michigan, 199 U.S. 325 (1905) (dealing with Detroit scheme).
228. Id. at 324-25. The police power encompasses the acknowledged ability to regulate haulers, avoid nuisances, and provide for safety.
the community lowers the tipping fee at the public landfill and institutes a "generator fee" or user fee to make up for the potential revenue loss) may be unconstitutional. If purely "economic" flow control arrangements violate the Commerce Clause, surely mandates that a hauler obtain a "franchise" or "license" that is at least implicitly conditioned on flow control would be unconstitutional as well.

Finally, and importantly, courts are likely to seriously question "franchise" programs that involve public declarations of intent to ensure that a facility or system is utilized or evidence economic coercion. If the local government's position regarding the terms of a franchise agreement — specifically, with regard to the delivery of collected waste or recyclables — is essentially nonnegotiable, the resulting process is essentially identical to flow control mandates created by ordinances. Unlike some franchise arrangements, in which the award is either for collection only and the hauler may choose the collection site, or combined collection/disposal franchises in which the hauler and community may negotiate which disposal site(s) is utilized, if the franchisee essentially has "no choice," the Commerce Clause may be violated.

A franchise or economic flow control system may present additional constitutional concerns. The Supreme Court has long held that a state or local statute, ordinance, or regulation, pursuant to the Contract Clause of the Constitution, may not impair "the obligations of Contracts." Although the Court has held that this proscription against impairing the obligation of contracts should not be interpreted literally, when a state or local requirement promotes a "substantial impairment of a contractual relationship," the impairment must be both necessary and reasonably designed to promote a valid public purpose.

Flow control requirements, whether direct or indirect, may seriously impair existing contractual obligations between an affected party and others. The Supreme Court has never insisted that contract rights be completely destroyed, rather, its decisions refer to

231. Id. See, e.g., Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) (statute cannot effectively prohibit or impair implementation of contract in existence as of time of passage of requirement).
"substantial impairment."\textsuperscript{235} Since several courts have held, in the context of Commerce Clause claims, that such measures are not "necessary" to advance a legitimate public purpose (i.e., less discriminatory measures are available), a court might well find that the measure is not immune from Contract Clause scrutiny. The undisputed aim of many flow control measures is to ensure the economic viability of a facility or entity, rather than to promote a "legitimate" goal such as environmental protection. Accordingly, the impairment of contractual interests that could result would arguably be without a legitimate public purpose and, accordingly, contrary to the Contract Clause.\textsuperscript{236}

The very purpose of many flow control requirements and programs is to compel (i.e., monopolize) all solid waste within the jurisdictional limits to be disposed of at a particular facility or facilities. Such actions may, particularly in the absence of any state statutory authorization for flow control, contravene the Sherman Act.\textsuperscript{237} Franchise-facilitated flow control requirements might also constitute improper "tying" arrangements by conditioning the grant of the franchise upon the requirement that waste be delivered to one or more designated facilities. Generally, three elements must be shown to establish the existence of a per se illegal arrangement: (1) the tying of two distinct items, products, or services; (2) sufficient economic power with respect to the tying item to appreciably restrain competition in the market for the tied product; and (3) an effect on a non-insubstantial amount of commerce.\textsuperscript{238} A program that ties together two distinct items — the hauler's franchise and the use of the disposal or other waste services afforded by the city's facilities — could satisfy the first element of the test. The power to

\begin{itemize}
\item \textsuperscript{235} Allied Structural Steel, 438 U.S. at 244.
\item \textsuperscript{236} See, e.g., Waste Recycling v. Southeast Alabama Solid Waste Disposal Auth., 29 F.3d 641 (11th Cir. 1994) (flow control requirement, even when developed in accordance with state solid waste management rules, cannot be justified by demonstration that measure is economically necessary or beneficial); Waste Sys. Corp. v. County of Martin, 985 F.2d 1381 (8th Cir. 1993) (same); Stephen D. DeVito, Jr. Trucking v. RISWMC, 770 F. Supp. 775, 781 (D.R.I. 1991) (same).
\item \textsuperscript{238} See, e.g., Jefferson Parish Hospital Dist. No. 2 v. Hyde, 446 U.S. 2 (1984).
\end{itemize}
franchise waste haulers could be viewed as akin to that of the owner of a patent or trademark who issues licenses only on the condition that other goods or services of the owner be purchased. Such arrangements have long been held to violate the federal Sherman Act.\(^{239}\) It is irrelevant that waste haulers' franchises are not "sold" in the typical commercial sense for antitrust purposes.\(^{240}\)

The second factor, sufficient economic power in the market for the tied item, also may be present. The locality might seek to exercise absolute economic power over the issuance or denial of a franchise. The resulting restraint in the market for the tied item, (i.e., waste management facility services), could be significant. At the same time, a not insubstantial amount of commerce may be effectively foreclosed from competition. Such programs, therefore, by conditioning the grant of a waste hauler's franchise upon use of particular facilities, may establish an illegal tying arrangement. Such a "franchise" program, a process that is essentially identical in effect to a licensing requirement, could deny competitors free access to the waste services market in the community, force franchisees to forego their choice of alternative management facilities, and result in the elimination of competition in the waste services area with respect to waste generated within local governmental limits.

Restraints of trade, controls upon entry into the marketplace, and use of monopoly power have traditionally represented classic prohibited conduct.\(^{241}\) There would be little doubt that such conduct, if engaged in by a private party, would likely violate federal and comparable state antitrust laws.\(^{242}\) Competitively-bid franchises and contracts will likely survive judicial dormant Commerce Clause scrutiny; however, "franchises" that are really one-sided licensing re-


\(^{242}\) See, e.g., Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); United States v. Griffith, 334 U.S. 100, 108 (1948) (anticompetitive behavior that forecloses competition or eliminates existing competition violates Sherman Act); DeFino v. Civic Center Corp., 718 S.W.2d 505 (Mo. App. 1986).

Assuming that the activity by the local government is not otherwise beyond the reach of the antitrust laws, a finding that the entity is a market participant, rather than a regulator, might subject the entity to antitrust liability. In City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 379 (1991), the Court stated that, "with the possible market participant exception, any action that qualifies as state action is 'ipso facto ... exempt from operation of the antitrust laws.' " \(^{Id.}\) (quoting Hoover v. Ronwin, 466 U.S. 558 (1984)).
quirements in disguise, and contracts that result from an uncompetitive bidding process, may not.

Instead of relying upon antiquated notions of police power and controversial applications of the market participant doctrine, the Second Circuit would have likely reached the same result, through a reasoned application of Carbone, by applying the standard developed by the Third Circuit in the consolidated Harvey & Harvey litigation.243 There, the court, despite having the benefit of the Second Circuit's decisions neither mentioned the Second Circuit's rulings nor otherwise referred to either the police power standard or the market participant doctrine. In evaluating the constitutionality of Pennsylvania flow control designation programs that resulted, in some cases, in the selection of a single facility (and which frequently involved contracts between the county and the designated facility or facilities), the court held that the appropriate standard is whether "the selection process was open and competitive and offered truly equal opportunities to in and out-of-state businesses."244

X. TEST APPLICABLE UNDER "PER SE INVALIDITY" DOCTRINE TO DETERMINE WHETHER THERE IS A LESS DISCRIMINATORY ALTERNATIVE

Under the per se invalidity test, once it is determined that the standard of review is applicable because a state measure discriminates against protected commerce either on its face or in practical effect, the burdens of proof and persuasion shift to the defendant. The defendant must demonstrate that the measure both serves a legitimate state purpose and is the least discriminatory alternative to achieve local goals. The Supreme Court has held that the proffered justification must be subjected to the "strictest scrutiny."245

243. Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788 (3d Cir. 1995).
244. Id. at 802.
245. Hughes v. Oklahoma, 441 U.S. 322, 337. Professor Smith has summarized the test as follows:

It is settled Supreme Court doctrine that if a regulation is discriminatory, the state bears the burden of justifying it. First, the state must prove that it has a legitimate interest to be served by the regulation. Second, it must show that the regulation serves this interest to a substantial extent. Third, it must prove that it has no available alternatives to the regulation that are less discriminatory. Uncertainty in the record on these points, particularly the latter two, is resolved against the state. The state is excused from its burden of proof only if Congress has consented to the discrimination, which rarely occurs.

Smith, supra note 6, at 1231 (emphasis added) (citations omitted).
In Southcentral Pennsylvania Waste Haulers Association v. Bedford-Fulton-Huntingdon Solid Waste Authority, the court concluded that it should look at alternatives available both at the time the flow control ordinance was adopted as well as the present. The court also noted that it must look for alternatives which would allow the landfill (the flow-controlled facility operated by the defendant counties) to continue to be operational on finance, without the assistance of flow control ordinances. Chief Judge Rambo noted that since the counties were predominately rural and relatively poor, a tax for expansion of the landfill would not have been reasonable.

The court's reasoning is arguably inconsistent with the Supreme Court's mandate that, when the per se invalidity test is applicable, a judgment in favor of the plaintiff is virtually assured. The court addressed the issue on second cross motions for summary judgment. It had little difficulty concluding that flow control ordinances enacted by Bedford, Fulton, and Huntingdon counties

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248. Id. at 15. The court described the development of flow control in the three counties:

To comply with Act 101, the counties of Bedford, Fulton and Huntingdon developed a municipal waste management plan. Under the counties' plan, all waste generated within the tri-county area must be disposed of at landfills operated by the Bedford-Fulton-Huntingdon Solid Waste Authority ("the Authority"). After conducting extensive research, including holding public hearings, the counties determined that the Authority would expand and renovate the existing Bedford landfill to meet Act 101 requirements. It is disputed whether the renovation and connected flow control ordinances was the only feasible alternatives available to the counties at the time that option was selected.

The Bedford landfill renovation project was financed through a loan from the Farmer's Home Administration ("FmHA"). On more than one occasion, Defendants' and their financial expert, John Finley, have commented on the significance of the FmHA loan. The FmHA is widely recognized as lender of last resort. Defendants qualified for a FmHA poverty line interest rate "because the median household incomes of each of the Sponsoring Counties was lower than 80% of the Pennsylvania non-metropolitan median household income as defined by FmHA." Despite their status as poverty line loan recipients, however, the counties had to provide the FmHA with some indication that they were capable of servicing the loan on a long-term basis.

The counties enacted the flow control ordinances to assist them first in securing the FmHA loan, and then in servicing the debt. The ordinances require that all waste generated within the tri-county area be sent to an Authority landfill for disposal.

Id. at 3-4.
to facilitate the municipal solid waste plan developed by the counties pursuant to the Pennsylvania Municipal Waste Planning, Recycling and Waste Reduction Act (Act 101),249 were subject to the per se invalidity test.250 The court determined, however, that it must examine both the existence of presently available alternatives, and whether the flow control ordinances were the least restrictive alternatives available to the counties at the time of their adoption.251 The court reasoned that, with regard to the issue of whether an "available alternative" should be evaluated from the perspective of hindsight, or through an examination of present-day options, no clear precedent existed.252 The Southcentral court first examined the plaintiffs' contentions that there may have been alternatives when the ordinance was enacted.253 In rejecting the contention that a general tax increase could have been implemented in order to expand the publicly owned facility, the court reasoned that "'reasonable' must be construed to mean 'affordable.'"254

The per se test, however, requires the shifting of the burdens of proof and persuasion to the defendant regardless of the status of the plaintiff as a movant. The defendant's proffered justification must be subject to the strictest scrutiny,255 and the Supreme Court has unmistakably declared that "[w]hen a state statute . . . discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have gener-

250. Id. at 8-10. The court stressed that it found "unconvincing Defendants' argument that Atlantic Coast Demolition militates in favor of the application of the Pike balancing test to the instant facts." Id. at 10.
In expressly endorsing Carbone and expressly rejecting Filiberto, the Third Circuit confirmed this court's belief that strict scrutiny review is required." Id.
251. Id. at 14.
252. Id. at 13. The court concluded that:
The outcome of the instant action will be driven by the way this court defines the alternatives inquiry. Accordingly, the court finds it prudent to examine all alternatives—those available at the time flow control ordinances were enacted, and those presently available. The court will first examine whether nondiscriminatory alternatives existed at the time the ordinances were enacted. Should the court find that such alternatives did exist, summary judgment will be granted in favor of Plaintiffs. If, however, the court finds that no non-discriminatory alternatives existed then, the court will examine whether such alternatives exist today. Finally, if the court finds that such alternatives are presently available, the court will examine whether it is reasonable to require Defendants to implement those alternatives.

Id. at 14.
253. Id.
254. Id. at 15.
ally struck down the statute without further inquiry." The Supreme Court's standard is an exacting one for a good reason — discriminatory activity should not be fostered and the free market principles advanced by the dormant Commerce Clause ought not be diminished through concerns about the economic viability of a particular alternative. The Court's standard is not one of making certain that the defendant's economic condition is unaffected by the removal of a discriminatory law or regulation. The reality is that a non-discriminatory alternative almost always exists, and the Court has never insisted that relief be granted only when an alternative appears to be both "reasonable" and "affordable."

Likewise, the Southcentral court arguably erred in its examination of present day non-discriminatory alternatives. It insisted that any alternative must "allow the landfill to continue to be operational and financed, but without the assistance of flow control." The court rejected plaintiffs' demonstration that a surplus of landfill capacity existed in the region, arguing that "[t]he issue is not simply whether other landfill space is available; but whether the counties can finance any of the suggested alternatives." The court determined that any advanced alternative had to ensure that the counties could "continue to support the debt" that had been secured through the discriminatory flow control ordinances. Accordingly, while the court was quick to apply the more stringent standard of dormant Commerce Clause review in light of the clearly discriminatory nature of the flow control mandates, it was apparently unwilling, at least pursuant to a motion for summary judgment, to strike down the ordinances if the defendants would be adversely affected. The court denied the parties' cross motions, finding that "material factual disputes remain as to whether economically feasible alternatives are presently available to the counties."

Through the application of a standard that seeks to ensure the continued economic viability of a facility that was designed, constructed, and operated pursuant to a discriminatory program, the

257. Id. One option that was apparently not advanced or considered was the privatization of the Bedford landfill, with the landfill acting as a participant in an open market for the disposal of waste.
258. Southcentral Pennsylvania Waste Haulers Ass'n, No. 1:CV-93-1318, slip op. at 17.
259. Id.
260. Id.
261. Id. at 18.
Southcentral court seemingly minimized the effect of the discrimination on the plaintiffs (and the residents of the counties) by refusing to endorse a remedy that would leave the defendants less than whole. Such an approach could sanction, rather than minimize, discriminatory behavior, and institutionalize long-term discrimination simply because economic regimes have been created and fostered by constitutionally questionable activity.

The United States Supreme Court's decisions do not suggest that the "per se invalidity" standard should be employed in a manner in which a clearly discriminatory measure may be less likely to be invalidated than one evaluated pursuant to the Pike "balancing" test. Moreover, no decision of the Court has suggested that defendants in "per se" cases must be protected from the economic consequences that may follow from the invalidation of an unconstitutional law or regulation. The Southcentral court's reasoning is, therefore, inconsistent with the determination in Carbone that the existence of a financial obligation is evidence of economic protectionism, rather than a justification for a more deferential standard of review.

The Commerce Clause does not simply protect economic actors in instances in which the avoidance of discrimination is economically advantageous to the defendant or of no economic import. Instead, the Commerce Clause serves an important — indeed, irreplaceable — function as a mandate for economic cooperation and unification. As the United States Supreme Court noted in Pennsylvania v. Union Gas Co., 262 "[i]t would be difficult to overstate the breadth and depth of the commerce power. It is not the vastness of this power, however, that is so important here; it is its effect on the power of the States." 263 Justice Cardozo also declared that "[t]he Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run, prosperity and salvation are in union and not division." 264 In order to ensure that the principles behind the Commerce Clause are given effect, courts must be willing to invali-

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263. Id. at 20 (citations omitted).
date measures that are discriminatory or evidence economic protectionism, by applying a strict burden of proof and persuasion.

XI. CONCLUSION

The Commerce Clause acts as an obstacle to anticompetitive barriers to the movement of solid waste that are not specifically authorized by Congress. *Carbone* is simply the latest in a series of decisions that have questioned measures that seek to "hoard" waste volumes or to exclude non-local wastes. Through consistent application of the principles that underlie the Commerce Clause, courts can ensure that the goals of the founding fathers are promoted and that a national market for waste services is fostered.