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Does Garbage Have Standing?: Democracy, Flow Control and a Principled Constitutional Approach to Municipal Solid Waste Management

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Does Garbage Have Standing?*: Democracy, Flow Control and a Principled Constitutional Approach to Municipal Solid Waste Management

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Citizens through state and municipal government should constitutionally be allowed to choose whether to manage their local waste. For the federal courts to dictate otherwise allows the garbage industry to trump local democratic decision making, and therefore profit at the expense of the American public.

The courts should decline such intrusion. First, sanitation is fundamentally a state and local activity protected by principles of federalism. Consistent with the holding in Garcia, Congress in RCRA defined the federal/state rela-

* For comparing trees and garbage, I apologize to Christopher Stone, author of *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1970). In *Sierra Club v. Morton*, 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972), the Supreme Court declined to grant majestic old-growth trees standing to challenge the destruction of a forest. This article varies the theme and suggests that neither garbage, nor its disposal merchants, have standing under the Commerce Clause to challenge municipal reduction, recycling, eradication and other management of local solid waste.

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tionship to be primarily non-federal as to non-hazardous solid waste management.

Second, waste is not in itself a commodity. Rather, commerce lies only in the commercial disposal service, which service may never be needed if the waste is municipally managed and disposed of at home.

I. Introduction

Should America's solid waste destiny, including who pays the bill, be entrusted to the garbage industry or to the public? That choice is the focus of this article.

This paper suggests that within our democratic system of government, local citizens, not the interstate waste industry, should have the primary role in deciding how to manage local garbage and other municipal solid waste.[1] Otherwise, the industry fox guards the municipal henhouse.[2] The waste industry will increasingly profit by America's failure to control the generation of volumes of waste, even while local governments nevertheless remain ultimately responsible for insuring proper waste disposal.

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1. In non-legal terms, municipal solid waste can be defined as the things we throw away, which includes garbage, trash, refuse and rubbish each of which have somewhat different meanings though used synonymously in casual speech, and in this article. WILLIAM RATHJE & CULLEN MURPHY, RUBBISH! THE ARCHAEOLOGY OF GARBAGE 9 (1992). *See also* Resource Conservation and Recovery Act § 1004(27), 42 U.S.C. § 6903(27) (1988 & Supp. III 1991) [hereinafter RCRA]. Solid waste includes recyclable material, that is, waste which through some effort can be reprocessed or reused. However, solid waste does not include material which retains value to its owner, since it is not then waste. For example, scrap metal which can be sold for profit or a deposit soda can which is brought back to a grocery store for a refund.

2. In direct contrast to local government, the garbage disposal industry has absolutely no financial incentive to reverse trends towards solid waste proliferation, for it is in their financial interest to allow garbage to engulf the nation, producing a financial bonanza of increasing demand and decreasing supply of waste disposal options. Waste reduction and recycling is an anathema to an industry which thrives on increasing volumes of garbage, decreasing disposal options, and the oligopsonic pricing which may result.

The Commerce Clause[3] has been used[4] to challenge municipal control over managing locally-generated waste. In particular, the challenge has been against what are termed flow control ordinances.[5] The flow control issue potentially involves billions of dollars.[6] More important, flow control ordinances are an essential governmental tool for solid waste management. The United States Supreme Court is reviewing one such case, *C & A Carbone, Inc. v. Town of Clarkstown*.[7]

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3. U.S. CONST. art. I, § 8, cl. 3.

4. *See, e.g.*, Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775, 785 (D.R.I. 1991), *aff'd*, 947 F.2d 1004 (1st Cir. 1991); Waste Sys. Corp. v. County of Martin, 784 F. Supp. 641 (D. Minn. 1992), *aff'd*, 985 F.2d 1381 (8th Cir. 1993); Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth., 814 F. Supp. 1566 (M.D. Ala. 1993).

5. A flow control ordinance is a local law which directs municipal waste to designated facilities and applies only to locally generated waste. Twenty five states which have authorized municipalities to enact flow control ordinances: COLO. REV. STAT. § 30-20-107 (1992); CONN. GEN. STAT. § 22A-220A (1993); DEL. CODE ANN. tit. 7, § 6406(31) (1991); FLA. STAT. ch. 403.713 (1993); HAW. REV. STAT. § 340A-3(a) (1985); ILL. ANN. STAT. ch. 34, para. 5-1047 (Smith-Hurd 1993); IND. CODE § 36-9-31-3-4 (1993); IOWA CODE § 28G.4 (1993); LA. REV. STAT. ANN. § 30:2307(9) (West 1988); ME. REV. STAT. ANN. tit. 38, § 1304-B(2) (West 1992); MINN. STAT. ANN. § 115A.80 (West 1993); MISS. CODE ANN. § 17-17-319 (1992); MO. REV. STAT. § 260.202 (1990); N.J. STAT. ANN. §§ 13:1E-22 (West 1991), 48:13A-5 (West 1993); 1991 N.Y. Laws ch. 569, at 1072-1073; N.C. GEN. STAT. § 130A-294 (1992); N.D. CENT. CODE, §§ 23-29-06(6), (8) (1993); OHIO REV. CODE ANN. § 343.01(I)(1) (Anderson 1992); OR. REV. STAT. §§ 268.317(3), (4) (1991); PA. STAT. ANN. tit. 53, § 4000.303(e) (1993); R.I. GEN. LAWS § 23-19-10(40) (1992); TENN. CODE ANN. § 68-211-814 (1993); VT. STAT. ANN. tit. 24, §§ 2203a-2203b (1992); VA. CODE ANN. §§ 15.1-28.01 (Michie 1993); WASH. REV. CODE §§ 36.58.040 (West 1991 & Supp. 1993), 35.21.120 (West 1990); W. VA. CODE § 24-2-1h (1992); WIS. STAT. §§ 159.13(3), (11) (1992).

In New York, however, flow control ordinances have been written which authorize direction of waste generated out-of-state to designated facilities. *See, e.g.*, Rockland County — Solid Waste Treatment and Disposal Act, 1991 N.Y. Laws ch. 569, at 1072.

6. It has been reported that should the Supreme Court hold that flow control violates the Commerce Clause, $10 billion in municipal bonds may be at stake, particularly since many localities are faced with overcapacity in their waste to energy plants. *See* Jeff Bailey, *Up in Smoke: Fading Garbage Crisis Leaves Incinerators Competing for Trash*, WALL ST. J., Aug. 11, 1993, at A1-2.

7. As this article is written, the United States Supreme Court has before it a case, C & A Carbone, Inc. v. Town of Clarkstown, 182 A.D.2d 213, 587 N.Y.S.2d 681, *appeal denied*, 80 N.Y.2d 760, 605 N.E.2d 874, 591 N.Y.S.2d 138 (1992), *cert. granted*, — U.S. —, 113 S. Ct. 2411, 124 L. Ed. 2d 635 (1993). This case may ultimately be the vehicle for determining whether local government can permissibly manage local waste. If the Court rules that a municipality is

Local governments should be allowed to sponsor environmentally sound solid waste facilities, for activities such as recycling and composting. However, many such facilities are feasible only if a municipality is able to direct or flow[8] its waste to the designated facilities. Otherwise, a multi-million dollar municipal recycling or composting plant may be built, but with no waste to process. Each judicial decision which takes away from a municipality's ability to manage its citizens' waste disenfranchises the municipality's control over their waste destiny.[9]

This article proffers that, as to municipal management of locally generated waste, including flow control, the Constitution need not, and should not, be interpreted in a manner which necessitates congressional repair.[10]

First, Congress has, for Tenth Amendment purposes, deferred local solid waste management to the States and their political subdivisions. By its declaration in the Resource Conservation and Recovery Act (RCRA)[11] that solid waste management is primarily a non-federal activity, Congress

precluded by the dormant Commerce Clause from directing locally-generated waste to designated facilities using flow control, then it becomes questionable whether other waste management devices are permissible, since each type causes waste to flow to municipally designated facilities. Such types of waste management devices include solid waste utility, district, franchise or municipal collection.

8. This can be accomplished through so-called "flow controls" which are "legal provisions used by local governments to designate where MSW [municipal solid waste] from a specified geographic area must be processed, stored, or disposed." 58 Fed. Reg. 37,477-79 (1993). EPA's definition may include what otherwise might be viewed as equivalent alternatives to flow control ordinances, since waste can be flowed to municipal facilities through award of a franchise, or through municipal collection and disposal, or through municipally-subsidized pricing (available with a solid waste district or authority) which makes the local facility the least expensive option.

9. "Waste destiny" encompasses controlling the amount of waste generated, reused, recycled, landfilled, incinerated and so on, with all attendant costs including that of environmental protection and cleanup.

10. As discussed throughout this article, there is a paramount need for waste to be managed closest to home. If a Supreme Court ruling prevents this, the only responsible response is for Congress to act. As discussed below, legislative proposals have been put forth, and EPA has been directed by Congress to study the issue.

11. § 1002(a)(4), 42 U.S.C. § 6901(a)(4) (1988).

has defined the federal/state relationship as to municipal solid waste management and ceded it to state and local governments and their democratic processes. This comports with the Supreme Court's teachings in *Garcia v. San Antonio Metropolitan Transit Authority*,[12] that the national political process be used to define the Tenth Amendment.[13] Thus, Congress has recognized that state and municipal governments should have a basic and paramount right to manage their citizens' waste. Moreover, this declaration is consistent with fundamental constitutional principles of federalism, including the promise of a "republican form of government" found in the Guaranty Clause.[14]

A second and independent basis for upholding local waste management against a Commerce Clause challenge is that locally generated waste, when municipally managed, should not be deemed an article of commerce at all. Rather, waste should be viewed the same as fire and crime, something to be municipally contained, controlled, and preferably eradicated. Thus, the waste does not implicate commerce until it is actually placed into the interstate garbage marketplace almost universally as part of a disposal service. This comports with the common sense notion that waste is not a commodity, product or raw material, and therefore is fundamentally different from bona fide articles of commerce which are otherwise involved in dormant Commerce Clause jurisprudence.[15]

The above is a straightforward judicial approach to local solid waste management which avoids the need for fact-specific Commerce Clause review every time a state or municipal government attempts to manage its citizens' waste. This approach also reconciles, in large measure, the majority and

12. 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985).

13. U.S. CONST. amend. X.

14. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion . . . .").

15. Allowing local management of local solid waste which has not entered the channels of commerce has many advantages, the most important of which is that it allows local democratic decision-making as to solid waste management.

dissenting opinions in *City of Philadelphia v. New Jersey*[16] and its progeny[17]. This approach encourages waste management at home, but at the same time does not interfere with interstate garbage disposal services.

Allowing municipal management of local waste permits waste self-determination and home rule. This is impaired if outside interests have a right to locally-generated waste.[18] A principled, logical and comprehensible constitutional approach to solid waste management is possible only if locally managed garbage is denied Commerce Clause protection.

Finally, and reassuringly, competing constitutional principles, as well as competing policy agendas,[19] are reconciled by interpreting the Constitution to allow local management of endemic waste.[20] There is beauty in simplicity, so perhaps we should try to beautify the constitutional landscape pertaining to garbage. Sanctioning local management of local waste will encourage states and localities to tackle their own waste dilemmas.[21] It is consistent with RCRA, the Constitu-

16. 437 U.S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978).

17. Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 504 U.S. —, 112 S. Ct. 2019, 119 L. Ed. 2d 139 (1992); Chemical Waste Management, Inc. v. Hunt, 504 U.S. —, 112 S. Ct. 2009, 119 L. Ed. 2d 121 (1992).

18. If a local community decides to implement "radical recycling" and thereby attempts to recycle everything in its community, this will be its right. Any residue left after recycling can then be sent by the community out into the national garbage marketplace and the protected channels of interstate commerce.

19. Although not central to this article, competing legislative proposals allowing import bans or taxes, and more recent proposals (due to the flow control issues) regarding export bans, may become unnecessary if local government is encouraged (as it is) and fully empowered (as it may not be) to manage its own waste maximally and then to place the residue into protected channels of interstate commerce. *See* discussion *infra* parts VI.A and VI.B.

20. If, as recommended in this article, the Court rules in *Carbone* that local government can constitutionally manage local waste, this will avoid the necessity of a Congressional fix and may also help reconcile the views of the dissent and the majority in *Philadelphia*, 437 U.S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978); *Fort Gratiot*, 504 U.S. —, 112 S. Ct. 2019, 119 L. Ed. 2d 139 (1992); *Chemical Waste Management*, 504 U.S. —, 112 S. Ct. 2009, 119 L. Ed. 2d 121 (1992).

21. As discussed further below, the concept that waste is best managed at or close to the source, the "proximity principle," applies to all waste (solid, hazardous, nuclear) and to the creation of pollution generally. The EPA has also acknowledged this. *See infra* notes 183-193 and accompanying text.

tion, and perhaps even with the Golden Rule[22] as applied to waste: "Dump not upon others that which you would not wish others to dump upon you."[23]

II. Garbage Management Basics: A Traditionally Local Function

Local government has traditionally had a role in solid waste management. The local garbage dump dates back to the first prehistoric villages, when human animals became sedentary animals.[24] Site designation was true in colonial America[25] and has continued.[26]

Today, we know that municipal waste remains a noisome pollutant.[27] Solid waste mismanagement can result in groundwater contamination from leaky landfills,[28] rotting garbage left uncollected on city streets,[29] odors from poorly

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22. "In everything, do to others what you would have them do to you . . . ." *Matthew* 7:12. *See generally* 5 BRITANNICA MICROPAEDIA 341 (15th ed. 1992) (for universality of the concept).

23. Stated by Chief Justice Rehnquist in less biblical terms, it is "the commonsense notion that those responsible for a problem should be responsible for its solution *to the degree they are responsible for the problem but not further.*" *Fort Gratiot*, 504 U.S. at —, 112 S. Ct. at 2029, 119 L. Ed. 2d at 154 (Rehnquist, C.J., dissenting) (emphasis in original).

24. *See, e.g.*, RATHJE & MURPHY, *supra* note 3, at 9, 33-40.

25. ERNEST S. GRIFFITH, HISTORY OF AMERICAN CITY GOVERNMENT, THE COLONIAL PERIOD 99-125, 258-91 (1938).

26. MARTIN V. MELOSI, POLLUTION AND REFORM IN AMERICAN CITIES 1870-1930 108 (1980).

27. In a sense, virtually all wastes are pollutants. Industrial pollutants such as air, water and soil pollution are usually hazardous. Improperly managed human waste can be quite pathogenic. Municipal solid waste has become a significant source of groundwater contamination as particularly demonstrated by the new subtitle D regulation. *See generally* JEFFREY GABA & DONALD W. STEVER, LAW OF SOLID WASTE, POLLUTION PREVENTION & RECYCLING 4.01 (1992). *See also* Comprehensive Environmental Response, Compensation, and Liability Act § 101(33), 42 U.S.C. § 9601(33) (1988 & Supp. III 1991) (for a definition of "pollutant or contaminant")[hereinafter CERCLA].

28. Additionally, as Chief Justice Rehnquist mentioned in his dissent in *Philadelphia*, landfills can create methane explosion hazards, health hazards caused by rodents, fires and scavenger birds, and can harm aesthetic appearance. 437 U.S. at 630, 98 S. Ct. at 2539, 57 L. Ed. 2d at 486. New subtitle D regulations will lessen some of these dangers through new municipal solid waste landfill requirements. *See* 40 C.F.R. pt. 258 (1992).

29. Labor strikes by garbage collectors can result in uncollected garbage.

designed treatment facilities,[30] and medical waste washing up on beaches,[31] to list a few examples. Add to these the well-known problems of vermin, pestilence, disease and aesthetics, and one realizes why the courts have long recognized the vital role which local government plays in solid waste management.[32]

Municipal control of fire, police, education and sewer services are essential public services, are of local concern, and are traditionally state and local governmental services.[33] Solid waste management is no different. The activity has long been considered governmental in nature.[34] Local government in some places is required by law to manage community solid waste.[35] The Supreme Court has referred to sanitation as a traditional function of local government[36] and has upheld its local management.[37]

The object of municipal solid waste management is to control and eliminate waste, just as fire and police departments attempt to control and eliminate fire and crime. The

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30. Even the state-of-the-art sludge composting facilities have odor problems.

31. This problem became an important media and political issue during the summer of 1988 and eventually resulted in the Medical Waste Tracking Act of 1988, Pub. L. No. 100-582, 102 Stat. 2950 (codified in part at 42 U.S.C. §§ 6992 - 6992k (1988 & Supp. III 1991)). *See also* 40 C.F.R. pt. 259 (1988).

32. *See* Hybud Equip. Co. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981), *vacated*, 455 U.S. 931, 102 S. Ct. 1416, 71 L. Ed. 2d 640 (1982), *cert. denied*, 471 U.S. 1004, 105 S. Ct. 1866, 85 L. Ed. 2d 160 (1985).

33. National League of Cities v. Usery, 426 U.S. 833, 854, 96 S. Ct. 2465, 2476, 49 L. Ed. 2d 245, 259-60 (1976) (examples of traditional government functions are fire prevention, police protection, sanitation, hospital services and education). This case was overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985).

34. Williams v. Eggleston, 170 U.S. 304, 185 S. Ct. 617, 42 L. Ed. 2d 1047 (1898); William H. Danne, Jr., Annotation, *Applicability of Zoning Regulations to Waste Disposal Facilities of State or Local Governmental Entities*, 59 A.L.R. 3d 1244 (1974).

35. For example, California law directs local government to provide solid waste handling services. CAL. PUB. RES. CODE § 40,057 (West 1993).

36. *See supra* note 33 and accompanying text.

37. California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 305, 26 S. Ct. 100, 50 L. Ed. 2d 204 (1905); Gardner v. Michigan, 199 U.S. 325, 26 S. Ct. 106, 50 L. Ed. 2d 212 (1905). *See* discussion *infra* notes 80-81, 96-103, 198.

object is to promote the public welfare, not to earn profits or promote trade in garbage.

Citizens expect their government to provide for a landfill, garbage transfer station, and perhaps a recycling facility, just as they expect government to provide other essential services. Often, solid waste can be municipally eliminated through landfilling or incineration. This, of course, makes solid waste a peculiar object of commerce, whose elimination is encouraged or mandated by governmental policy and law.[38]

Local government has been historically responsible for supervising solid waste management.[39] Whether through incidental regulation of private haulers, or by the award of exclusive or nonexclusive franchises, or by the use of municipal collection and disposal, the choice has been locally made through the democratic process.

III. Democracy and Local Solid Waste: Federalism, Republican Government and the "Invasion of the Garbage Snatchers"

It is ironic that waste management, often viewed as a lowly and unesteemed business, implicates some of the most fundamental aspects of our American system of government. Municipal solid waste management, in constitutional law terms, may be seen as pitting the Commerce Clause against the constitutional principles of federalism, the Tenth Amendment and a basic notion of democratic decision making protected by the Guaranty Clause.

A. A Republican Form of Government Includes the Right To Home Rule Over Municipal Waste

Local political judgments regarding waste self-determinism are fast becoming as essential, and costly, as local decisions regarding educating our children and controlling crime

38. *See* discussion *infra* part III. Landfill leachate and incinerator ash still remain. Incinerator ash may still be marketed for a hefty price as hazardous waste depending on the Supreme Court's interpretation of RCRA. *See, e.g.*, Chicago v. Environmental Defense Fund, 985 F.2d 303 (7th Cir. 1993), *cert. granted*, — U.S. —, 113 S. Ct. 2992, 125 L. Ed. 2d 687 (1993).

39. *See supra* notes 20-23.

and drugs. Therefore, it is essential to determine who has the constitutional right to control municipal solid waste—the garbage industry or the people.

1. The Vitality of Town Hall Democracy in Local Waste Management

Visualize a local municipal scenario in a fictitious New England town's democratic solid waste decision making process. If the citizens of the town, at a town meeting, vote to install a $1 million mixed bulky waste recycling plant which will totally eliminate this type of solid waste from the waste stream, this should be their democratic right. If one resident protests the flow control ordinance[40] directing all designated waste to the recycling plant, because this denies him the right to sell his old refrigerator or dishwasher to a New Jersey garbage merchant, he should voice his objection at the town meeting. If the community elects municipal management with flow control, the lone objector's grievance should not be cognizable under the Commerce Clause.[41] Nor should a non-resident garbage merchant have standing[42] to challenge this democratic decision. Local government should be permitted to democratically choose local solid waste programs.[43] Garbage should not have standing.[44]

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40. In addition to the goal of managing all the town's construction and demolition, resulting in mixed bulky waste, the flow control ordinance can also be used to finance the facility by guaranteeing a flow of waste for which a "tip fee" is paid. However, the same results could also be achieved through municipal collection, franchising, or the creation of a district.

41. If, for example, the lone objector was an established local scrap dealer, or otherwise made an investment in self-recycling, there might be present as a takings or due process claim. This issue is common whenever government replaces private enterprise with a government monopoly. However, this is beyond the scope of this article.

42. Dennis v. Higgins, 498 U.S. 439, 461, 111 S. Ct. 865, 878, 112 L. Ed. 2d 969, 987 (1991) (Kennedy, J., dissenting). Justice Kennedy articulates a distinction between standing and causes of action arguing that non-local merchants have neither standing nor a cause of action, and that local merchants do not have a cause of action under the Commerce Clause, but may under the Fifth and Fourteenth Amendments in certain situations.

43. Thus, if a county wishes to implement a radical recycling program to recycle all waste generated in the county (whether by public works or private bidding), this is its prerogative. If industry wishes to put up an incinerator to

The other side of the democratic coin is when the citizens at the town meeting vote to do nothing about their garbage except to truck it out of town.[45] The democratic choice is to place local waste into commerce. The community then will depend on the efficacy of the *Philadelphia* and *Fort Gratiot* decisions[46] to prevent other jurisdictions from erecting barriers to this waste, which will allow waste haulers to migrate freely around the United States searching for the most advantageous final resting place for their trash.[47]

A local government may democratically choose to dispose of its solid wastes locally or to export such wastes into commerce. When deciding how to handle its solid waste, a municipality must consider many other factors. One concern is the long-term reliability of the waste disposal service. A community might rather depend upon its own recycling than rely on the commercial export market. Another concern is a municipality's potential liability under CERCLA. A town must be concerned about the hazardous substances contained

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burn waste for energy, this is its prerogative and should be subject only to ordinary zoning, operational and similar health and safety constraints applicable to any utility generator. It should not matter that the local jurisdiction has provided complete waste disposal services for its citizens and has, because of a county radical recycling program, no need for the additional incinerator for waste disposal. An analogy would be a water bottling company opening in a community with municipal water.

44. Granting non-resident waste traffickers the ability to shield local solid waste from municipal management is analogous to allowing non-resident environmental interests standing to protect trees, a concept which was rejected by the Supreme Court. *See* Sierra Club v. Morton, 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972).

45. Al Turi Landfill, Inc. v. Town of Goshen, 556 F. Supp. 231, 232 (S.D.N.Y.), *aff'd*, 697 F.2d 287 (2d Cir. 1982). The Goshen ordinance was upheld as nondiscriminatory. This decision may also occur indirectly, for example, by enacting a zoning ordinance which limits the amount of available landfill space.

46. *Philadelphia*, 437 U.S. at 617, 98 S. Ct. at 2531, 57 L. Ed. 2d at 475; *Fort Gratiot*, 504 U.S. at —, 112 S. Ct. at 2019, 119 L. Ed. 2d at 139.

47. To the hauler, this may be the least expensive site. Municipalities, on the other hand, have become increasingly aware of the potential liability under CERCLA. Therefore, they tend to avoid what may be, or may become, a Superfund site because of the potential cleanup liability as a Potentially Responsible Party (PRP). *See, e.g.*, B.F. Goodrich Co. v. Murtha, 754 F. Supp. 960 (D. Conn. 1991), *aff'd*, 958 F.2d 1192 (2d Cir. 1992).

within its municipal waste,[48] if it chooses to export this waste.

Should it simply send its garbage off to the lowest bidder? Perhaps not. If the low bidder ultimately disposes[49] of the waste at a Superfund site, the town could become jointly and severally liable for a multi-million dollar cleanup.[50]

It is manifestly democratic to allow local management of local waste and at the same time prohibit local interference with waste which has been placed into commerce. To prevent local management of local waste denies citizens their vote on a matter of exclusively local concern. In effect, it gives outside garbage merchants more than a vote, but rather a veto, by granting them legal standing to assert an entitlement to municipal waste. For practical effect, the garbage industry is allowed to prevent its object of trade from being locally reused, recycled or eradicated.[51] This disenfranchises local citizens of waste management, and therefore deprives them of a "republican form of government" guaranteed by the Constitution.[52]

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48. Municipal solid waste (MSW) contains what is termed "household hazardous waste," which includes such items as household cleaners, varnish removers, paints and pesticides. It may contain other hazardous substances. The EPA has proposed the "Four Percent (4%) Rule", which assumes four percent of MSW to be hazardous.

49. *See* Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth., 814 F. Supp. 1566 (M.D. Ala. 1993) (prohibiting any "downstream" regulation of the waste). The court failed to distinguish hazardous waste under RCRA with hazardous substances under CERCLA, the disposal of the latter of which can result in unlimited, strict, joint and several liability. CERCLA § 107, 42 U.S.C. § 9607 (1988 & Supp. III 1991).

50. Because of potential CERCLA liability, private industrial and commercial waste generators have become very sensitive to where their waste ultimately is disposed. In addition to self-interest in avoiding financial exposure is the moral (and intergenerational) question of dumping waste at another's environmentally unsound disposal site.

51. If the Supreme Court were to so hold, would it be possible for a state with surplus solid waste management facilities to sue a neighboring state to enjoin its waste reduction, reuse and recycling efforts?

52. U.S. CONST. art. IV, § 4. Technically speaking, it is the state which is deprived through its political subdivisions. *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988) (the Guarantee Clause offers a better approach to federalism than does the Tenth Amendment). *Cf.* Community Communications

2. Solid Waste Management Plans, Home Rule Philosophy, and Democratic Implementation

The concept of local management of local waste is both a grassroots concept[53] and one which is an integral part of the state and municipal solid waste management plans (SWMPs) being developed nationwide. These plans are implemented locally, through the local democratic process, often at significant taxpayer expense.[54]

Although not generally cast specifically in terms of "home rule,"[55] this is an appropriate characterization for both the planning and the implementation of local solid waste management.[56] Many states have home rule provisions applicable to municipal activities.[57] As discussed later in Part III of this article, home rule is a universal theme in waste management. It is consistent with the Golden Rule,[58] and has found expression in international law,[59] Supreme Court

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Co. v. Boulder, 455 U.S. 40, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982) (home rule provision in Colorado constitution did not create state action exemption to Sherman Antitrust Act). *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-22, at 394 (2d ed. 1988).

53. Household recycling is a common topic in local newspapers, and there has been much written on the subject. *See, e.g.*, JENNIFER CARLESS, TAKING OUT THE TRASH (1992).

54. For example, in Rockland County, New York, the development of its local solid waste management plan and generic environmental impact statement, which includes a thorough recycling analysis, site study and alternatives review, costs over two million dollars.

55. *But see* Hybud Equip. Corp. v. City of Akron, 654 F.2d 1187, 1190-91 (6th Cir. 1981) (the Ohio Constitution's grant of home rule over sanitation was at issue).

56. *See, e.g.*, N.Y. ENVTL. CONSERV. LAW § 27-0711 (McKinney 1993) (mandating county deference to town and village solid waste management ordinances). *See also* Matter Contracting Co. v. Greene County, 175 A.D.2d 557, 572 N.Y.S.2d 965 (1991). Of course, where a broader regulation is appropriate, a county can be given preemptive powers. *See, e.g.*, Rockland County — Solid Waste Treatment and Disposal Act, 1991 N.Y. LAWS ch. 569, at 1072 (flow control authorization allows courts to preempt town and village ordinances).

57. *See, e.g.*, COLO. CONST. art. XX, § 6 (as amended 1912) (vests in the people of every town with a population of 2,000 or more the "full right of self-government in both local and municipal matters").

58. *See supra* note 18.

59. For example, the proximity principle discussed *infra* notes 183-193, and accompanying text.

cases[60] (particularly the dissents),[61] and in federal statutes.[62] Home rule is embodied in RCRA's explicit deference to the state and local authority,[63] as well as the federal government's encouragement of states to adopt solid waste management plans.[64] The home rule concept is also found in the attempts of private citizens to recycle their bottles, cans and newspapers.

Most solid waste planning today derives its authority, and obtains directives, from the state government. Some states have required their political subdivisions to undertake complete responsibility for local solid waste. In New Jersey, for example, this is accomplished through the formation of 22 planning units,[65] each of which is required to undertake a needs analysis and to provide for waste facilities either within the planning unit or through intermunicipal agreement.[66] Plans which include exportation are disfavored.[67] Ohio's 1988 solid waste disposal statute establishes districts

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60. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S. Ct. 715, 66 L. Ed. 2d 659 (1980); Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983).

61. *See Philadelphia*, 437 U.S. at 629, 98 S. Ct. at 2538, 57 L. Ed. 2d at 485 (Rehnquist, J., dissenting); *Fort Gratiot*, 504 U.S. at —, 112 S. Ct. at 2128, 119 L. Ed. 2d at 152 (Blackmun, J., joining); Chemical Waste Management, Inc. v. Hunt, 504 U.S. —, —, 112 S. Ct. 2009, 2017, 119 L. Ed. 2d 121, 136 (1992).

62. *See, e.g.*, RCRA § 1002, 42 U.S.C. § 6901 (1988 & Supp. III 1991); CERCLA § 101, 42 U.S.C. § 9601 (1988 & Supp. III 1991); Low-Level Radioactive Waste Policy Amendments Act, 42 U.S.C. § 2021b-j (1988 & Supp. III 1991).

63. RCRA § 1002(a)(4), 42 U.S.C. § 6901(a)(4) ("[t]he collection and disposal of solid waste should continue to be primarily the function of state, regional and local agencies. . . ."). *See also* U.S. ENVIRONMENTAL PROTECTION AGENCY, THE SOLID WASTE DILEMMA: AN AGENDA FOR ACTION 11 (Feb. 1989) ("[w]hen Congress passed [RCRA], it recognized that state and local governments have primary responsibility for solid waste management. . . .").

64. *See* RCRA §§ 4001-4010, 42 U.S.C. §§ 6941-6949a. *See also* 40 C.F.R. pt. 256 (1992) (guidelines for development and implementation of solid waste management plans).

65. *See* New Jersey Solid Waste Management Act, N.J. STAT. ANN. § 13:1E (West 1991).

66. Litigation has resulted from New Jersey's policy to avoid reliance on out-of-state facilities for long-term disposal. *See In Re* Long-Term Out-of-State Waste Disposal Agreement Between the County of Hunterdon and Glendon Energy Co., 568 A.2d 547 (N.J. Super. Ct. App. Div.), *cert. denied*, 583 A.2d 337 (N.J. 1990).

and requires them to plan for the disposal of all in-district waste.[68] Rhode Island also formed a state corporation[69] to manage all solid waste generated in the state,[70] which provided for complete local management.[71]

New York requires planning units to draft solid waste management plans, including recycling analysis. The waste exportation option is disfavored.[72] In New York, waste flow control has been authorized by special law[73] enacted at the request of the planning unit involved.[74] New York's less rigid structure allows private enterprise to enter the waste disposal market more easily. This structure also means that the planning units cannot be certain which components of the

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67. N.J. STAT. ANN. §§ 13:1E-19, 13:1E-21 (West 1991). This statute provides that if New Jersey waste is taken out-of-state for recycling, the residue must be returned. This provision is indirectly at issue in the *Carbone* case, discussed *infra* part VII.C, since neither the parties in *Carbone* wish to return the recycling residue to New Jersey.

68. Ohio also uses a differential fee schedule which differentiates between in-district, out-of-district and out-of-state waste and also imposes various transportation requirements. The statute was challenged on Commerce Clause grounds and summary judgment was granted. However, the Sixth Circuit reversed, finding triable issues of fact. National Solid Waste Management Ass'n v. Voinovich, 763 F. Supp. 244 (S.D. Ohio 1991), *rev'd*, 959 F.2d 590 (6th Cir. 1992).

69. The Rhode Island Solid Waste Management Corporation, a public corporation created by an act of the Rhode Island General Assembly. *See* R.I. GEN. LAWS § 23-19-6 (1989).

70. Rhode Island's flow control law was invalidated in the *DeVito* case. Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775 (D.R.I.), *aff'd*, 947 F.2d 1004 (1st Cir. 1991).

71. The State's attempt to bar exportation of waste, so that the waste would be totally managed in the state's landfill and other facilities, was preliminarily enjoined due to the likelihood that the regulation violated the Commerce Clause. *DeVito*, 770 F. Supp. at 785.

72. N.Y. ENVTL. CONSERV. LAW ch. 43-B, art. 27 (McKinney 1993).

73. *See, e.g.*, Rockland County — Solid Waste Treatment and Disposal Act, 1991 N.Y. LAWS ch. 569, at 1072.

74. In New York, solid waste planning is generally done at the county level of government. *See* 40 C.F.R. § 255.20 (1992) (preliminary identification of regions including discussions with cities and counties). *See also* RCRA § 4006(a), 42 U.S.C. § 6946(a) (1988 & Supp. III) ("the Governor of each State . . . shall promulgate regulations . . . identifying the boundaries of each area within the State which . . . is appropriate for carrying out regional solid waste management."). *See* 40 C.F.R. pt. 255 (1992) (identifies regions and agencies for solid waste management).

waste stream will be managed by the private sector, and which components will be managed by the public sector. This uncertainty makes it exceedingly difficult to size public facilities.[75] The United States Supreme Court has recognized this planning reality, though without offering any solutions.[76] This article proposes one.

Each of these state plans demonstrates the local democratic process at work. New Jersey chose its utility form largely because of the historical problems of organized crime and political corruption.[77] New York planning envisions merchant and other market participation.[78] Rhode Island, due to its size, operates as a single solid waste planning unit.

These differences reflect democratic choices. Ultimately, these state and local SWMPs attempt to provide for home

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75. For example, there is currently no materials recovery facility (MRF) located in Rockland County, New York, with which to recycle residential curbside recyclables. The County's solid waste management plan envisions the construction of one large MRF for the County. However, if private industry were suddenly to enter the picture with one or more smaller private facilities to take a portion of the recyclables waste stream, the County's MRF may end up being oversized. Conversely, if everyone recycles and private industry does not enter the picture, it may then be undersized.

76. The Court stated:

> Although accurate forecasts about the volume and composition of future waste flows may be an indispensable part of a comprehensive waste disposal plan, Michigan could attain that objective without discriminating between in- and out-of-state waste. Michigan could, for example limit the amount of waste landfill operators may accept each year.

Fort Gratiot, 504 U.S. at —, 112 S. Ct. at 2027, 119 L. Ed. 2d at 151-52.

This solution merely dumps the waste overflow problem onto another jurisdiction's lap to precipitate retaliation through reciprocal volume limitations. This problem does not result if a state or municipality is allowed to manage its own locally generated solid waste.

77. The New Jersey garbage industry was long dominated by organized criminal influences. *See* Trade Waste Management Ass'n v. Hughey, 780 F.2d 221, 223 (3d Cir. 1985); State v. New Jersey Trade Waste Ass'n, 472 A.2d 1050 (N.J. 1984). Prior to 1970, most solid waste in New Jersey was collected by private haulers and disposed of at privately owned landfills. However, environmental problems mounted and anti-competitive activities dominated the market. New Jersey had a shortage of landfills, thus triggering the possibility of waste disposal havoc. *See* A.A. Mastrangelo, Inc. v. Commissioner of Dep't of Envtl. Protection, 449 A.2d 516, 518 (N.J. 1982); Southern Ocean Landfill v. Mayor & Council of the Township of Ocean, 314 A.2d 65, 66 (1974).

78. N.Y. GEN. MUN. LAW § 103 (Consol. 1993).

rule over local waste. This is good public policy. However, home rule democracy requires power, which may be lost if municipal government is deprived of the ability to handle, control, process and dispose of local solid waste.

Solid waste services can be provided in various ways ranging from completely private[79] to exclusively municipal collection and disposal.[80] Where the private sector[81] is involved, citizens often expect and sometimes demand governmental regulation for both health and safety reasons.[82] Other reasons include fiscal concerns associated with collusive bidding and the influence of organized crime.[83]

3. Franchise and Monopoly Service — Traditional Democratic Choices for the Public Welfare

One of the most weighty decisions of local government, in governing its local problems, is the decision to exclusively regulate a field formerly governed by the marketplace. But democratic self-governance allows this for the greater good.

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79. *See id.*

80. Legal authority for municipal collection and disposal, to the exclusion of private interests, is found in numerous states. *See* ALASKA STAT. § 29.35.050(3) (1992); *In re* Antone G. Zhizhuzza, 81 P. 955 (Cal. 1905); United States Disposal Sys., Inc. v. City of Northglenn, 567 P.2d 365 (Colo. 1977); United Sanitation Servs., Inc. v. City of Tampa, 302 So.2d 435 (Fla. Dist. Ct. App. 1974); Cassidy v. City of Bowling Green, 368 S.W.2d 318 (Ky. 1963); City of Lake Charles v. Wallace, 170 So.2d 654 (La. 1965); City of Grand Rapids v. DeVries, 82 N.W. 269 (Mich. 1900); Bellerive Inv. Co. v. Kansas City, 13 S.W.2d 628 (Mo. 1929); City of Hobbs v. Chesport, Ltd., 417 P.2d 210 (N.M. 1966); City of Rochester v. Gutberlett, 105 N.E. 548 (N.Y. 1914); Tayloe v. City of Wahpeton, 62 N.W.2d 31 (N.D. 1953); City of Canton v. Van Voorhis, 22 N.E.2d 651 (Ohio 1939); Yohe v. City of Lower Burrell, 208 A.2d 847 (Pa. 1965); Breckenridge v. McMullen, 258 S.W. 1099 (Tex. Civ. App. 1923); Smith v. Spokane, 104 P. 249 (Wash. 1909).

81. The private sector often provides waste disposal services, even in large cities. For example, New York City services are mostly privatized but regulated. N.Y. GEN. MUN. LAW § 103 (Consol. 1993). Nevertheless, the public sector must be available where the private sector is unwilling or unable to act due to a lack of profitability or labor strikes.

82. Both county health departments and state environmental protection departments commonly regulate the activities of private solid waste businesses.

83. *See* Trade Waste Management Ass'n v. Hughey, 780 F.2d 221, 223 (3d Cir. 1985) (discussing the social evils associated with the influence of organized crime in the solid waste industry); *see also* EDWIN L. MILLER, JR., SAN DIEGO DISTRICT ATTORNEY, FINAL REPORT WASTE MANAGEMENT, INC. (1992).

Exclusive franchises or monopolies of solid waste management services are means of self-governance. Again, there may be varying ranges of private involvement. For example, a municipality may allow private haulers free reign to collect garbage and recyclables, but cause all or part of the garbage to be deposited in a public landfill, transfer station, or a recycling facility.[84] In contrast, a municipality may choose to handle all aspects itself through municipal waste collection and disposal,[85] while another community may chose to award exclusive[86] or non-exclusive franchises.[87] Franchises or monopoly service are important democratically chosen municipal solid waste options.

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84. *See, e.g.*, ROCKLAND COUNTY INTEGRATED SOLID WASTE MANAGEMENT PLAN & GENERIC ENVIRONMENTAL IMPACT STATEMENT (N.Y. Sept. 1991).

85. For example, in San Diego County, California, the County Board of Supervisors formally declared through a September 1992 policy statement that waste disposal assets in the County should be publicly owned, managed and controlled to best serve the public interest. *Cf.* New Jersey Solid Waste Utility Control Act, N.J. STAT. ANN. § 13:1E-1 (West 1991) (removing solid waste collection from the purely private sector and subjecting all such activities to public utility regulation). Under the Solid Waste Management Act, the Utility Control Act authorizes the New Jersey Department of Environmental Protection and Energy to award waste disposal franchises. Brief of the State of New Jersey as Amicus Curiae in Support of the Respondent at 6, *Carbone* (No. 92-1402) (citing N.J. STAT. ANN. § 48:13A-5 (West 1993)).

86. The Supreme Court has long recognized the propriety of allowing the award of an exclusive franchise for the collection and disposal of solid waste. In California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 26 S. Ct. 100, 50 L. Ed. 204 (1905), the Supreme Court upheld the City of San Francisco's right against a due process challenge to award an exclusive franchise to collect all waste generated in the City and dispose of it at a site designated by the City. The Court regarded this exercise of authority as one "reasonable, necessary and appropriate, for the protection of the public health and comfort." *Id.* at 318, 265 S. Ct. at 103, 50 L. Ed. at 210. The citizens of San Francisco chose this option, which the Supreme Court did not disturb.

87. A non-exclusive franchise allows for private competition while preserving municipal control in vital areas, such as the choice of local management or export into commerce, and if exported, the choice of sending the waste to environmentally sound disposal sites.

4. The Guaranty Clause

Our very democracy is impaired if a community (or a state[88]) is denied such power and thus prohibited from waste self-determinism. Local voters should be able to choose to send their waste to progressive waste facilities, whether local or out-of-state. Alternatively, local voters should be allowed to place their waste into the hands of commercial waste merchants, whether interstate or international. An interpretation of the Commerce Clause which divests citizens of the ability to control their own waste, particularly in view of the complicated waste planning involved, is of great importance. Professor Tribe warns that federal usurpation of local self-governance is to "restructure the basic institutional design of the system a state's people choose for governing themselves."[89] It is the epitome of antimajoritarianism for the judiciary, under the cover of dormant Commerce Clause jurisprudence, to deny waste self-determination to local government and its citizens.[90] This type of jurisprudence may "nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell."[91]

If local citizens choose to implement an intense recycling or composting program, using their established institutional decision-making, such is their democratic right and should not be open to an outsider's challenge. Outside private merchants simply should not have standing to challenge local decisions.

The Guaranty Clause, particularly when viewed with other constitutional provisions as part of a unified system of

88. State-wide solid waste management should be treated no differently than local management. If, as in *DeVito* the state wishes to create a state-wide authority to manage all waste, then it should be the voters' prerogative. *DeVito*, 770 F. Supp. at 777. If in-state commercial interests believe that they deserve a special exemption, they should make this plea in their statehouse. Neither out of state interests nor the waste itself should have standing to challenge rational local management of local waste.

89. TRIBE, *supra* note 52, § 5-23, at 397 (2d ed. 1988) (emphasis omitted).

90. U.S. CONST. art. IV, § 4.

91. Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 775, 102 S. Ct. 2126, 2145, 72 L. Ed. 2d 532, 557 (1982) (Powell, J., concurring in part and dissenting in part) (quoting TRIBE, *supra* note 52, § 5-23, at 397).

government, ensures democratic government in the United States.[92] Citizens must be allowed to "retain the power to govern, not merely administer, their local problems."[93] There is no dispute that garbage is a formidable problem of special local concern.

Preventing states and their political subdivisions from acting to solve this problem strikes at the heart of "rule by the people." Apart from the political question ordinarily associated with Guaranty Clause jurisprudence, local governance depends only upon the judiciary's interpretation of dormant Commerce Clause applicability to local waste management.[94] At least one commentator has suggested that the Guaranty Clause allows a more principled approach to federalism than the Tenth Amendment.[95] The Guaranty Clause is an appropriate vehicle for analyzing local citizens' right to manage their own waste.

B. Solid Waste Management is Imperiled if Garbage Merchants Have Standing Under the Commerce Clause to Attack Local Waste Solutions

If outside (non-local) trash vendors are permitted to challenge municipal waste choices because local solid waste management implicates interstate commerce, there results a significant litigation risk for any community which may choose to manage its own solid waste. The mere threat of such potential litigation will chill waste self-management by fiscally cautious communities. Even for fearless communities, the danger of being faced with dormant Commerce Clause litigation by implementing a multi-million dollar solid waste management plan with expensive facilities, which litigation might result in less facilities and the obligation to pay

92. The Guaranty Clause also protects against "invasion", which here might be the "invasion of the garbage snatchers." In interpreting the Commerce Clause, it may also be useful to compare the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

93. 456 U.S. at 790, 102 S. Ct. at 2154, 72 L. Ed. 2d at 567.

94. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962); *see also* Luther v. Borden, U.S. (7 How.) 1 (1849).

95. *See* Merritt, *supra* note 52, at 1.

the challenger's damages, attorney's fees and costs, is quite unsettling. When local government is hindered in its efforts to manage its municipal waste through the prospect of oppressive Commerce Clause litigation, its ability to govern is impeded. The result is a profound threat to autonomous solid waste decision making.

Commerce Clause litigation is notoriously fact-specific.[96] Assuming that interstate commerce is affected, the first question to address is which dormant Commerce Clause test to apply.[97] Even if the least restrictive *Pike v. Bruce Church, Inc.*[98] balancing test is applied, there is still the risk that the municipality, faced with the industry's arsenal of economists and lawyers, might lose the balancing test and therefore be subject to significant liability. As Justice Kennedy warned in *Dennis v. Higgins*,[99] major corporations and industry associations have been able to maintain dormant Commerce Clause litigations in the past without attorney fee awards. With the significant economic interests at stake in dormant Commerce Clause litigation and the resources available to the typical plaintiff in such cases, there may result a shift in the "balance of power away from the States and toward interstate businesses."[100] In the solid waste management field, this is an acute threat.

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96. In Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 462, 470-74, 101 S. Ct. 715, 723, 727-29, 66 L. Ed. 2d 659, 668, 672-75 (1981), the Court applied the *Pike* balancing test to sustain a state law banning the retail sale of milk in plastic nonreturnable containers after balancing the purposes of the law: to promote resource conservation, to ease solid waste disposal problems and to conserve energy against its burden on interstate commerce. Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970).

97. There are several tests ranging from the *Pike* balancing test, *see infra* note 425, to the strict scrutiny test, all the way to a *per se* invalidation for protectionist barriers.

98. 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970).

99. 498 U.S. 439, 464, 111 S. Ct. 865, 880, 112 L. Ed. 2d 969, 989 (1991) (Kennedy, J., dissenting).

100. *Id.* at 464, 111 S. Ct. at 880, 112 L. Ed. 2d at 989 (Kennedy, J., dissenting).

C. Federalism, the National Political Process and RCRA's Secession of Solid Waste Management Duties to State and Local Government

1. Federalism and Solid Waste Management

The view that citizens have the democratic right to manage their own waste is augmented by both congressional and judicial recognition that solid waste management implicates basic principles of federalism.

a. *California Reduction Co. v. Sanitary Reduction Works*[101] and Local Solid Waste Management Through Flow Control

The Supreme Court, using the language of federalism, has authorized local solid waste management and flow control. In *California Reduction*, the Supreme Court expressly approved of municipal waste flow control, and explained San Francisco's power to award an exclusive franchise for waste collection and disposal in the language of federalism: "it may be taken as firmly established in the jurisprudence of this court that the States possess, because they have never surrendered, the power — and therefore municipal bodies, under legislative sanction, may exercise the power [to award the franchise]. . . ."[102]

In *California Reduction*, the state's device for protecting its citizens was the award of an exclusive franchise.[103] In other circumstances, a utility model may be appropriate.[104] In pointing out the state's sovereign power regarding new power facilities, in language applicable to solid waste facilities, the Supreme Court stated that the "need for new power

101. 199 U.S. 306, 26 S. Ct. 100, 50 L. Ed. 204 (1905).

102. 199 U.S. at 318, 26 S. Ct. at 103, 50 L. Ed. at 209-10. *Cf.* Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982) (home rule town not entitled to state's antitrust exemption because town was not state actor).

103. 199 U.S. at 307, 26 S. Ct. at 100, 50 L. Ed. at 207.

104. *See, e.g.*, Town of Hallie v. City of Eau Claire, 471 U.S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985) (sewage utility); Pacific Gas & Elec. Co. v. State Energy Resources Conservation Dev. Comm'n, 461 U.S. 190, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983) (electric utility).

facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States."[105]

The same can be said for new solid waste facilities. The public health and comfort rationale cited in *California Reduction*, justifying franchises, utilities and flow control, applies as well to today's solid waste management problems.[106]

California Reduction can serve as a cornerstone for avoiding a potential conflict between the dormant Commerce Clause and principles of federalism and the Tenth Amendment in matters of solid waste management. The competing constitutional principles can be reconciled by deeming local waste managed by state or local government to be essentially a local matter "for the protection of the public health and comfort."[107] Whether based upon principles of federalism, the Tenth Amendment or the Guaranty Clause, the crux of the matter is that local solid waste management does not involve an object of interstate trade when locally managed. The only waste which becomes a subject of dormant Commerce Clause protection is waste which, for expedience or necessity,[108] is actually placed into the interstate waste marketplace.

b. The Nuclear Waste Case Law Lessons

Apart from the solid waste arena, the Supreme Court has permitted state regulation of waste even in the very feder-

105. *Pacific Gas & Elec. Co.*, 461 U.S. at 205, 103 S. Ct. at 1723, 75 L. Ed. 2d at 766 (solid waste language added) (quoting Frost v. Corporation Comm'n, 278 U.S. 515, 534 (1929)). Justice Brandeis observed that the "franchise to operate a public utility . . . is a special privilege which . . . may be granted or withheld at the pleasure of the State." *Frost*, 278 U.S. at 534 (Brandeis, J., dissenting).

106. *California Reduction*, 199 U.S. at 318, 26 S. Ct. at 103, 50 L. Ed. at 210. The Supreme Court has noted the difference between state-sanctioned activities and those of interstate commerce. *See* Dennis v. Higgins, 498 U.S. 439, 448, 111 S. Ct. 865, 871, 112 L. Ed. 2d 969, 979 (1991) (quoting Crutcher v. Kentucky, 141 U.S. 47, 57, 11 S. Ct. 851, 853, 35 L. Ed. 649, 652 (1891) ("carry[ing] on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise")).

107. *California Reduction*, 199 U.S. at 318, 26 S. Ct. at 103, 50 L. Ed. at 210.

108. *Philadelphia*, 437 U.S. at 629, 98 S. Ct. at 2538, 57 L. Ed. 2d at 485.

ally-regulated atomic energy field. With respect to nuclear waste, the Court in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*,[109] upheld a nuclear moratorium based upon waste disposal issues, despite Atomic Energy Act preemption arguments.

The analogy to municipal solid waste is clear.[110] The less comprehensive the federal regulatory scheme, the more reluctant the courts should be to preempt.[111] As discussed later, the municipal solid waste provisions of RCRA are, at a minimum, very deferential to, and arguably cede power to, state and local government. The judiciary should defer to state and local government when exclusively endemic waste management is involved, as well as decline to use the dormant Commerce Clause, and so avoid preemption by judicial interpretation.

The nuclear waste arena has produced another case of relevance, *New York v. United States*.[112] In this case the Court struck down a portion of the Low-Level Radioactive Waste Policy Act Amendments of 1985[113] as being violative of New York's state sovereignty as defined by the Tenth Amendment.[114] In particular, the Court stated that the "take title"

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109. 461 U.S. 190, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983).

110. The *Pacific Gas & Electric Co.* factors involving nuclear waste are analogous to those involving simple garbage. In *Pacific Gas & Electric Co.*, there was no congressional decision to regulate atomic waste [as with garbage], nor any prohibition against states locally regulating atomic waste [as with garbage], even though power generation and spent atomic waste [like garbage] are articles of interstate commerce when placed into the interstate disposal marketplace. *See id.* at 199, 103 S. Ct. at 1719-20, 75 L. Ed. 2d at 762. *Cf. Philadelphia*, 437 U.S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (waste moving in commerce); New York v. United States, 505 U.S. —, —, 112 S. Ct. 2408, 2419-20, 120 L. Ed. 2d 120, 140 (1992) (O'Connor, J.) ("[r]egulation of the resulting interstate market in waste disposal is therefore well within Congress' authority under the Commerce Clause"); Illinois v. General Elec. Co., 683 F.2d 206, 214 (7th Cir. 1982) (nuclear waste moving in commerce where the Court considered state nuclear waste management despite otherwise substantial federal involvement in the nuclear field). The Court should also consider state involvement in municipal solid waste management.

111. TRIBE, *supra* note 52, § 6-27, at 497.

112. 505 U.S. —, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992).

113. 42 U.S.C. § 2021(b)-(d) (1988).

114. The Supreme Court found the "take title" provision of the Act unconstitutional. This provision required states to take title and be liable for all low-

provision would compel states to enact and enforce a federal program regulating low-level radioactive waste disposal which would violate New York State's sovereignty.[115] Although Justice O'Connor observed that the "take title" provisions are apparently unique,[116] it may have a fraternal twin in municipal solid waste management. If the judiciary, as Congress' dormant Commerce Clause surrogate, are to prohibit local management of local waste, as has occurred in several jurisdictions,[117] this effectively creates a "can't take title" provision.

Inability to take control over solid waste is equally corrosive towards state sovereignty as the "take title" provision concerning spent nuclear waste held unconstitutional in *New York*, except that instead of shifting a burden (spent nuclear waste title and potential liability) from the nuclear waste industry to the state,[118] it shifts a benefit (garbage disposal fees) from state and local government to the trash trade. Instead of forcing states to regulate on behalf of Congress,[119] it forces them to deregulate on behalf of private industry.

In both instances, there is a loss of accountability to the local citizenry, exemplified by a federal mandate which compels regulation (nuclear waste) or deregulation (garbage). Thus, state and local officials will bear the brunt of public disapproval while the federal officials (administrative or judicial) who devise the scheme remain insulated from the electoral ramifications.[120]

However, the scheme is a failure which, through principled judicial interpretation, need not continue. *New York*

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level radioactive waste generated within the state if the state did not provide for disposal of their waste by January 1, 1996. Low Level Radioactive Waste Act, 42 U.S.C. § 2021e(d)(2)(C) (1988 & Supp. 1994).

115. *Id.*

116. 505 U.S. at —, 112 S. Ct. at 2428, 120 L. Ed. 2d at 151.

117. Stephen D. DeVito, Jr. Trucking v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775 (D.R.I.), *aff'd*, 947 F.2d 1004 (1st Cir. 1991); Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth., 814 F. Supp. 1566 (M.D. Ala. 1993); Waste Sys. Corp. v. County of Martin, 784 F. Supp. 641 (D. Minn. 1992).

118. 505 U.S. at —, 112 S. Ct. at 2428, 120 L. Ed. 2d at 150.

119. *Id.*

120. *Id.* at —, 112 S. Ct. at 2424, 120 L. Ed. 2d at 145-46.

may resuscitate judicial power to invalidate legislation as violative of the Tenth Amendment, but concerning solid waste management, no judicial override is necessary. Congress, through RCRA, has already tendered solid waste management to state and local government by defining the federal/state relationship for purposes of the Tenth Amendment.

2. *Garcia v. San Antonio Metropolitan Transit Authority*[121] and the National Political Process: Keeping and Maintaining Solid Waste Home Rule at the State and Local Level

The Supreme Court clearly indicated that the Tenth Amendment has a role in our federal system of government.[122] However, unless there is present either an extraordinary divesture of state sovereignty such as found in *New York v. United States*, or a failure of the political process,[123] the Supreme Court is no longer willing to be the arbiter of power between the federal government and the states where Congress has affirmatively exercised its powers under the Commerce Clause.[124]

As stated in *Garcia*, it is now up to Congress to ultimately decide which functions of government will be federal, and which will be left within the province of state and local

121. 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985).

122. *See, e.g., New York*, 505 U.S. at —, 112 S. Ct. at 2429, 120 L. Ed. 2d at 151; Gregory v. Ashcroft, 501 U.S. —, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991); Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983); Fry v. United States, 421 U.S. 542, 547 n.7, 95 S. Ct. 1792, 1795 n.7, 44 L. Ed. 2d 363, 369 n.7 (1975).

123. In the dormant Commerce Clause context, the courts are careful to note discrimination against unrepresented interests. Conversely, "the existence of major in-state interests affected by the [law at issue] is a powerful safeguard against legislative abuse." Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 n.17, 101 S. Ct. 715, 728 n.17, 66 L. Ed. 2d 659, 674 n.17 (1981). *See generally* Donald H. Regan, *The Supreme Court & State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

124. *Garcia*, 469 U.S. at 556, 105 S. Ct. at 1020, 83 L. Ed. 2d at 1037; *see also* South Carolina v. Baker, 485 U.S. 505, 512-15, 108 S. Ct. 1355, 1361, 99 L. Ed. 2d 592, 602-03 (1988) (no Tenth Amendment violation where Congress removed federal income tax exemption on state and local municipal bonds).

government.[125] Congress has done exactly this with respect to solid waste management. This is important for both pragmatic and structural reasons. As the Court stated:

> The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else — including the judiciary — deems state involvement to be.[126]

Structurally, central to defining the federal/state relationship is the role of the political process. With respect to the argument that there should be state immunity from congressional legislation when the activity is traditionally local, the Court stated, "[a]ny rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."[127]

Judicial invalidation of municipal solid waste management raises a mirror situation to *Garcia*: the judiciary is invalidating state and local legislation by raising a rule of state non-immunity to the dormant Commerce Clause, even though Congress has expressly deferred to state and local governments in this field.[128] This is judicial intermeddling with federalism which turns *Garcia* on its head.

The court went on with a discussion quite apropos to the developing field of solid waste management:

> "The science of government . . . is the science of experiment," . . . and the States cannot serve as laboratories for social and economic experiment . . . if they must pay an added price when they meet the changing needs of their

125. 469 U.S. at 549-50, 105 S. Ct. at 1016-17, 83 L. Ed. 2d at 1033.

126. *Id.* at 546, 105 S. Ct. at 1015, 83 L. Ed. 2d at 1031.

127. *Id.*

128. *See infra* note 131 and accompanying text.

> citizenry by taking up functions that an earlier day and a different society left in private hands.[129]

3. RCRA Ratifies and Cedes Local Role in Solid Waste Management

a. A Traditional and Established Home Rule Activity

Waste home rule, like housekeeping, appears to be a universally accepted principle and is consistent with the Golden Rule applied to waste. Congress, through RCRA, has confirmed this, by encouraging waste management home rule. Congress has allowed local government to properly manage and dispose of endemic waste and to encourage citizens to generate less garbage. Thus, the tradition of home rule over garbage is maintained.

Solid waste management has long been a function of, and reserved to, state and local government.[130] As stated by the Sixth Circuit,

> [C]ontrol of local sanitation, including garbage collection and disposal, like fire and police protection, is a traditional, paradigmatic example of the exercise of municipal police powers reserved to state and local governments under the Tenth Amendment. . . . [and which ordinances] are rationally related to a matter of legitimate local concern.[131]

As to local solid waste management, considerations of federalism and the Tenth Amendment clearly outweigh any dormant interest of the Commerce Clause because in RCRA,

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129. 469 U.S. at 546, 105 S. Ct. at 1015, 83 L. Ed. 2d at 1031 (citations omitted).

130. HOMER A. NEAL & J.R. SCHUBEL, SOLID WASTE MANAGEMENT AND THE ENVIRONMENT: THE MOUNTING GARBAGE AND TRASH CRISIS 3, 14-15 (1987); LOUIS BLUMBERG & ROBERT GOTTLIEB, WAR ON WASTE 195 (1989).

131. Hybud Equip. Corp. v. City of Akron, 654 F.2d 1187, 1192 (6th Cir. 1981); *see also* Annotation, *Validity of Statutory or Municipal Regulations as to Garbage*, 135 A.L.R. 1305 (1941).

Congress has explicitly stated the primacy of the non-federal role.[132]

b. Expressly a Local Function

The burden of effectively managing solid waste has intentionally not been federalized by Congress. Congress has expressly declared in RCRA, "the *collection* and *disposal* of solid wastes should continue to be primarily the function of State, regional and local agencies."[133]

Thus, Congress has clearly *not* assumed the lead in solid waste management.[134] Rather, through intentional and articulated deference, Congress has unequivocally "reserved to the states, or to the people" the power of solid waste management in a manner which is both permitted under, and which exemplifies, the Tenth Amendment, principles of federalism and the Guaranty Clause.

This comports with the traditional role of state and local government. Even under the plethora of modern federal environmental law, the task of comprehensive solid waste man-

132. This article suggests that there is no conflict, because local solid waste management does not implicate the Commerce Clause. However, if garbage is considered an article of commerce, then a conflict necessarily arises between the Commerce Clause and constitutional provisions of federalism, particularly as set forth in the Tenth Amendment, as well as considerations of democratic government found in the Guaranty Clause. *See* U.S. CONST. art. IV, § 8.

133. RCRA § 1002(a)(4), 42 U.S.C. § 6901(a)(4) (1988 & Supp. III 1991) (emphasis added). *See also* U.S. ENVIRONMENTAL PROTECTION AGENCY, THE SOLID WASTE DILEMMA: AN AGENDA FOR ACTION 11 (Feb. 1989). "When Congress passed RCRA, it recognized that state and local governments have primary responsibility for municipal solid waste management, but also gave EPA regulatory and assistance responsibilities in this area." *Id.*

134. *See, e.g.*, 40 C.F.R. pts. 240, 241, 243, 244, 247, 256 (1992) (general guidelines for solid waste processing). These guidelines are mandated for federal agencies, but "recommended to State, interstate and local government agencies." 40 C.F.R. § 240.100(d) (1992). The federal government has assumed the lead in the area of hazardous waste. Hazardous waste is a subspecies of solid waste. *See* RCRA § 1004(5), 42 U.S.C. § 6903(5) (1988 & Supp. III 1991). The term solid waste in ordinary discussion, and as generally used in this article, refers to non-hazardous solid waste. In the hazardous waste arena, if states do not provide assurance of the availability of hazardous waste treatment or disposal facilities, they will be denied federal remedial action. CERCLA § 104(c)(9), 42 U.S.C. § 9604(c)(9) (1988 & Supp. III 1991).

agement has remained with state and local government, with federal guidance and assistance.[135]

c. Congress Has Increased Local Governments' Powers Over Solid Waste

Congress envisioned a cooperative federal/state/local governmental relationship concerning non-hazardous solid waste management. But the primary responsibility is non-federal. Moreover, as described below, Congress has actually expanded local power to manage local solid waste. This congressional action, contained in subtitle D of RCRA, contradicts the garbage industry's notion that the dormant Commerce Clause should constrain local "hoarding" of waste.[136]

Initial federal involvement in solid waste management began with the Solid Waste Disposal Act of 1965,[137] and the Resource Recovery Act of 1970.[138] RCRA was the first piece of major federal solid waste legislation and its primary component, subtitle C, contained a comprehensive cradle to grave regulatory program for hazardous waste.[139] RCRA also contained a minor component, subtitle D, concerning non-hazardous solid waste. Subtitle D reaffirmed that Congress intended state and local governments to be ultimately responsible for solid waste management.[140] Significantly, sub-

135. *Id. See generally* RCRA §§ 4001-4010, 42 U.S.C. §§ 6941-6949a (1988 & Supp. III 1991) (RCRA Subchapter IV — State or Regional Solid Waste Plans). This is not, however, to say that RCRA or CERCLA authorizes protectionist state or local laws. Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781, 792 (4th Cir. 1991).

136. Local citizens, through their elected representatives, have no reason to hoard waste. On the contrary, they would prefer there be no waste. However, responsible local government expends considerable funds to build expensive waste disposal facilities in order to reuse, recycle and eliminate solid waste, and consequently directs their waste to facilities built for the purpose of receiving it.

137. Pub. L. No. 89-272, 79 Stat. 997 (codified as amended at 42 U.S.C. §§ 6901-6992k (1988 & Supp. III 1991)).

138. Pub. L. No. 91-512, 84 Stat. 1227 (codified as amended at 42 U.S.C. §§ 6901-6992k (1988 & Supp. III 1991)).

139. *See* RCRA §§ 3001-3019, 42 U.S.C. §§ 6921-6939a (1988 & Supp. III 1991).

140. *See* RCRA §§ 4001-4010, 42 U.S.C. §§ 6941-6949a (1988 & Supp. III 1991).

title D encouraged state and local development of comprehensive solid waste management plans.[141] Federal financial assistance was also available.[142]

Subtitle D enhanced the historical role of local government in solid waste management by removing certain obstacles to local management. One such obstacle was state prohibition against long-term solid waste agreements, particularly waste supply contracts for resource recovery facilities. To remove this obstacle, Congress agreed to provide financial assistance only if the state solid waste management plan insured,

> no state or local government within the State shall be prohibited under State law or local law from negotiating and entering into long-term contracts for the supply of solid waste to resource recovery facilities. . . .[143]

The most important effect of this provision was to eliminate state laws prohibiting local governments from assuring a flow of waste to local facilities.

Congress also sought to remove other obstacles to local solid waste management. For example, Congress authorized the Environmental Protection Agency (EPA) to help State and local governments remove:

> (B) impediments to financing of [energy and materials recovery] facilities . . . through the exercise of State and local authority to issue revenue bonds and the use of State and local credit assistance; and

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141. RCRA §§ 4006, 4007, 42 U.S.C. §§ 6946, 6947 (1988 & Supp. III 1991).

142. RCRA § 4008, 42 U.S.C. § 6948 (1988 & Supp. III 1991).

143. RCRA § 4003(a)(5), 42 U.S.C. § 6943(a)(5) (1988 & Supp. III 1991). The definition contained in RCRA § 1004(11), 42 U.S.C. § 6903(11) (1988 & Supp. III 1991) states: "The term 'long-term contract' means, when used in relation to solid waste supply, a contract of sufficient duration to assure the viability of a resource recovery facility (to the extent that such viability depends upon solid waste supply)." Of course, Congress has the right to withhold funds if a state fails to comply with federal directives. South Dakota v. Dole, 483 U.S. 203, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987) (transportation funds conditioned on raising drinking age to twenty-one years).

> (C) impediments to institutional arrangements necessary to undertake projects . . . including the creation of the special districts, authorities, or corporations where necessary having the power to secure the supply of waste of a project, to conserve resources, to implement the project, and to undertake related activities.[144]

It is illogical to suggest that Congress desired local government to issue revenue bonds backed by a secured supply of waste (for example, using flow control) while permitting the financing of such facilities to be undermined by affording the interstate garbage industry a right to this waste. EPA solid waste regulations emphasized that state planning must reflect a project's financial feasibility.[145] Congress has endeavored through RCRA to give municipal governments a means to solve their individual waste management problems and it is obvious that in enacting RCRA, Congress envisioned the necessity that local waste be brought (flowed) to municipal facilities.[146] Congress' efforts to help state and local gov-

144. RCRA § 4008(d)(3), 42 U.S.C. § 6948(d)(3).

145. *See, e.g.*, 40 C.F.R. § 235.10(c) (1992) ("The volume of wastes within a region will influence the technology choices for recovery and disposal . . . ."). *See also* 40 C.F.R. § 255.10(a)(1)(c) (a requirement that a region generate sufficient volume of waste to support its solid waste management plan's objectives).

146. Further support for this view is found in RCRA's legislative history, where Congress praised the provisions of Wisconsin's waste management plan which required the use of local facilities to make them financially viable. H.R. REP. NO. 1491, *reprinted in* 1986 U.S.S.C.A.N. 6240. Wisconsin's statute is similar to other states which have authorized flow control at Congressional urging. *See, e.g.*, COLO. REV. STAT. § 30-20-107 (1992); CONN. GEN. STAT. § 22A-220A (1993); DEL. CODE ANN. tit. 7, § 6406(31) (1991); FLA. STAT. ch. 403.713 (1993); HAW. REV. STAT. § 340A-3(a) (1985); ILL. ANN. STAT. ch. 34, para. 5-1047 (Smith-Hurd 1993); IND. CODE § 36-9-31-3 to -4 (1993); IOWA CODE § 28G.4 (1993); LA. REV. STAT. ANN. § 30:2307(9) (West 1988); ME. REV. STAT. ANN. tit. 38, § 1304-B(2) (West 1992); MISS. CODE ANN. § 17-17-319 (1992); MO. REV. STAT. § 260.202 (1990); N.J. STAT. ANN. §§ 13:1E-22 (West 1991), 48:13A-5 (West 1993); 1991 N.Y. LAWS ch. 569, at 1072-1073; N.C. GEN. STAT. § 130A-294 (1992); N.D. CENT. CODE, § 23-29-06(6), (8) (1993); OHIO REV. CODE ANN. § 343.01(I)(1)(Anderson 1992); OR. REV. STAT. § 268.317(3), (4) (1991); PA. STAT. ANN. tit. 53, § 4000.303(e) (1993); R.I. GEN. LAWS § 23-19-10(40) (1992); TENN. CODE ANN. § 68-211-814 (1993); VT. STAT. ANN. tit. 24, §§ 2203a-2203b (1992); VA. CODE ANN. § 15.1-28.01 (Michie 1993); WASH. REV. CODE §§ 36.58.040 (1993), 35.21.120 (1990); W. VA. CODE § 24-2-1h (1992); WIS. STAT. § 159.13(3), (11) (1992).

ernment to help themselves exemplifies cooperative federalism.

d. RCRA's Delegation of Waste Management Role

Congress could not intend to grant municipalities solid waste "collection and disposal" functions yet deny local government, through the dormant Commerce Clause, the financial ability to perform this function.[147] Yet, this is exactly what will occur if local government cannot use flow control or equivalent governmental methods to support municipal solid waste facilities.

If responsible for collection and disposal of solid waste, state and local government must have the tools with which to act or face a constitutional Hobson's choice. Denying state and local government the power to manage local solid waste is much more significant than "encouraging each State to ignore the waste problem in the hope that another will pick up the slack."[148] Rather, such disempowerment strikes at the heart of federalism. It "impair[s] the States' integrity or their ability to function effectively in a federal system . . .,"[149] in violation of basic principles of federalism and the Tenth

147. The health and safety considerations involved in managing solid waste should include empowering the locality to finance solid waste management facilities. Dirt, Inc. v. Mobile County, 739 F.2d 1562, 1565 (11th Cir. 1984) (holding regulation allowing denial of permit to landfills that would threaten revenues of county waste management program to be rationally related to legitimate public purpose). Any other interpretation of the Tenth Amendment reservation would render it meaningless.

148. *Fort Gratiot*, 504 U.S. at —, 112 S. Ct. at 2030-31, 119 L. Ed. 2d at 156 (Rehnquist, C.J., dissenting).

149. Fry v. United States, 421 U.S. 542, 547 n.7, 95 S. Ct. 1792, 1795-96 n.7, 44 L. Ed. 2d 363, 369 n.7 (1975) (quoting TRIBE, *supra* note 52, § 5-20, at 379 n.6). "The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Id.* *See also* Merritt, *supra* note 52.

In any case, as recently stated by the Supreme Court: "While no one disputes the proposition that '[t]he Constitution created a Federal Government of limited powers' . . . the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases." *New York*, 505 U.S. at —, 112 S. Ct. at 2417, 120 L. Ed. 2d at 136-37 (1992) (quoting *Gregory v. Ashcroft*, 501 U.S. —, —, 111 S. Ct. 2395, 2399, 115 L. Ed. 2d 410, 422 (1991)).

Amendment. It would create the sort of "regulatory vacuum" which the Supreme Court has sought to avoid, by depriving local government of the ability to act when the national government declines to act.[150]

Through RCRA, Congress has allowed the states to become solid waste laboratories[151] and relinquished to them the responsibility and ability to experiment in solving the solid waste crisis. If one state finds the ultimate solid waste "solution," a means of completely eliminating solid waste, Congress may wish to jump in and adopt the state solution as a national mandate.[152] And if a solution is found, the state and local government inventor should look forward to public praise, not Commerce Clause condemnation. The principles of federalism deserve no less.

Interpreting RCRA as defining the federal/state relationship, as per *Garcia*, comports with what has been described by the Supreme Court as an advantage of a federalist structure of government:

> It assures a decentralized government . . . ; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in gov-

150. The Court noted, "[I]t is almost inconceivable that Congress would have left a regulatory vacuum; the only reasonable inference is that Congress intended the States to continue to make these judgments" regarding need, reliability, economic consequences or service shutdowns due to waste disposal problems, and other economic matters. *Pacific Gas & Elec. Co.*, 461 U.S. at 207-08, 103 S. Ct. at 1724, 75 L. Ed. 2d at 767.

See also TRIBE, *supra* note 52, § 6-27, at 498 (the same sort of regulatory vacuum occurs if states and municipalities are deprived of the ability to manage their own waste).

151. *Cf. Garcia*, 469 U.S. at 546, 105 S. Ct. at 1015, 83 L. Ed. 2d at 1031; Reeves, Inc. v. Stake, 447 U.S. 429, 441, 100 S. Ct. 2271, 2279-80, 65 L. Ed. 2d. 244, 254 (1980) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 52 S. Ct. 371, 76 L. Ed. 747 (1932) (Brandeis, J., dissenting)) (the court applied the Commerce Clause to South Dakota's innovative cement shortage solution would diminish the value of the states as social and economic laboratories).

152. Particularly, if a waste solution is discovered, the federal government may then wish to take the lead, perhaps by imposing appropriate and preemptive uniform regulations. *Cf.* Gade v. National Solid Wastes Management Ass'n, 505 U.S. —, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992) (the Court found the local regulations involving occupational health and safety standards for hazardous waste workers were preempted by federal OHSA regulations).

> ernment; and it makes government more responsive by putting States in competition for a mobile citizenry.[153]

Simply put, Congress has placed the responsibility for management of local waste upon local citizens and local government. This avoids garbage tyranny, while at the same time avoiding the lowest common denominator approach to solid waste management. It also avoids the abdication of local responsibility for municipal waste. It disavows a free market approach to solid waste management, thereby encouraging "waste flight" from environmentally sound facilities in a garbage race to the cheapest vendor.[154] Free market waste non-management should not become the judicially-mandated national standard.[155]

The Supreme Court has said that "a healthy balance of power between the states and the Federal Government will reduce the risk of tyranny and abuse from either front."[156] This balance should be struck in favor of allowing local waste management. As Alexander Hamilton stated, "in a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate."[157] But what federalism remains if people cannot even be the masters of their own garbage?[158] Because Congress has spoken in the area of solid

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153. Gregory v. Ashcroft, 501 U.S. at —, 111 S. Ct. at 2399, 115 L. Ed. 2d at 422 (referencing Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491-1511 (1987) and Deborah Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3-10 (1988)).

154. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, THE SOLID WASTE DILEMMA: AN AGENDA FOR ACTION (1989). The report states that the short-term solution of waste flight only delays the inevitable management problems in the locality shipping the waste, and hastens potential problems in the area that receives and disposes of the waste.

155. This is what is required if the courts impose a free market requirement on waste management. *See DeVito*, 770 F. Supp. at 779.

156. *Gregory*, 501 U.S. at —, 111 S. Ct. at 2400, 115 L. Ed. 2d at 422.

157. *Id.* at —, 111 S. Ct. at 2400, 115 L. Ed. 2d at 422-23 (citing THE FEDERALIST NO. 28, 180-81 (Alexander Hamilton), "Power being almost always the rival of power, the general government will at all times stand ready to check usurpations of the state governments, and these will have the same disposition towards the general government.").

158. Concededly, a legislative fix is always possible. For example, if the lawmaking of the federal government (either by congressional legislation or

waste management, and deferred to the states, the conclusion drawn must be that the people can be the masters, through their state and local governments.

Whether based upon the Tenth Amendment, the Guaranty Clause or other principles of federalism, it is constitutionally sound to allow local management of waste. Local control allows the promotion of municipal facilities where waste can be either eliminated, as through landfilling and incineration, or productively reused, as through composting and recycling. In either case, the waste is managed at home. It is municipal waste housekeeping. The first "law of garbage" — that "everyone wants it picked up but nobody wants to put it down"[159] — is solved. As discussed below in Part V, this local management activity does not implicate interstate commerce, particularly since the waste may be completely eliminated as part of the local management.

D. Jurisprudential Considerations

The courts should also be cognizant of the jurisprudential consideration that the central focus of the Commerce Clause is not to protect individual liberties, but rather, under the guidance of Congress, to keep the Union an economic whole.[160] Thus, judicial anti-majoritarianism is dangerous, for the very reason that the Constitution grants Congress, not the courts, the express power to regulate commerce.

It is both anti-democratic and contrary to Commerce Clause jurisprudence for the courts to impose a free mar-

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through judicial decision-making) were to promote the generation of garbage and discouraged waste reduction and recycling, state and local government would likely lobby for change because they would bear the brunt of the increased disposal costs. As suggested in this article, the Supreme Court can avoid hindering reuse, recycling and reduction of solid waste by holding local solid waste management to be constitutionally permissible, either on federalism grounds or Guaranty Clause grounds, by declining to sanctify garbage as an article of commerce.

159. *See, e.g.*, U.S. ENVIRONMENTAL PROTECTION AGENCY, THE SOLID WASTE DILEMMA: AN AGENDA FOR ACTION (1989).

160. However, individuals can nevertheless obtain relief for violations of the Commerce Clause. *See* Dennis v. Higgins, 498 U.S. 439, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991).

ket[161] mandate upon local government solid waste management. The Commerce Clause does not endorse any particular economic theory.[162] Nevertheless, when courts prohibit management of local waste and instead require such waste to flow to cheaper out-of-state landfills, they are imposing economic doctrine.[163]

The judiciary should be reluctant to alter the historical role of local government's solid waste management. If, for example, a free market approach to waste management is considered desirable, this decision should be left to Congress, which has the staff and resources to make a decision of such profound national importance.[164] Congress is far better equipped than the judiciary to either formulate a new national program, or to leave waste management to the states as "laboratories of experimentation."[165] The courts should leave solid waste management to local government which, if it fails in its mandate, can be preempted by Congress. This is the constitutional balance which Congress has struck by

161. However, such terminology has infiltrated some of the Supreme Court's decisions. *See, e.g.*, Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 350, 97 S. Ct. 2434, 2445, 53 L. Ed. 2d 383, 399 (1977) (common market); Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370, 96 S. Ct. 923, 927, 47 L. Ed. 2d 55, 60 (1976) (area of free trade).

162. Edmund W. Kitch, *Regulation, the American Common Market & Public Choice*, 6 HARV. J.L. & PUB. POL'Y 119, 121-22 (1982); *see also* Russell Chapin, Chadha, Garcia *and the Dormant Commerce Clause Limitation on State Authority to Regulate*, 23 URB. LAW. 163, 175 (1991).

163. *See DeVito*, 770 F. Supp. at 783-85.

164. As stated by one commentator:

> Congress has far better staff resources than do the individual judges who must rely on law clerks unlikely to have a thorough background in economics. Congress has 30,000 employees, subpoena power reaching well beyond the confines of a single litigated case, and specialized committees and subcommittees to deal with the specialized subject matter involved. Congress alone can provide for the full and thorough canvassing of the multitudinous and intricate facts that compose the problem of the regulatory freedom of the states and the appropriate limits on that authority. It can give the individual states an adequate hearing, as well as the commercial interests involved, and formulate a policy representing all concerned.

Chapin, *supra* note 162 at 180.

165. Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMMENTARY 395, 414 (1986).

RCRA, and which the courts should not ignore.[166] To do otherwise may be viewed as "an end run around popular government."[167]

IV. Interstate Commerce is Recognizably Distinct From Local Solid Waste Management

Using only common sense, one would not expect that backyard composting of leaves, brush or coffee grinds implicates the dormant Commerce Clause.[168] A somewhat larger leaf, brush and coffee grind composting program implemented by a group of citizens or a village government would likely be viewed no differently.[169] Extending local recycling to include local industrial waste, agricultural waste, or junk cars is merely broadening the scope of the effort, but not its nature. Local voters or their elected officials can decide that, for their health, safety and welfare, it is best that all community waste go to a municipal facility for environmentally sound processing and disposal. If the waste is locally landfilled, incinerated or composted, there remains no article left to enter interstate commerce, and thus there is no implication of the Commerce Clause. The issue of whether municipally destroyed indigenous waste is an article of commerce has rarely been discussed in court decisions.[170] It should be.[171] There is

166. As stated by Justice Black, "A century and a half of constitutional history and government admonishes this Court to leave that choice [train length] to the elected legislative representatives of the people themselves, where it properly belongs both on democratic principles and the requirements of efficient government." Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 789, 65 S. Ct. 1515, 1530, 89 L. Ed. 1915, 1936 (1945) (Black, J., dissenting).

167. William Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 706 (1976) (referring to dormant Commerce Clause doctrine).

168. This is not to say that Congress may not have the power to regulate such things, but only that until it does, leaves, brush, coffee grinds and other municipal solid waste do not invoke the dormant or negative aspects of the Commerce Clause.

169. If one or more citizens wish to compost their leaves elsewhere, this might involve due process or taking issues, but not the Commerce Clause.

170. *See* discussion *infra* Part V.

171. Nothing in this article disputes congressional power to regulate local solid waste management, at least to the extent that Congress deems such regulation appropriate within the federal system of government. *Cf.* Wickard v. Filburn, 317 U.S. 111, 63 S. Ct 82, 87 L. Ed. 122 (1942) (upholding Congress'

an essential difference between "waste management" and "waste commerce".

Though the distinction is not apparent from reported judicial decisions, there is a fundamental difference between local protectionism against interstate trade in waste disposal services, and local waste management which may eliminate the need for such services. It helps to first examine the nature of waste.

A. What Is Waste?

The notion that waste is a commodity is counter-intuitive and oxymoronic. Waste is not non-waste, but rather, by its very definition,[172] is unwanted by its generator. In itself, waste adds nothing beneficial to society or the environment.[173] It is not produced for sale, but is a by-product of production. Waste is not a manufactured product, but rather, like fire and crime, is something best prevented or elimi-

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power to regulate locally produced wheat, based upon cumulative impacts). Federal environmental laws and regulation extensively apply to local waste management activities, for example, MSW landfill requirements, 40 C.F.R. pt. 258 (1992), and proposed new RCRA "subtitle D" regulations, as well potential liability for municipal waste containing hazardous substances. *See, e.g.*, B.F. Goodrich v. Murtha, 958 F.2d 1192 (2d Cir. 1992); GABA & STEVER, *supra* note 27, at § 4.05.

Moreover, Congress need not regulate an article of commerce in order to regulate matters affecting commerce. *See, e.g.*, *Garcia*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985) (wages and hours regulation); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 281-83, 101 S. Ct. 2352, 2362-63, 69 L. Ed. 2d 1, 19-20 (1981); Clason v. Indiana, 306 U.S. 439, 59 S. Ct. 609, 83 L. Ed. 858 (1939); Sporhase v. Nebraska *ex rel* Douglas, 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982) (Rehnquist, C.J., dissent). However, the Supreme Court in *Garcia* has left defining the federal/state relationship to the national political process, and thus left with Congress the ability to define an activity (such as solid waste management) as within the scope of the Tenth Amendment and therefore outside the scope of judicial power under the dormant commerce clause.

172. *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2580 (3rd ed. 1976) (defines waste as damaged, defective or superfluous material produced during or left over from a manufacturing process or industrial operation or refuse from places of human or animal habitation, such as garbage, rubbish, excrement or sewage).

173. As to beneficial use, there have been various changes to the regulatory definition of solid waste under RCRA based upon some beneficial use. *See generally* GABA & STEVER, *supra* note 27, at § 2-1.

nated. There is no social value in its creation, and it costs money to dispose of.[174] As far as its generator is concerned, it is best never created. Therefore, the difference between waste and commodities, products or raw materials is fundamental.[175]

Broadly speaking, waste can be considered a form of pollution.[176] Whether candy-wrapper litter, roadside dumping of tires or a junkpile, the solid waste involved pollutes the environment — visually, olfactorily, chemically and biologically.

Many types of waste are very damaging to the environment. For example, nuclear and other radiological waste can emit dangerous levels of radiation for thousands of years.[177] Many types of industrial wastes are exceedingly toxic and can

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174. Some by-products can be sold for profit, such as scrap metal, aluminum and some other recyclables. If there is consistently enough profit, there is usually a local scrap dealer who usually obtains, through the local political process, an exemption from local solid waste ordinance. For the purposes of analysis, material with residual value *to the generator* should not be considered waste. *See infra* note 178.

175. How other nations view waste management is illustrative. European nations tend to view solid waste as strictly pollution, not a commodity or natural resource. It is becoming the general policy of the EEC that waste be processed as near to the point of production as possible. *See, e.g.*, Case C-2/90, Commission v. Belgium, — E.C.R. — (1993) [*Wallonia*] (applying proximity principle; upholding Wallonian import ban against solid waste).

Closer to home, it is significant that negotiations on the North American Free Trade Agreement (NAFTA), which were concluded August 12, 1992, did not contain specific environmental standards. The Environmental Side Agreement to the NAFTA, concluded September 15, 1993, provides for an environmental law enforcement mechanism and infrastructure for financing the cleanup of the US-Mexico border area. These provisions grew out of concern for Mexico's traditional failure to enforce its environmental laws. If NAFTA, which was ratified by Congress on November 17, 1993, bestows solid waste with article of commerce status, it would further encourage Mexico to participate in the garbage market, further endangering its environment. *See* Madnick, Michael D., Comment, *NAFTA: A Catalyst For Environmental Change*, 11 PACE ENVTL. L. REV. — (1993).

176. Local disposal of waste is not different in kind from permissible local release of other pollutants. Car exhaust and factory emissions into the air or water, are wastes also. They are not articles of commerce, whose creation is encouraged, even though their recapture and recycling might be more cost effective than minimally controlled release.

177. Nuclear waste is a well known and very controversial form of waste. It is its own category of waste under federal law, and is not classified as solid

be released into the environment through air, water or soil mediums. The chloroflorocarbons (CFC's) contained within seemingly innocuous household waste such as aerosol sprays and refrigerants may contribute to potentially catastrophic stratospheric ozone depletion.

Solid waste is not different in kind from other types of waste. Waste results from the activities of civilization, but is something society would rather do without. It is a by-product, not a resource.[178] The difference between waste, commodities, products and raw materials is significant. Like anti-matter, waste is the antithesis of useful or beneficial material.[179] Consider one form of solid waste, garbage. It attracts vermin, creates fire and explosion risks, and pollutes the air, soil and groundwater.

The assertion that solid waste is a kind of valuable resource is self-serving and inconsistent with the view universally held (except by the waste generating and disposal industries) that solid waste is best never produced. This is not to discourage society from creating less solid waste by beneficially reusing it.

The argument has been made that waste is an integral part of a "circle of commerce," wherein "raw materials [are] harvested, mined and manufactured" into articles of commerce, and "thereafter discarded, sorted, recycled, and finally

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waste. RCRA § 1003(27), 42 U.S.C. § 6903(27) (1991). However, solid waste does include medical radiological waste. *Id.*

178. The solid waste industry has argued that solid waste is a type of natural resource, for example, as fuel for waste-to-energy plants. *See* Brief for *Amicus Curie* National Solid Wastes Management Association in Support of Petitioners, *Carbone*, — U.S. —, 113 S. Ct. 2411, 124 L. Ed. 2d 635 (1993) (No. 92-1402). Of course, this should not discourage society from being less wasteful by attempting to make beneficial reuse of its waste.

179. This is not snobbishness, or to judgmentally deny that "what is one person's trash may be another's treasure." Rather, it is to say that when there is a cost imposed for disposal, rather than a sale of material for value, it is waste.

Nor is this to say that waste cannot be productively reused or recycled, since such is the very purpose of municipal materials recovery and composting programs and facilities.

remanufactured yet again . . . ."[180] Significantly, this recycling utopia is not inconsistent with existing local management of endemic waste. The point is to have the control over waste necessary to reduce waste volumes, and recycle what is left. Therefore, in this regard manufacturers and municipalities should be natural allies, and the common enemy excessive waste and waste disposal profiteers.

B. Foreign Nations and Indian Tribes

The Commerce Clause grants Congress power to regulate commerce not only among the states, but also with foreign nations and Indian Tribes. How we define solid waste today may later define the principles of trade with both foreign countries and American Indians. Thus, it may be informative to study how others manage solid waste to guide us in formulating our own views.

1. The EEC View of Solid Waste Management

The European concept of solid waste is that it is not a commodity or natural resource, but rather is unwanted matter — a form of pollution. As in the United States, the general goals are to reduce the volume of solid waste, and reduce and recycle what remains to the maximum extent feasible.[181] There is a duty of care imposed upon all who handle most

180. *See* Brief for *Amicus Curie* National Solid Waste Management Association in Support of Petitioners, at 2, *Carbone*, — U.S. —, 113 S. Ct. 2411, 124 L. Ed. 2d 635 (1993) (No. 92-1402).

181. *See, e.g.*, ECKARD REHBINDER & RICHARD STEWART, ENVIRONMENTAL PROTECTION POLICY 88-100 (European Univ. Instit. 1988). For example, as to packaging controls Denmark bans one-way beverage containers, and Netherlands law provides authority to ban "any product that adds unduly to the amount of waste, is difficult to dispose of, frequently littered, or is not sufficiently reusable." *See* LOUIS BLUMBERG & ROBERT GOTTLIEB, WAR ON WASTE: CAN AMERICA WIN ITS BATTLE WITH GARBAGE? 281 (1989).

See also Commission v. Denmark, 1988 E.C.R. 4607 (finding returnable beverage containers law to be disproportionately restrictive, after balancing environmental objectives against burden on free movement of goods) [hereinafter *Danish Bottles*]; *Environmental Protection and Free Movement of Goods: the Danish Bottles Case*, 2 J. ENVTL. L. 89 (1990).

types of waste.[182] European Economic Community ("EEC") member states have a fundamental obligation to ensure that waste is disposed of without injury to health and the environment.[183] However, there also remains the anti-protectionist notion that waste which is placed into commerce should not be arbitrarily impeded at member states' borders.[184]

It is becoming the general policy of the EEC, as expressed by the European Court of Justice (ECJ) and some member states, that waste be processed as near to the point of production as possible.[185] There has been some debate concerning the movement of hazardous waste, with the contention that such waste is goods within the meaning of the Treaty of Rome and therefore should be freely traded between member states.[186]

In *Wallonia*,[187] a recent case before the ECJ, the Court found that a waste import ban implemented by Wallonia, a political subdivision of Belgium, interfered with the free movement of goods concerning hazardous waste, but not ordinary solid waste. As to hazardous waste, the EEC had, through the Basel Convention on Transboundary Movement of Hazardous Waste and their Disposal and the 1984 Directive on Transfrontier Movement of Hazardous Waste, created a comprehensive system of European Community "harmonization" which preempted the Wallonian hazardous waste import ban.[188] However, as to ordinary solid waste, the court

182. *See, e.g.*, Environmental Protection Act, 1990, § 34(1) (Eng.). *See generally* ALLEN & OVERY, WASTE MANAGEMENT, THE DUTY OF CARE (1992).

183. Council Directive 75/442 on Waste, 1975 O.J. (L 194) 39; *see also*, REHBINDER & STEWART, *supra* note 181, at 88.

184. *See Wallonia*, *supra* note 175.

185. *See, e.g.*, ALLEN & OVERY, ENVIRONMENTAL LAW UPDATE 10 (Jan. 1993). This is also consistent with the "subsidiarity principle," that governmental activity (such as environmental protection) take place at the lowest practicable level of government. *See, e.g.*, Ludwig Kraemer, *The Single European Act and Environment Protection: Reflections on Several New Provisions in Community Law*, 24 COMMON MKT. L. REV. 659, 665 (1987).

186. ALLEN & OVERY, *supra* note 182, at 9.

187. Case C-2/90, Commission v. Belgium, — E.C.R. — (1990) (decision of July 9, 1993 (Fr.)), *reprinted in* THE TIMES LAW REPORTS (U.K.), 23 July 1993 at 369-371; *see also* Marina Wheeler, *From Danish Bottles to Wallonian Waste*, U.K. ENVTL. L.J., Summer/Autumn 1992, at 26-28.

188. Wheeler, *supra* note 187 at 26.

took into consideration the "unique nature of waste" which required consideration of the principle that environmental damage should, as a priority, be rectified at the source, and by implication, that it is for "each region, commune or other locality to take the appropriate measures to ensure the proper treatment and disposal of their own waste."[189] The court thus applied the "proximity principle," that waste disposal should take place as close as possible to the place of production. For these reasons, the Wallonian law was upheld as to the municipal solid waste management.[190]

The *Wallonia* case did not directly involve the issue of whether Wallonia could implement a flow control ordinance to require that Wallonian generated waste be managed at locally designated facilities. However, this ability was implicit in the court's approval in applying the self-sufficiency principle to a sub-European Community level of government.[191] Allowing this local management is consistent with the proximity principle, otherwise enunciated as part of Community policy.[192]

It is apparent that the EEC differentiates waste from commercial products. As seen in hazardous waste law, the EEC disfavors import barriers which restrict the movement of waste which has been placed into commerce. This European view corresponds to United States Supreme Court's in the *Philadelphia* and *Fort Gratiot* decisions, regarding waste which is in commercial transit.

The EEC also favors local management of locally generated waste (consistent with the Golden Rule as applied to waste). This corresponds to the Supreme Court's *California Reduction*[193] and *Clason*[194] decisions, which recognize the im-

189. *Id.* at 27.
190. *Id.*
191. *Id.*
192. *See* Council Resolution, 1990 O.J. (C 122) 2 (which expresses the desirability that waste materials be prevented at the source, or removed at the closest suitable facility, and that transportation be kept to a minimum); *see also* ALLEN & OVERY, GREEN AND CLEAN IN EUROPE: A CORPORATE COUNSEL'S GUIDE TO ENVIRONMENTAL LAW IN THE EEC (Feb. 1993) (privately published on file with author).
193. 199 U.S. at 306, 26 S. Ct. at 100, 50 L. Ed. at 307.

portance of waste management close to home.[195] The forthcoming anticipated agreement on intra-Community trade in waste may ultimately make the above distinction, and perhaps the United States Supreme Court can help articulate principled guidance in this area.

The EEC is developing a commercial system similar to our own American federal system, by encouraging the free movement of commerce. However, as *Wallonia* shows, waste is viewed *sui generis*. It is treated as environmentally problematic, where the best solution is to eliminate the problem closest to the source. If waste self-management results in "Balkinization," this is intended and desirable since reduction in waste results in greater economic efficiency for all.[196] Home rule applied to local waste makes perfect sense, and the Europeans are beginning to recognize it.

2. Canadian Solid Waste Management

Canadian law and policy is similar to that of the United States on solid waste management issues.[197] This includes the preference of waste reduction, recycling and reuse, as well as local management of locally generated waste.[198]

If Canada were to fully succeed in managing its own solid waste, it as a nation would be depriving its southern neighbors of a large potential source of solid waste. It may be useful to study the international trade aspects of this.

If solid waste is deemed an article of commerce, one might ask whether a home embargo of Canadian solid waste

194. 306 U.S. 439, 59 S. Ct. 609, 83 L. Ed. 2d 858 (1939).

195. *See also* Gardner v. Michigan, 199 U.S. 325, 332, 199 S. Ct. 325, 332, 50 L. Ed. 212, 216 (1905) (describing solid waste collection and disposal as one of local government's controlling obligations).

196. *See, e.g.*, STEPHAN SCHMIDHEINY, CHANGING COURSE: A GLOBAL BUSINESS PERSPECTIVE ON DEVELOPMENT AND THE ENVIRONMENT (MIT Press 1992).

197. The Canadian definition of waste is pure and simple, and completely appropriate: "[Waste is] any substance (solid or hazardous) for which the owner/generator has no further use and which he/she discards." Definition of Canadian Council of Ministers of the Environment (CCME), *restated in* ENVIRONMENT CANADA, OFFICE OF WASTE MANAGEMENT, FEDERAL WASTE REDUCTION 12203 PERSPECTIVES 1 (1993). This same publication also commits to adherence to the polluter pays principle for guiding waste management activities. *Id.* at 2.

198. *Id.*

should be viewed like an embargo of salmon or timber. If Canada barred its salmon or timber from entering the United States because of a selfish desire to eat fish and build homes, retaliation might justifiably ensue. Can the same be said of a solid waste embargo? The answer is just the opposite.

Nevertheless, assume for a moment that retaliation is an appropriate sanction. What form should it take? Logically, the retaliation should be proportional and of like kind. Thus, if Canada deprives the United States of solid waste by managing its waste internally — using waste reduction, recycling and reuse — then the United States should do likewise, so as to completely deprive Canada of our waste! Of course, Canada might retaliate further, by embargoing its hazardous waste and toxic air and water emissions. The United States may then impose a punitive sanction, by embargoing its spent nuclear fuel.

This would be novel, and noble, waste reduction warfare that would clean up the environment and would be in accord with classic principles of international environmental law that 1) states have an obligation to avoid transboundary harm; 2) that environmental harm may be wrongful; and 3) that victim states have the legal right to insist on the prevention and abatement of such harm.[199]

So perhaps, in our international relations with Canada, it is best that we consider waste a unique commodity. We can then clean things up through retaliatory waste reduction wars, almost holy wars, because they impose the Golden Rule as applied to waste, as well as the *sic utere* principle[200] of international law: the obligation not to use one's property in such a way as to damage one's neighbors.[201]

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199. *See* Francois A. Mathys, *International Environmental Law: A Canadian Perspective*, 3 PACE Y.B. INT'L LAW 91, 92 (1991) (citing *Trail Smelter Case* (United States v. Canada), 3 R.I.A.A. 1905 (1938 & 1941); *Corfu Channel Case* (United Kingdom v. Albania), 1949 I.C.J. 4 (judgment of Apr. 9); *Lake Lanoux Arbitration* (France v. Spain), 12 R.I.A.A. 281 (1957)).

200. *Sic utere tuo ut alienum non laedas.* ("[O]ne should use his own property in such a manner as not to injure that of another.") BLACK'S LAW DICTIONARY 1380 (6th ed. 1990).

201. *See also* Principle 21 of the Stockholm Declaration: "States have . . . the responsibility to ensure that activities within their jurisdiction or control do not

3. The North American Free Trade Agreement

The negotiations on the North American Free Trade Agreement (NAFTA), which were concluded August 12, 1992, did not contain specific environmental standards. Yet, environmental considerations were a focal point of discussion.[202] One concern was the effectiveness of Mexico's environmental laws, and whether that country might become a "pollution haven."[203]

Indeed, if Mexico is willing, it could become an exquisite dumping ground for all North American solid waste in light of the great expense of landfilling and incineration in the United States and the dollar's strength against the peso. If United States law bestows upon solid waste the status of article of commerce, there is absolutely no reason why Mexico should not be entitled to fill up its banks with greenbacks and its countryside with garbage under the protection of the Commerce Clause.[204] The problem is a moral one. Future generations from both countries will be ashamed of the narrow-sighted deed — the act of voluntarily becoming a waste dumping ground by offering the cheapest repository.[205]

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cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." DECLARATION OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, U.N. Doc. A/CONF 48/14 & Corr. 1 (1972), *reprinted in* 11 I.L.M. 1416, 1420 (1972).

202. *See* A.B.A. SEC. NAT. RESOURCES & ENV'T *The Year in Review* 191-92 (1992).

203. *Id. See also* Tim Golden, *A History of Pollution in Mexico Casts Clouds Over Trade Accord*, N.Y. TIMES, Aug. 16, 1993, at A1, A7.

204. The Fifth Circuit has recently struck down a Louisiana statute banning the importation of hazardous waste from foreign countries, as violating the Commerce Clause. Chemical Waste Management, Inc. v. Templet, 967 F.2d 1058 (5th Cir. 1992).

205. Chief Justice Rehnquist has already raised this argument, in a domestic context: "I see no reason in the Commerce Clause, however, that requires cheap-land States to become the waste repositories for their brethren, thereby suffering the many risks that such [landfill] sites present." *Fort Gratiot*, — U.S. —, 112 S. Ct. 2019, 2030, 119 L. Ed. 2d 139, 155 (1992) (Rehnquist, C.J., dissenting).

4. Indian Tribes' Solid Waste Management

The Commerce Clause provides that Congress shall have the power "[t]o regulate commerce . . . with the Indian Tribes."[206] Therefore, the dormant aspect of the Commerce Clause would appear equally applicable to the Native American nations as to the several states. Thus, if Indian solid waste is deemed an article of commerce, Native Americans may be required to constitutionally justify any interference with the exportation of waste from their lands. It would seem equally peculiar if non-Indian outsiders were permitted to come onto native lands demanding discarded tribal artifacts from Indian dumping grounds swinging the sword of the dormant Commerce Clause backed by a potential award of attorneys' fees.[207]

A different perspective on the same issue arises if Indians are to become involved in high-tech activities which may result in waste generation. The Mescalero Apaches have sought credible, formal discussions with the federal government regarding using Indian lands in New Mexico to store high-level nuclear waste.[208] If the tribe accepts the waste and creates additional non-nuclear solid waste in the process, how does the Commerce Clause factor into the equation in this waste management? Presuming that the high-level nuclear waste is not locally generated, and so is commerce for Commerce Clause purposes,[209] should the tribe invest any capital for managing the waste it generates, or will this be fiscally dangerous because the private sector may be available to provide the service at a lower cost? Is it prudent for

206. U.S. CONST. art. I, § 8, cl. 3.

207. Indian nations are not immune from liability for civil rights violations. It is clearly the law that such attorneys' fees are awardable for violations of the Commerce Clause. Dennis v. Higgins, 498 U.S. 439, 464, 111 S. Ct. 865, 879, 112 L. Ed. 2d 969, 989 (1991).

208. *See* Matthew L. Wald, *Tribe on Path to Nuclear Waste Site*, N.Y. TIMES, Aug. 6, 1993, at A12; Matthew L. Wald, *Nuclear Industry Seeks Interim Site to Receive Waste*, N.Y. TIMES, Aug. 27, 1993, at A1, A20. The rent for such facility might be $50 million a year. *Id.* at A1.

209. *See* Illinois v. General Elec. Co., 683 F.2d 206, 213-14 (7th Cir. 1982) (interstate transport of spent atomic fuel is protected by Commerce Clause and it is "irrelevant that traffic is in 'bads' rather than goods.").

the tribe to invest in environmentally secure waste facilities where such waste management by the tribe might later be viewed as unconstitutionally burdening interstate commerce.

As to both tribal artifacts and high level nuclear waste, the Indians' managers will undoubtedly prefer managing the waste they generate without potential judicial interference under the dormant Commerce Clause. In this way, Native Americans can take responsibility and be accountable for, and hopefully take pride in, their waste management practices.[210]

V. Locally Managed Waste Is Not an Article of Commerce

When household coffee grinds are placed in the backyard composting pile, the grinds do not become an object of any trade. Rather there is literal home rule over the internally generated solid waste. Composting a community's coffee grinds is no different. Local management, processing, and disposal of solid waste delays, or prevents, the waste from becoming an article of commerce. The local waste collected and deposited in the local town landfill, or waste locally incinerated or composted, never becomes an object of trade. If the municipality allows private haulers to collect the waste and to haul it to a local landfill, there is obviously less restriction on competition than awarding an exclusive franchise to do the same.[211] It is also no different from requiring households

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210. *See* Kevin Gover & Jana L. Walker, *Escaping Environmental Paternalism: One Tribe's Approach to Developing a Commercial Waste Disposal Project in Indian Country*, 63 U. COLO. L. REV. 933 (1992) (portraying a Native American tribe's effort to use its land as a site for a commercial solid waste landfill in San Diego County, California, and a discussion of environmental racism).

211. California Reduction v. Sanitary Reduction Works, 199 U.S. at 308, 26 S. Ct. at 104, 50 L. Ed. at 210 (1905). Recently in *Hybud*, the Sixth Circuit allowed exclusive franchise for garbage collection and disposal.

> Courts in literally hundreds of reported cases have upheld the authority of local governments to monopolize and control local garbage collection by eliminating or restraining competition among private collectors. If any area of the law can be said to be well settled, this one is.

654 F.2d at 1192. *See also* EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §§ 24.242, 24.245 (3d ed. 1986).

to connect to a municipal sewer utility, even if the sewer services are privately operated.[212]

Sewage is the fraternal twin of solid waste, and cases involving sewer districts are instructive as to the nature of the municipal activity. *Town of Hallie v. City of Eau Claire*[213] rejected an antitrust challenge to a city's exclusively franchised sewage collection and disposal system. Though there was no Commerce Clause challenge as to whether sewage should have the constitutional status as an article of commerce, there is little difference between garbage and sewage.[214] Therefore, if out-of-state garbage merchants are entitled to local waste under the Commerce Clause, septic and sewage merchants will undoubtedly seek to be next in line. "Honeydippers" (firms which clean out septic tanks) will start wearing out-of-state clothing and assert that municipal sewer systems infringe on their right to trade in this malodorous waste, perhaps insisting that the Constitution guarantees the private sector the right to keep citizens' toilets flushing.

It is well established that local government, when acting pursuant to state policy, has the power to "displace competition with regulation or monopoly public service," and thus avoid the strictures of the Sherman Antitrust Act.[215] This state action antitrust exemption has evolved from *Parker v. Brown*.[216] In *Parker*, the Supreme Court upheld California's regulation of the raisin market against both antitrust and Commerce Clause challenges even though eventually 95% of the raisins sold eventually found their way into interstate commerce.[217] As part of its decision, the Court in *Parker* distinguished between a commodity not yet in commerce and

212. *See, e.g.*, Rupp v. Grantsville City, 610 P.2d 338 (Utah 1980) ("While the operation of the utility is a proprietary activity, the power to compel connection with the sewer system is a governmental exercise of the State police power"); Village of Peck v. Hoist, 396 N.W.2d 536 (Mich. Ct. App. 1986).

213. 471 U.S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1984).

214. *Id.*

215. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413, 98 S. Ct. 1123, 1137, 55 L. Ed. 364, 382 (1978).

216. 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943).

217. *Id.*

one which is.[218] The states retain, said Chief Justice Stone, "the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken."[219]

There is a much greater distinction to be made between local raisins, 95% of which eventually reach interstate markets, and local solid waste and sewerage, which may reach no market at all. If locally managed with local disposal (landfilled, incinerated, and home-composted), the waste is not pre-commerce but rather non-commerce. It never becomes an item of trade. This cannot be said for the raisins in *Parker* or any of the other commodity cases.[220]

This same distinction was made by (now Chief) Justice Rehnquist's dissent in *Sporhase v. Nebraska ex rel Douglas*.[221] The *Sporhase* case involved groundwater (a commercial commodity much more akin to raisins than garbage) and Nebraska's efforts to regulate its withdrawal and interstate transport.[222] The majority saw a clear interstate dimension to the groundwater at issue, since the water was pumped from a Nebraska well and used to irrigate Nebraska and Colorado agricultural lands, both of which grow crops for worldwide markets.[223] Like the trash being moved by the interstate waste disposal trade in *Philadelphia*, the *Sporhase* Court similarly viewed the groundwater being pumped by farmers across state borders for the interstate agricultural markets as an article of commerce.[224]

Nevertheless, the Court's ruling in *Sporhase* left intact most of the Nebraska statute.[225] The Court found only the reciprocity provision to be discriminatory legislation since it was not "narrowly tailored to [Nebraska's] conservation and preservation rationale."[226] Therefore, it did not survive the strict scrutiny test.

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218. *Id.* at 360-61, 63 S. Ct. at 318, 87 L. Ed. at 331.
219. *Id.* at 360, 63 S. Ct. at 318, 87 L. Ed. at 331.
220. *See, e.g.*, cases cited *infra* notes 254-58.
221. 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982).
222. *Id.*
223. *Id.* at 953, 102 S. Ct. at 3462, 73 L. Ed. 2d at 1263.
224. *Id.* at 961, 102 S. Ct. at 3466, 73 L. Ed. 2d at 1269.
225. *Id.* at 960, 102 S. Ct. at 3466, 73 L. Ed. 2d at 1268.
226. *Sporhase*, 458 U.S. at 957-58, 102 S. Ct. at 3465, 73 L. Ed. 2d at 1265.

It is significant that only the reciprocity provision contained in the Nebraska statute in *Sporhase* was invalidated.[227] Even though the groundwater was unquestionably an important commodity transported across state borders for irrigation of agricultural lands, the Court nevertheless agreed that the Nebraska statute advanced an "unquestionably legitimate and highly important" purpose to "conserve and preserve diminishing sources of groundwater."[228] The Court interjected that "a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State."[229]

The *Sporhase* majority's decision invalidating the reciprocity provisions can be viewed as ultimately based upon the interstate dimension of groundwater which was used to irrigate transboundary lands for internationally marketed crops.[230] However, management of local waste is quite distinguishable from the interstate transport of groundwater needed as a raw product for crops.

Moreover, the argument made by Justice Rehnquist's dissent in *Sporhase*, which differentiated between groundwater and articles of commerce, applies more appropriately to local solid waste management than to groundwater management.[231] First, Justice Rehnquist recognized the affirmative power of Congress when passing legislation: "Congress may regulate not only the stream of commerce itself, but also activities which affect interstate commerce, including wholly intrastate activities. The activity upon which the regulatory effect of the congressional statute falls in many of these cases does not directly involve articles of commerce at all."[232]

Asserting the proposition that Congress has the power to regulate even where no articles of commerce are involved,

227. *Id.*

228. *Id.* at 954, 102 S. Ct. at 3463, 73 L. Ed. 2d at 1262.

229. *Id.* at 955-56, 102 S. Ct. at 3464, 73 L. Ed. 2d at 1264.

230. *Id.* at 953, 102 S. Ct. at 3463, 73 L. Ed. 2d at 1264.

231. *Sporhase*, 458 U.S. at 941, 102 S. Ct. at 3466-68, 73 L. Ed. 2d at 1269 (Rehnquist, C.J., dissenting).

232. *Id.* at 941, 102 S. Ct. at 3467, 73 L. Ed. 2d at 1269 (citation omitted).

Justice Rehnquist cited *Kirschbaum Co. v. Walling*,[233] where the Fair Labor Standards Act was held to apply to employees who operated and maintained a loft building. Neither the employees nor the work they performed dealt with articles of commerce, but because large quantities of goods for interstate commerce were produced in the loft, the FLSA applied.[234] Using this example, Justice Rehnquist concluded, "[t]hus, the authority of Congress under the power to regulate interstate commerce may reach a good deal further than the mere negative impact of the Commerce Clause in the absence of any action by Congress."[235]

Justice Rehnquist's conclusion is a truism. After *Garcia*,[236] Congress can regulate practically anything it chooses. If the power to regulate is coextensive with the definition of article of commerce, then everything which federal government might conceivably regulate is also an article of commerce.[237] The dormant Commerce Clause would then reach anything and everything which a state or a locality may wish to regulate.[238] The practical consequence of a coextensive Commerce Clause rule is that state and local government should not regulate anything without first insuring (under penalty of *Dennis v. Hickman*[239] attorney's fees) that there is a legitimate public interest outweighing any burden on interstate commerce under the *Pike* balancing test.[240] The federal judiciary will thus be empowered, with only the help of a creative plaintiff, to micromanage every municipal regulation of any article of commerce. Such a Commerce Clause rule might well eviscerate the Tenth Amendment, the Guaranty Clause and federalism itself.

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233. 316 U.S. 517, 62 S. Ct. 1116, 86 L. Ed. 1638 (1942).

234. *Id.* at 525-26, 62 S. Ct. at 1121, 86 L. Ed. at 1648.

235. *Sporhase*, 458 U.S. at 961-62, 102 S. Ct. at 3467, 73 L. Ed. 2d at 1269.

236. *See generally Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016.

237. *Id.* at 529, 105 S. Ct. at 1010, 83 L. Ed. 2d at 1017.

238. *Id.* at 528, 105 S. Ct. at 1005, 83 L. Ed. 2d at 1016.

239. *See* Dennis v. Hickman, 513 So. 2d 146 (Fla. Dist. Ct. App. 1987).

240. *See* Pike v. Bruce Church Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L. Ed. 2d 174, 178 (1970).

Justice Rehnquist made an important distinction between what Congress *can* affirmatively regulate under the Commerce Clause and what the judiciary *ought* to regulate. In *Sporhase*, he accurately states that "Congress arguably could regulate ground-water overdraft, even if ground water is not an 'article of commerce' itself."[241]

Analogous examples of this are found in federal environmental law. Congress does regulate both solid and hazardous waste, as well as other forms of pollution. Nevertheless, toxic air or water emissions would be incredulous articles of commerce. Hazardous and solid waste are not manufactured for sale. The commerce involved is the pollution control or waste disposal services.

Even if pollution and waste were considered resources, like groundwater, Justice Rehnquist views remain relevant:

> [A] state may so regulate a natural resource as to preclude that resource from attaining the status of an "article of commerce" for the purposes of the negative impact of the Commerce Clause. It is difficult, if not impossible, to conclude that "commerce" exists in an item that cannot be reduced to possession under state law and in which the State recognizes only a usufructuary right. "Commerce" cannot exist in a natural resource that cannot be sold, rented, traded, or transferred, but only *used*.[242]

Justice Rehnquist continued, "By contrast, Nebraska so regulates ground water that it cannot be said that the State permits any 'commerce,' intrastate or interstate, to exist in this natural resource."[243] Justice Rehnquist's argument is equally applicable to municipal management of solid waste, particularly when the management is total, that is, when the waste is completely disposed of through landfilling or incineration.[244]

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241. 458 U.S. at 962, 102 S. Ct. at 3467, 73 L. Ed. 2d at 1269.

242. *Id.* at 963, 102 S. Ct. at 3468, 73 L. Ed. 2d at 1270 (emphasis in original).

243. *Id.* at 964, 102 S. Ct. at 3468, 73 L. Ed. 2d at 1271.

244. *Id.* at 962, 102 S. Ct. at 3467, 73 L. Ed. 2d at 1269.

This is not a new concept. In *Clason v. Indiana*,[245] the Supreme Court recognized a state's power to prevent any trade (intrastate or interstate) in dead animals not slaughtered for food. The state statute required that the animal remains be transported by licensed operators, under strict sanitary conditions, to a designated disposal facility.[246] The Supreme Court rejected the Commerce Clause challenge that this burdened interstate commerce because the state prevented the dead animals from becoming legitimate articles of commerce.[247] The Court stated, "[T]he mere power of the Federal Government to regulate interstate commerce does not disable the States from adopting reasonable measures designed to secure the health and comfort of their people."[248]

Thus, *Clason* directly sanctioned flow control under the theory that the solid waste (dead animals), locally managed, did not become an article of commerce and that preventing the waste from becoming such was an appropriate means to a lawful end.[249] This rationale is equally compelling in the management of non-animal solid waste.[250] Local governments can manage waste to "secure the health and comfort of their people."[251] Both, Justice Rehnquist's dissent in *Sporhase*, and the Supreme Court's holding in *Clason*, are compelling in the context of both solid waste and other forms of pollution.

The Commerce Clause is inappropriate when applied to waste and pollution control. To make the point, substitute "waste and pollution" for "commodity" in Justice Jackson's classic enunciations of the theory behind the Commerce Clause:

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245. 306 U.S. 439, 59 S. Ct. 609, 83 L. Ed. 2d 858 (1939).

246. *Id.* at 440-41, 59 S. Ct. at 610, 83 L. Ed. 2d at 859-60.

247. *Id.* at 443-44, 59 S. Ct. at 611-12, 83 L. Ed. 2d at 861-62.

248. *Id.* at 444, 59 S. Ct. at 612, 83 L. Ed. 2d at 862; *see also Sporhase*, 458 U.S. at 941, 102 S. Ct. at 3456, 73 L. Ed. 2d at 1254.

249. *Clason*, 306 U.S. at 444, 59 S. Ct. at 612, 83 L. Ed. 2d at 862.

250. There is no significant difference between dead animals and other forms of putrescible solid waste, unless the animals have died from infectious disease, in which case quarantine laws may come into play.

251. *Clason*, 306 U.S. at 444, 59 S. Ct. at 611, 83 L. Ed. 2d at 862.

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce [waste and pollution] by the certainty that he will have free access to every [waste and pollution disposal] market in the Nation, that no home [waste or pollution] embargoes will withhold his [waste and pollution] exports, and no foreign state will by customs duties or regulations exclude [the toxic, hazardous and other solid wastes] . . . . Such was the vision of the Founders . . . .[252]

Such was surely not the vision of the Founding Fathers. The Constitution and its Commerce Clause should not be distorted in this manner.

VI. Import Bans, Export Bans, and the Market Participant Doctrine

Though the distinction is not apparent from reported judicial decisions, there is a fundamental difference between local protectionism against interstate trade in waste disposal services, and local waste management which may eliminate the need for such services.

A. *City of Philadelphia v. New Jersey*[253] and its Progeny — Prohibiting Import Tariffs and Protectionists Quarantines

Before *Philadelphia*, virtually all dormant Commerce Clause cases involved articles which had inherent value as commercial materials, products or raw materials. For example, the precedents involving articles of commerce upon which *Philadelphia* is based involved items such as milk,[254] cantaloupes,[255] minnows,[256] shrimp[257] and timber.[258] How-

252. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539, 69 S. Ct. 657, 665, 93 L. Ed. 865, 875 (1949) (Jackson, J.) (*cited in* Dennis v. Higgins, 498 U.S. 439, 449-50, 111 S. Ct. 865, 872, 112 L. Ed. 2d 969, 980 (1991)).

253. 437 U.S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978).

254. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 55 S. Ct. 497, 79 L. Ed. 1032 (1935); *H.P. Hood & Sons*, 336 U.S. at 525, 69 S. Ct. at 657, 93 L. Ed. at 865 (1949).

255. Pike v. Bruce Church Inc., 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 174 (1970).

256. Hughes v. Oklahoma, 441 U.S. 322, 99 S. Ct. 1727, 60 L. Ed. 250 (1979).

ever, whether or not waste is per se an article of commerce was not specifically at issue in *Philadelphia*. Rather, the focus of the Court's discussion was the evils of protectionism and invalidity of parochial legislation.[259] These dangers which may emerge as a result of a state's restrictive solid waste policies have been reiterated in recent Supreme Court decisions.[260]

Philadelphia properly applied the dormant Commerce Clause doctrine to interstate waste disposal services, and the waste being moved as part of these services. The legal precept that the business of collecting and disposing of solid waste across state lines constitutes interstate commerce did not start with *Philadelphia*.[261] Such commercial waste disposal is an activity which, like any other interstate business, should not be the object of a state's arbitrary discrimination. Under the circumstances, New Jersey's argument that commercial waste vendors warrant no Commerce Clause protection was weak.[262]

In *Philadelphia*, the Court invalidated New Jersey's attempt to block the movement of solid waste which was indisputably being transported in the channels of commerce as part of the waste disposal service.[263] Similarly, in *Fort Gra-*

257. Toomer v. Witsell, 334 U.S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948); Foster Fountain Packing Co. v. Haydel, 278 U.S. 1, 49 S. Ct. 1, 73 L. Ed. 147 (1928).

258. South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 104 S. Ct. 2237, 81 L. Ed. 2d 71 (1984).

259. *See Philadelphia*, 437 U.S. at 617, 98 S. Ct. at 2531, 57 L. Ed. 2d at 475. Examples of parochial legislation include assuring "a steady supply of milk by erecting barriers to allegedly ruinous outside competition, . . . or to create jobs by keeping industry within the State[,] . . . or to preserve the State's financial resources from depletion by fencing out indigent immigrants . . . ." *Id.* at 627, 98 S. Ct. at 2537, 57 L. Ed. 2d at 483 (citations omitted).

260. *See* Chemical Waste Management, Inc. v. Hunt, 504 U.S. —, 112 S. Ct. 2009, 119 L. Ed. 2d 121 (1992); *Fort Gratiot*, 504 U.S. at —, 112 S. Ct. at 2019, 119 L. Ed. 2d at 139.

261. United States v. Pennsylvania Refuse Removal Ass'n, 242 F. Supp. 794 (E.D. Pa.), *aff'd*, 357 F.2d 806 (3d Cir. 1965), *cert. denied*, 384 U.S. 961, 86 S. Ct. 1588, 16 L. Ed. 2d 674 (1966).

262. New Jersey's argument that waste merchants have no Commerce Clause protection because they process waste is somewhat like arguing that pollution remediation firms have no rights because they trade in pollution.

263. *Philadelphia*, 437 U.S. at 626-27, 98 S. Ct. at 2537, 57 L. Ed. 2d at 483.

tiot Sanitary Landfill v. Michigan Dep't of Natural Resources, the Court was faced with solid waste commercial transactions which unquestionably [have] an interstate character involving a disposal service.[264] In *Chemical Waste Management v. Hunt*, the Court found that an Alabama tax placed only on out-of-state hazardous waste destined for one of the state's commercial hazardous waste land disposal facilities violated the Commerce Clause.[265] None of these cases involved municipal disposal of indigenous waste or whether such local management involves an article of commerce thus implicating the Commerce Clause.

Philadelphia, *Fort Gratiot* and *Chemical Waste Management v. Hunt* do not imply that local government cannot manage locally generated waste. In fact, there are indications to the contrary.[266] Each involved situations in which an outside jurisdiction or a waste generator could not manage its own waste, needed to export it, and the interstate market was

264. 504 U.S. at —, 112 S. Ct. at 2023, 119 L. Ed. 2d at 147.

265. *Chemical Waste Management*, 504 U.S. at —, 112 S. Ct. at 2013, 119 L. Ed. 2d at 129. The Court has elsewhere remarked that, "space in radioactive waste disposal sites is frequently sold by residents of one state to residents of another. Regulation of the resulting interstate market in waste disposal is therefore well within Congress' authority. . . ." New York v. United States, 505 U.S. —, —, 112 S. Ct. 2408, 2419-20, 120 L. Ed. 2d 120, 140 (1992) (citing *Philadelphia*, 437 U.S. at 617, 98 S. Ct. at 2531, 57 L. Ed. 2d at 475 (1978); *Fort Gratiot*, 504 U.S. at —, 112 S. Ct. at 2019, 119 L. Ed. 2d at 139 (1992)). Obviously, there is no interstate market in waste when municipal disposal is used (local landfilling, incineration), because the waste remains with the local municipality.

266. For example, *Philadelphia* left open the option of restricting waste facilities to residents, "We express no opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state-owned resources . . . or. . . to spend state funds solely on behalf of state residents. . . ." 437 U.S. at 627 n.6, 98 S. Ct. at 2537 n.6, 57 L. Ed. 2d at 484 n.6.

Chief Justice Rehnquist, in his dissent, ventured that "[o]ther mechanisms also appear open to Alabama to achieve results similar to those that are seemingly foreclosed today . . . subsidies or other tax breaks . . . . Or . . . open[ing] its own facility catering only to Alabama customers." 504 U.S. at —, 112 S. Ct. at 2018, 119 L. Ed. 2d at 138 (Rehnquist, C.J., dissenting).

A third option, suggested by this article, not only allows private industry to perform whatever interstate business it wishes to conduct, but also allows the state to manage waste generated within the state by directing this waste to designated disposal facilities.

ready to accept it for a fee.[267] Such commercial facilities exist because government has not undertaken the disposal of the waste being generated. If local government had undertaken the task, it might avoid the need to export the waste through a commercial disposal service.

It is not difficult to recognize waste which is moving in interstate channels of commerce. In each instance there is discarded material, and an entity willing to accept and dispose of the waste for a fee.[268] If the waste can be disposed of on site, or locally, there is no need to send the waste into the interstate garbage markets and it never need become an article of commerce.[269]

Both *Fort Gratiot* and *Philadelphia* concerned waste which unquestionably involved interstate commerce (the disposal service) and which was stymied at a border through an

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267. As the Court noted in *Fort Gratiot*, it is really semantics whether to characterize the interstate transaction as " 'sales' of garbage or "'purchases' of transportation and disposal services." 504 U.S. at —, 112 S. Ct. at 2023, 119 L. Ed. 2d at 147.

268. Some material, such as scrap metal and aluminum containers, can be sold at a profit by the waste scavenger. If not discarded by the owner generator, these are not properly considered waste. However, most recyclables are waste because they require a payment for disposal and ultimate reuse, which is less than the cost of other traditional disposal, such as landfilling. Thus, recycling saves the avoided costs of other disposal. Where such avoided cost is possible, some state statutes require recycling. *See, e.g.*, N.Y. GEN. MUN. LAW § 120(aa) (McKinney 1986).

269. This is not inconsistent with the Supreme Court's teachings on the subject. The Court stated, "All objects of *interstate* trade merit Commerce Clause protection; none is excluded by definition at the outset." *Fort Gratiot*, 504 U.S. at —, 112 S. Ct. at 2023 n.3, 119 L. Ed. 2d at 147 n.3 (citing *Philadelphia*, 437 U.S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978)) (emphasis added). The Court further stated in *Fort Gratiot* that "[w]hether the business arrangements between out-of-state generators of waste and the [private site operator] are viewed as 'sales' of garbage or 'purchases' of transportation and disposal services, the commercial transactions unquestionably have an interstate character." 504 U.S. at —, 112 S. Ct. at 2023, 119 L. Ed. 2d at 147. To that extent the Supreme Court has said that "[we] have reaffirmed the idea that '[s]olid waste, even if it has no value, is an article of commerce.'" This must be seen in context, that the wastes were moving in interstate trade. Chemical Waste Management v. Hunt, 504 U.S. at —, 112 S. Ct. at 2012 n.3, 119 L. Ed. 2d at 131-32 (1992) (quoting *Fort Gratiot*, 504 U.S. at —, 112 S. Ct. at 2023, 119 L. Ed. 2d at 146-47).

import ban.[270] Absent court intervention, this interstate disposal commerce would be impaired and perhaps retaliatory garbage barriers would be imposed by other jurisdictions. The Commerce Clause seeks to prevent such interference with "[d]iscriminatory, self-protective, and retaliatory state actions."[271] The waste trade today is a multi-billion dollar business which is flourishing, and will continue to flourish with America's throw-away mentality and less than totally effective waste reduction, reuse and recycling programs. Therefore, under the Commerce Clause, the garbage trade can provide services for those jurisdictions and entities which choose, or cannot avoid, exporting their waste.

It is clear that import restrictions by their very nature are offensive to interstate commerce. They prevent waste which is in interstate commerce from finding a home in a private landfill in a neighboring state,[272] or a neighboring county[273], or a foreign country,[274] or they impose tariffs (called disposal fees) not assessed against in-state waste.[275] At least prior to *Philadelphia* and its progeny, import restrictions were commonly used to conserve in-state landfills from being filled with out-of-state waste.[276] However, such conservation was at the expense of private enterprise participating in the interstate garbage disposal trade. The adverse affect on commerce is obvious.

Professor Laurence Tribe points out, "The states may no more solve their waste problems by rerouting the market's

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270. *Fort Gratiot*, 504 U.S. at —, 112 S. Ct. at 2019, 119 L. Ed. 2d at 139; *Philadelphia*, 437 U.S. at 617, 98 S. Ct. at 2531, 57 L. Ed. 2d at 475.

271. This is the Madisonian strand of Commerce Clause interpretation. *See* TRIBE, supra note 52, § 6-3, at 404. A less severe view was Chief Justice Roger Taney's that the Commerce Clause left the states free to regulate except where this conflicted with a federal statute. *Id.* § 6-3, at 405; *The License Cases*, 46 U.S. (5 How.) 504, 573, 12 L. Ed. 256, 278 (1847) (Taney, C.J.).

272. *Philadelphia*, 437 U.S. at 617, 98 S. Ct. at 2531, 57 L. Ed. 2d at 475.

273. *Fort Gratiot*, 504 U.S. at —, 112 S. Ct. at 2019, 119 L. Ed. 2d at 139.

274. *See* Chemical Waste Management Inc., v. Templet, 967 F.2d 1058 (5th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3498 (U.S. Jan. 19, 1993) (No. 91-3693).

275. Chemical Waste Management, Inc. v. Hunt, 504 U.S. —, 112 S. Ct. 2009, 119 L. Ed. 2d 121 (1992).

276. *See, e.g.*, Waste Sys. Corp. v. County of Martin, 985 F.2d 1381, 1386 (8th Cir. 1993).

allocation of that waste than they may solve their highway safety problems by routing the market's private participants, and all their attendant hazards, through neighboring states."[277] He continues, "[t]he Commerce Clause can have no tolerance for politically expedient decisions 'by one state to isolate itself in the stream of interstate commerce from a problem shared by all.'"[278] Import restrictions do not pass constitutional muster because they are protectionist and serve to isolate the localities from a common problem.[279]

To demonstrate the general offensiveness of import restrictions, suppose every municipality in the United States imposed the relatively trivial requirement that any waste disposal trucks passing through must stop at a municipal checkpoint and allow visual examination of the vehicle and its waste contents. If the garbage were being hauled from Vermont to a Midwest landfill, this trivial requirement would require hundreds of stops — obviously an excessive burden on commerce.[280] Because this requirement would greatly burden interstate commerce, dormant Commerce Clause

277. TRIBE, *supra* note 52, § 6-8, at 425.

278. *Id.* § 6-8, at 425-26 (citing *Philadelphia*, 437 U.S. at 629, 98 S. Ct. at 2538, 57 L. Ed. 2d at 485).

279. In exceptional circumstances, some discrimination is allowed, however, there must be a legitimate purpose and no reasonable non-discriminatory alternatives. *See, e.g.*, Maine v. Taylor, 477 U.S. 131, 106 S. Ct. 2440, 91 L. Ed. 2d 110 (1986) (upholding ban on importing out-of-state baitfish where ban had legitimate local purpose that could not be served as well by available nondiscriminatory means).

280. TRIBE, *supra* note 52, § 6-7 (citing Smith v. Alabama, 124 U.S. 465, 8 S. Ct. 564, 31 L. Ed. 508 (1888); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 13 L. Ed. 996 (1851); Bradley v. Public Utilities Comm'n of Ohio, 289 U.S. 92, 53 S. Ct. 577, 77 L. Ed. 1053 (1933); Duckworth v. Arkansas, 314 U.S. 390, 62 S. Ct. 311, 86 L. Ed. 294 (1941); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 58 S. Ct. 510, 82 L. Ed. 734 (1938); Southern Pac. Co. v. Arizona, 325 U.S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945); Raymond Motor Transp. v. Rice, 434 U.S. 429, 98 S. Ct. 787, 54 L. Ed. 2d 664 (1978); Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R. Co., 393 U.S. 129, 89 S. Ct. 323, 21 L. Ed. 2d 289 (1968); Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 101 S. Ct. 1309, 67 L. Ed. 2d 580 (1981)). Interestingly, the Eleventh Circuit would apparently allow Georgia counties to do just that. *See* Diamond Waste, Inc. v. Monroe County, 939 F.2d 941, 946 (11th Cir. 1991) (otherwise finding that county importation ban violated the Commerce Clause).

scrutiny, either through a *Pike* balancing test[281], strict scrutiny[282], or *per se* invalidity[283] is applied.

The Commerce Clause theme of *Philadelphia* and *Fort Gratiot* is that parochial restrictions that are protectionist in nature are improper; it is not that local government is prohibited from solving local waste problems. Professor Tribe's paraphrase of a famous summation by Justice Cardozo is appropriate: "[T]he peoples of the several states must sink or swim together, even in [our] collective garbage."[284] Nonetheless, if local government helps its citizens swim through the management of local solid waste, this cumulatively allows us all to swim. Whether the task is reducing crime, fire, illiteracy or trash, local responsibility and local control will achieve the best result.

B. Enforced Local Management, Including Flow Control, Bears Little Resemblance to Import Restrictions

Export barriers pertaining to locally generated waste are completely different from import restrictions pertaining to waste which is in the stream of commerce. Export barriers do not impose one jurisdiction's will upon another. Rather, it allows non-discriminatory taxpayer-financed self-determinism. Export barriers eliminate waste before the need arises to place it into commerce or the need for outside disposal service.

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281. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L. Ed. 2d 174, 178 (1970); *see also* Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579, 106 S. Ct. 2080, 2084, 90 L. Ed. 2d 552, 558 (1986).

282. If discrimination is found, strict scrutiny will be applied. *See, e.g.*, Maine v. Taylor, 477 U.S. 131, 106 S. Ct. 2440, 91 L. Ed. 2d 110 (1986).

283. A finding that state legislation constitutes economic protectionism results in the "virtually *per se* rule of invalidity." *Philadelphia*, 437 U.S. at 624, 98 S. Ct. at 2535, 57 L. Ed. 2d at 481.

284. TRIBE, *supra* note 52, § 6-8, at 426 (paraphrasing Justice Cardozo's summation in Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523, 55 S. Ct. 497, 500, 79 L. Ed. 1032, 1038 (1935)).

1. Waste Facility Financing — Community Money for Environmentally Sound Solid Waste Management

a. Flow Control

A solid waste export ban is designed to effectuate local management of local garbage and other locally-generated solid waste. Generally termed "flow control" or "designation,"[285] export bans generally require that locally generated waste be brought to a local facility, in order to assure that facility's financial viability.[286] Export bans help to foster and finance proper environmentally sensitive and economical management of solid waste.

b. Financing Alternatives

In addition to legally compelled export bans, (flow control), there are other means by which a municipality can control and manage solid waste. A municipality might create a refuse entity with either franchised collection, municipal collection or municipally subsidized facilities, as a means of shepherding local waste to designated facilities. The waste is either picked up by the municipality, its franchisee or agents, and delivered to the facility or flows there by force of economics. Economics, in the form of zero or below-market tip fees, would be used to direct the flow to a designated facility. In each case, the waste flow is precisely the same as with a flow control ordinance; only the methodology is changed by increased bureaucracy.[287]

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285. Perhaps more precisely, waste flow control means municipal direction of locally generated solid waste for processing or disposal.

286. Although the terms may be construed broadly to encompass both import restrictions and export bans, the term "flow control" generally involves only export bans. *See, e.g.*, Rockland County — Solid Waste Treatment and Disposal Act, 1991 N.Y. LAWS ch. 569, at 1072 ("[authorizing] local laws requiring that all solid waste generated, originated or brought within [local] boundaries . . . shall be delivered to a specified . . . facility").

The purpose of including non-indigenous waste may, however, be permissible as a legitimate non-discriminatory effort to avoid a generator's intentional commingling of local and foreign waste for the purpose of avoiding flow control.

287. Chief Justice Rehnquist stated:

By using any of these methods, local solid waste is directed to designated facilities and, if wholly managed, will never be placed into commerce. The principle financing difference is that flow control requires fees to be paid at the gate, whereas fees supporting a district's facilities, or a municipal collection, are collected via a tax bill or assessment.

Because the waste flow results are the same, if export flow control is invalidated, these other alternatives should also fail, since they are simply different means to the same end.[288] This conclusion, and the waste havoc which will ensue, is the logical result of the twisted reasoning whereby waste became per se protected commerce.

2. Municipal Waste Facilities Require a Secure Source of Revenue

A multi-million dollar municipal waste processing or recycling facility is financed through the bond market.[289] Bondholders want to be assured of repayment, and therefore study the mechanisms for repayment. They may look to see whether private facilities are able to threaten the revenue of the municipal facility.[290] However, directing waste to a municipal facility, whether through flow control or otherwise,

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> But certainly we have lost our way when we require States to perform such gymnastics, when such performances will in turn produce little difference in ultimate effects . . . . And each new arrangement will generate a new legal challenge, one that will work to the principal advantage only of those States that refuse to contribute to a solution.

Chemical Waste Management, Inc. v. Hunt, 504 U.S. —, —, 112 S. Ct. 2009, 2019, 119 L. Ed. 2d 121, 138 (1992).

288. As the Court stated in *Philadelphia*, "[t]he evil of protectionism can reside in legislative means as well as legislative ends." 437 U.S. at 626, 98 S. Ct. at 2537, 57 L. Ed. 2d at 482.

289. Facility financing bonds can be backed several ways: through the municipality itself; through general obligation bonds; by the assessments or levies of a tax district or authority; or by the income generated by facility operations, generally through tipping fees. The last approach, "revenue financing," is most common for solid waste facilities.

290. Dirt, Inc. v. Mobile County Comm'n, 739 F.2d 1562, 1565 (11th Cir. 1984) (regulation allowing denial of permit to landfills that would threaten revenues of county waste management program rationally upheld as related to legitimate public purpose).

guarantees a supply of waste to municipal facilities constructed to receive such waste.

The practical effect of judicial holdings that localities cannot constitutionally control locally generated waste is that it will be impossible to finance municipal facilities. Public waste management will then become impractical, if not impossible.

3. Flow Control Is the Best Option

Among the various options for directing waste to environmentally sound solid waste facilities, flow control has many advantages. First, flow control ordinances have the advantage of administrative simplicity. A local law directs the waste flow, tip fees are paid at the designated facility and appropriate environmental enforcement is conducted. In contrast, if a solid waste authority or district is formed, authorization may be required at both the state and local levels of government. In addition, a separate independent administrative structure must be established, and procedures must be implemented for imposing special assessments, ad valorem taxes or user fees.[291] This is a much more complex process, the cost of which will be borne by local citizens.

Besides administrative simplicity, flow control also encourages waste reduction. For example, if a composting plant provides a long-term means of managing local waste in an environmentally sound manner, the tip fee charged can be set at an amount which reflects the actual cost of the facility or, alternatively, the real cost of disposal.[292] In this manner, cit-

291. *See, e.g.*, N.Y. GEN. MUN. LAW § 226(b) (McKinney 1986). For example, the process for forming a solid waste authority for Rockland County, New York, is: (1) for the County government to prepare a draft law and request authorization from the State; (2) for the state legislature to then enact an enabling law, which it then refers back to the County; and (3) the County then holds a public hearing and then forms the authority. Forming a district is similarly complex, and requires delineation of the service area, establishment of rates, and creation of an administrative structure.

292. As landfills close and environmental hazards are discovered, waste disposal costs increase. The real cost of disposal must account for these costs, as well as other possible externalities. For example, deposition at any landfill which may leak may subject the depositor to the cost of a future cleanup. Looked at differently, the present disposal fee is subsidized at the expense of

izens will be encouraged to reduce the amount of their waste through simple market economics.[293] Conversely, tip fees might be set at below cost in order to promote composting and use of the facility. Thus, export flow control can accomplish two major environmental goals: it can assure long-term availability of environmentally safe waste management options, and it can encourage waste reduction, reuse and recycling.[294]

4. Total Solid Waste Management: The Destruction of Non-Commerce

Total waste management of local waste by a municipality does not discriminate against interstate commerce. Conceptually, total waste management by a state or any of its political subdivisions, or even a foreign country,[295] should be viewed no differently. Waste management should not be viewed as protectionist in terms of interstate commerce. Such measures, whether through flow control, franchise, public utility or municipal collection, ultimately serve to protect the health, safety and welfare of citizens and the environment.

Flow control ordinances, in particular, attempt to solve the solid waste problem at its source by allowing the develop-

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the future cleanup. A product tax reflecting the real cost of waste disposal is one type of market approach. *See* Britt Anne Bernheim, Note, *Can We Cure Our Throwaway Habits by Imposing the True Social Cost on Disposal Products*, 63 U. COLO. L. REV. 953 (1992).

293. Waste Sys. Corp. v. County of Martin, 985 F.2d 1381 (8th Cir. 1993), *aff'g* 784 F. Supp. 641 (D. Minn. 1992) (rejecting this concept as interfering with the interstate flow of waste).

294. Flow control can help accomplish other environmental goals as well: 1) promotion of energy recovery, 2) controlled inspection and monitoring of waste, 3) providing a guaranteed waste stream and stabilizing the waste market, 4) encouragement of recycling, reuse and energy recovery technological innovations, 5) avoidance of potential Superfund or other cleanup liabilities, 6) allowing consolidated and therefore reduced truck traffic, and 7) allowing characterization of waste streams and thus the creation of viable solid waste management plans.

295. As suggested above, if Canada manages all of its waste internally, this should not be cause for the United States to retaliate because its waste industry may be deprived of waste. Rather, we should try then to emulate Canadian waste reduction.

ment and financing of locally crafted solutions for the disposal of locally generated waste. Flow control reflects the real cost of disposal and has the advantage of administrative simplicity, thereby encouraging waste reduction and recycling. By comparison, restricting out-of-jurisdiction waste from local private facilities (i.e., import restrictions) is not an essential management tool. It is instead discrimination, particularly when it allows hoarding of private disposal capacity.[296]

C. The Market Participant Doctrine is Unsuitable and Makes Government Subservient to an Inappropriate Constitutional Doctrine

Faced with the threat of Commerce Clause litigation, municipalities have grappled with finding a legally defensible way of managing local waste. The uncertainty, some might say utter confusion, in applying constitutional doctrine to solid waste management causes municipalities to seek a safety net. Some hope to have found it with the market participant doctrine. Their reliance is misplaced.

The *Philadelphia* decision suggested that state-owned or subsidized facilities may be able to avoid the type of Commerce Clause scrutiny applied to state regulation of private waste facilities.[297] This option was also left open in *Fort Gratiot*.[298] In *Chemical Waste Management v. Hunt*, decided the same day as *Fort Gratiot*, Chief Justice Rehnquist offered the

296. This is not to say that in some cases it may not be permissible. For example, if a local facility is processing local waste, the local jurisdiction may justifiably impose restrictions on its processing of out-of-jurisdiction waste because of the problems inherent in segregating such a fungible item as municipal garbage, especially if commingled.

297. The Supreme Court stated: "We express no opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state-owned resources . . . or New Jersey's power to spend state funds solely on behalf of state residents and businesses . . . ." *Philadelphia*, 437 U.S. at 627-28 n.6, 98 S. Ct. at 2537 n.6, 57 L. Ed. 2d at 484 n.6.

298. The Court stated: "Nor does the case raise any question concerning policies that municipalities or other governmental agencies may pursue in the management of publicly owned facilities. The case involves only the validity of the Waste Import Restrictions as they apply to privately owned and operated landfills." *Fort Gratiot*, 504 U.S. at —, 112 S. Ct. at 2023, 119 L. Ed. 2d at 146.

market participant doctrine as an option whereby Alabama could open its own facility catering only to Alabama customers.[299]

Whether or not publicly owned or sponsored facilities are subject to dormant Commerce Clause scrutiny is a multi-billion dollar issue.[300] Because of the potential money involved, municipalities,[301] as well as legal commentators,[302] have grasped onto the market participant exception[303] to the Com-

299. Chemical Waste Management v. Hunt, 504 U.S. at —, 112 S. Ct. at 2019, 119 L. Ed. 2d at 138 (Rehnquist, C. J., dissenting).

300. For example, municipally sponsored "waste to energy" incinerators require a large volume of municipal solid waste in order to operate. Were these plants to lose their source of waste due to cheaper temporal landfilling options elsewhere and a Commerce Clause interpretation requiring the lower cost option, this could cost bondholders an estimated ten billion dollars ($10,000,000,000). *See* Jeff Bailey, *Up in Smoke: Fading Garbage Crisis Leaves Incinerators Competing for Trash*, WALL ST. J., Aug. 11, 1993, at A2. This does not include the other costs incurred around the country for developing and implementing solid waste management plans and other effort aimed at creating local garbage solutions.

301. *See, e.g.*, Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth., 814 F. Supp. 1566 (M.D. Ala. 1993) (rejecting the doctrine). *See also* Brief of *Amicus Curiae*, City of Springfield, Missouri in Support of Respondent, C & A Carbone, Inc. v. Town of Clarkstown, — U.S. —, 113 S. Ct. 2411, 124 L. Ed. 2d 635 (1993) (No. 92-1402); Brief of *Amicus Curiae*, County of San Diego, California in Support of Respondent, *Carbone* (No. 92-1402).

302. *See, e.g.*, Martin E. Gold, *Solid Waste Management and the Constitution's Commerce Clause*, 25 URB. LAW. 21, 29-32 (1993); Bradford C. Mank, *Out-of-State Trash: Solid Waste and the Dormant Commerce Clause*, 38 WASH. U. J. URB. & CONTEMP. L. 25 (1990); Anne Ziebarth, *Environmental Law: Solid Waste Transport and Disposal Across State Lines — The Commerce Clause versus the Garbage Crisis*, 1990 ANN. SURV. AM. L. 365, 370-76 (1990); David Pomper, Comment, *Recycling* Philadelphia v. New Jersey: *The Dormant Commerce Clause, Postindustrial "Natural" Resources, and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309 (1989); James Hinshaw, Comment, *The Dormant Commerce Clause after* Garcia: *An Application to Interstate Commerce of Sanitary Landfill Space*, 67 IND. L.J. 511 (1992). *But see* William L. Kovacs & Anthony A. Anderson, *States as Market Participants in Solid Waste Disposal Services — Fair Competition or the Destruction of the Private Sector*, 18 ENVTL. L. 779 (1988).

303. The Supreme Court has applied the market participant doctrine in several cases. *See* Hughes v. Alexandria Scrap, 426 U.S. 794, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976); Reeves, Inc. v. Stake, 447 U.S. 429, 100 S. Ct. 2271, 65 L. Ed. 2d 244 (1980) (local resident preference in state-produced cement); White v. Massachusetts Council of Constr. Employees, 460 U.S. 204, 103 S. Ct. 1042, 75 L. Ed. 2d 1 (1983). *But see* South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 104 S. Ct. 2237, 81 L. Ed. 2d 71 (1984) (a plurality rejected the doc-

merce Clause as a lifeboat to save public projects from the stormy seas of Commerce Clause litigation. Unfortunately, this lifeboat is not big enough, and in several recent cases has sunk[304] or has not even been launched.[305] The doctrine has many critics.[306]

The market participant doctrine is of recent vintage and has as its basic theory the right of state and local government to participate in the marketplace on the same terms as private enterprise.[307] However, participating on the same terms has been interpreted as excluding the governmental participant from acting simultaneously as a regulator. As stated by one district court,

> The critical question . . . is whether the challenged governmental conduct is more analogous to business activities of traders and manufacturers — in which case the state should be allowed to pursue its own economic interest and determine those with whom it will deal in the private market or is more analogous to an effort to regulate activities

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trine). Incidentally, as pointed out in Swin Resource Sys. Inc. v. Lycoming County, 883 F.2d 245, 249 (3d Cir. 1989), the author of each of the first three decisions cited above, which applied the doctrine, dissented in the subsequent decision.

304. *See, e.g., S.E. Alabama*, 814 F. Supp. at 1572.

305. *See, e.g.*, Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775 (D.R.I.), *aff'd*, 947 F.2d 1004 (1st Cir. 1991); Waste Sys. Corp. v. County of Martin, 784 F. Supp. 641 (D. Minn. 1992), *aff'd*, 985 F.2d 1381 (8th Cir. 1993).

306. *See generally* Richard H. Seamon, Note, *The Market Participant Test in Dormant Commerce Clause Analysis — Protecting Protectionism?*, 1985 DUKE L.J. 697 (1985); Jonathan D. Varat, *State 'Citizenship' and Interstate Equality*, 48 U. CHI. L. REV. 487, 503-08 (1981). *See, e.g.*, Jonathan Meyers, Note, *Confronting the Garbage Crisis: Increased Federal Involvement as a Means of Addressing Municipal Solid Waste Disposal*, 79 GEO. L.J. 567, 580 (1991); William L. Kovacs, *States as Market Participants in Solid Waste Disposal Services — Fair Competition or the Destruction of the Private Sector*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 779 (1988); Robert Meltz, *State Discrimination Against Imported Solid Waste: Constitutional Roadblocks*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,383 (Sept. 1990).

307. This doctrine was first enunciated in Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 96 S. Ct. 2488, 49 L. Ed. 2d. 220 (1976), on the same day that National League of Cities v. Usery, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976), announced what one commentator called the "New Federalism." *See generally* TRIBE, *supra* note 52, § 6-11, at 430.

> among such [private] parties in the private market in which case the state's conduct must be subject to commerce clause scrutiny.[308]

Unfortunately, because of the significant health and safety issues surrounding solid waste management, it would practically be malfeasance for a local government not to be a regulator in this field. Thus, the market participant doctrine creates a dilemma: the local government *must* regulate for its citizens health, safety and the environment; however, it may for the same reasons also feel compelled to manage its solid waste through public facilities.[309] Solid waste management is a "hybrid area that involves a distinctive public need in a highly regulated environment."[310]

Another problem with the doctrine is that it has been held to apply only to the market in which the state is a participant.[311] Courts have opined that if the market is not narrowly defined, the exception might swallow the rule.[312] Thus, if a municipality were to participate in the residential waste collection market, it may not participate in the waste disposal

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308. *S.E. Alabama*, 814 F. Supp. at 1572.

309. Nevertheless, the doctrine has been applied on occasion to uphold certain governmental waste management programs. *See, e.g.*, Swin Resource Sys., Inc. v. Lycoming County, 883 F.2d 245 (3d Cir. 1989) (preference for local residents for County owned and operated landfill); Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist., 643 F. Supp. 127 (D. Or. 1986), *aff'd*, 820 F.2d 1482 (9th Cir. 1987) (ordinance restricted district landfill to residents); Shayne Bros. v. District of Columbia, 592 F. Supp. 1128 (D.D.C. 1984) (restriction that only locally collected waste be deposited in city operated disposal facility).

310. *Swin Resource Sys.*, 883 F.2d at 259 (Gibbons, C.J., dissenting) (citing Hancock Indus. v. Schaeffer, 811 F.2d 225 (3d Cir. 1987)).

311. South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 97, 104 S. Ct. 2237, 2245, 81 L. Ed. 2d 71, 83 (1984).

> The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market.

Id.

312. *See, e.g., S.E. Alabama*, 814 F. Supp. at 1574; *Swin Resource Sys.*, 883 F.2d at 259 (Gibbons, C.J., dissenting); *South-Central Timber Dev.*, 467 U.S. at 97-98, 104 S. Ct. at 2245-46, 81 L. Ed. 2d at 83.

services market[313] even if the disposal were run by an allied waste authority.[314]

For example, while a state is undoubtedly permitted to own and operate a cement plant as a market participant, it is very questionable whether it could also regulate the raw materials for cement in a manner which would favor the plant.[315] Analogously, a municipality might install a materials recycling composting facility. Does it also have the right to regulate the raw materials used at such a facility — the recyclables and the compost — in such a way as to favor the municipal facility? This is perhaps an open question, but it could be viewed as impermissible regulation outside the relevant market.[316] A court might reasonably hold that the materials recycling and composting plants process the material, but are not participants in the collection market, and therefore, the state is not entitled to the market participant exemption in directing raw materials to facilities.[317]

The market participant doctrine is especially problematic in the solid waste field. As discussed above, solid waste presents basic health and safety concerns and demands governmental regulation and supervision. Environmental concerns have made this regulation increasingly complex. Hazardous substance and toxic tort law also create financial liabilities. Ominously, under the doctrine as interpreted by at least one court,[318] once the waste is placed into private

313. *See Swin Resource Sys.*, 883 F.2d at 259 (Gibbons, C.J., dissenting).

314. *See, e.g., S.E. Alabama*, 814 F. Supp. at 1574.

315. *See* Reeves, Inc. v. Stake, 447 U.S. 429, 100 S. Ct. 2488, 49 L. Ed. 2d 220 (1980).

316. *See, e.g., South-Central Timber Dev.*, 476 U.S. 82, 104 S. Ct. 2237, 81 L. Ed. 2d 71.

317. Waste Sys. Corp. v. County of Martin, 784 F. Supp. 641 (D. Minn. 1992), *aff'd*, 985 F.2d 1381 (8th Cir. 1993) (where the composting facility at issue was public, but no market participant theory was forwarded). Two reasons perhaps explain why no market participant theory was offered: 1) the flow control ordinance was clearly regulatory and 2) the collection market was arguably distinct from the composting (disposal) market.

318. *S.E. Alabama*, 814 F. Supp. at 1576.

> Even if [the municipality] could validly claim title to all waste produced within its borders, its proprietary interest would terminate once it [sold] the waste to private haulers for collection . . . . [A]ny attempt to attach conditions to the disposal of waste once it came to

hands, the municipality has no power to prevent, by contract or otherwise, its waste from ending up at a Superfund site with all the possible attendant liabilities as a "potentially responsible party."[319]

Therefore, as far as waste management is concerned, the market participant doctrine is fraught with peril. There is a better alternative, and one which could have been applied in *Hughes v. Alexandria Scrap Corp.*,[320] the case which promulgated the doctrine. In that case the state paid a bounty for junk automobiles in order to manage the discarded waste. In effect, it avoided the need for state or municipal collection by utilizing private collection and delivery to the State under the incentive of a bounty. In essence, all that was involved was a novel method of governmental solid waste management and, for all the reasons put forth in this article, the dormant Commerce Clause need not have been implicated.

The approach is straightforward: distinguish municipal waste management of locally generated waste (e.g., coffee grinds, junk cars) from the commercial waste disposal trade. This avoids the necessity of making government subservient to a doctrine which, when applied to waste management, is of only limited utility.

VII. Confusing Municipal Waste Management With the Commercial Waste Trade

A. Decisions in Solid Waste Cases Often Unnecessarily Implicate the Dormant Commerce Clause

The *Philadelphia* decision properly applied the dormant Commerce Clause to a protectionist state law which directly interfered with waste being moved through interstate channels of commerce. Unfortunately, neither *Philadelphia* nor

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rest in private hands would be an impermissible "downstream restriction" outside of the market in which it participates.

Id.

319. *See, e.g.*, B.F. Goodrich Co. v. Murtha, 958 F.2d 1192 (2d Cir. 1992) (municipal solid waste may be a "hazardous substance" under CERCLA); JEFFREY M. GABA & DONALD W. STEVER, LAW OF SOLID WASTE, POLLUTION PREVENTION AND RECYCLING, *supra* note 29, § 4.05.

320. 426 U.S. 794, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976).

its progeny distinguishes material which is in commerce from material which, as suggested above, should not be considered as an article of trade. Making such a distinction is the only principled way to reconcile widely divergent cases which, if waste is viewed as an article of commerce, are irreconcilable using Commerce Clause doctrine.[321] There follows a discussion recent cases exemplifying the complexities of applying the dormant Commerce Clause to solid waste management.[322]

Courts have had little difficulty ruling on regulations that operate as import restrictions. In *BFI Medical Waste Systems v. Whatcom County*,[323] a citizens group sponsored an initiative which resulted in a county ordinance banning all out-of-county infectious medical waste from the jurisdiction. The district court found that the ordinance deprived a private incinerator located within the county of a significant amount of out-of-county and Canadian medical waste. Because the ordinance prohibited importing solely on the basis of origin, the court held it to be impermissible discrimination against interstate and foreign commerce in violation of the Commerce Clause.[324]

Similarly, in *Diamond Waste, Inc. v. Monroe County*,[325] the county passed a resolution requiring a permit for the transportation of out-of-county waste into the county. This affected a landfill which a local city and private company sought to turn into a regional landfill, against the desires of the county commissioners.[326] The Eleventh Circuit did not

321. The wide divergence between the federal circuits on the issue of (export) flow control is apparently the reason the Court granted certiorari in the *Carbone* case. The pertinent Commerce Clause issue is not whether an export ban is simply the mirror of an import restriction because it hinders the movement of an article of commerce, but whether locally generated and locally managed waste is an article of commerce.

322. BFI Medical Waste Sys. v. Whatcom County, 756 F. Supp. 480 (W.D. Wash. 1991); Diamond Waste, Inc. v. Monroe County, 939 F.2d 941 (11th Cir. 1991); Government Suppliers Consolidating Servs., Inc. v. Bayh, 975 F.2d 1267 (7th Cir. 1992).

323. 756 F. Supp. 480 (W.D. Wash. 1991).

324. *Id.* at 484.

325. 939 F.2d 941 (11th Cir. 1991).

326. *Id.* at 943.

view the resolution as an act of economic protectionism, because it treated out-of-county waste and out-of-state waste the same.[327] Nevertheless, the court applied the *Pike* balancing test, and found that the prospective effect of the ordinance on interstate commerce was more than incidental, particularly if similar ordinances were passed by other counties.[328] The Eleventh Circuit held that the ordinance violated the Commerce Clause. The court, however noted that other courts had reached the opposite conclusion in comparable settings.[329]

In *Government Suppliers Consolidating Services, Inc. v. Bayh*,[330] brokers of municipal solid waste successfully challenged, under the Commerce Clause, an Indiana statute which banned the backhauling of waste. The waste industry was clearly moving waste which other localities found the need to export, and the Indiana restrictions unnecessarily burdened this movement.[331] The court noticed the "'[c]ircumstances of [the statute's] enactment suggest that it was the [legislature's] principal objective' of the statutes to impede importation of trash."[332] Therefore, the Seventh Circuit applied strict scrutiny in finding the Indiana provisions unconstitutional.[333] Indiana's backhaul ban clearly had nothing to do with state or local solid waste management. Rather, it was an attempt to isolate Indiana from a national garbage problem.

Distinguishable from protectionist discrimination against the garbage trade are cases involving bona fide attempts to locally manage locally generated waste. For example, in *Evergreen Waste Systems, Inc. v. Metropolitan Service District*,[334] a three county district which operated a landfill owned by the City of Portland, banned out-of-county disposal

327. *Id.* at 944.
328. *Id.* at 944-45.
329. *Id.* at 945.
330. 975 F.2d 1267 (7th Cir. 1992).
331. *Id.* at 1285.
332. *Id.* at 1278-79 (citing Lewis v. B.T. Inv. Managers, Inc., 447 U.S. 27, 100 S. Ct. 2009, 64 L. Ed. 2d 702 (1980)).
333. *Government Suppliers*, 975 F.2d at 1279.
334. 643 F. Supp. 127, 129 (D. Or. 1986), *aff'd*, 820 F.2d 1482 (9th Cir. 1987).

in order to extend the life of the landfill. A private hauler challenged the ban as a violation of the dormant Commerce Clause. The district court applied the *Pike* balancing test and found that the ban regulated evenhandedly because it applied to only one landfill, and it also barred waste from most Oregon counties as well as out-of-state. The Ninth Circuit affirmed on basically the same rationale.

The legal reasoning used appears quite ad hoc. However, this lack of a unifying legal framework is eliminated if *Evergreen* and similar cases are seen for what they are — local government using municipal resources to manage local waste. The citizens of metropolitan Portland owned the landfill and paid for the tri-county waste district. This is no different from establishing a first rate school district,[335] and the benefits of both can remain local. The local citizenry need not open their school district,[336] nor their waste management district,[337] to outsiders.[338] This is not protectionist, rather it is prudence.

It is also prudent not to export a local problem. For example, New Jersey's policy against exporting waste has also withstood Commerce Clause challenge in state courts.[339] In

335. *Cf.* Swin Resource Sys., Inc. v. Lycoming County, 883 F.2d 245 (3d Cir. 1989). "We know of no case, however, that holds that municipalities must permit out-of-state students to matriculate in its public schools on equal terms with in-state students in order to comply with the commerce clause." *Id.* at 251 n.2.

336. *Cf.* Martinez v. Bynum, 461 U.S. 321, 328, 103 S. Ct. 1838, 1842, 75 L. Ed. 2d 879, 887 (1983) (upholding state residence requirements because it "furthers substantial state interest in assuring that services provided for its residents are enjoyed only by residents").

337. Because of the public ownership, it might be tempting to assert the "market participant" exception to the Commerce Clause. However, the regulatory activities of the Portland "Metro" district might be viewed as voiding the exception. *See, e.g.*, Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth., 814 F. Supp. 1566, 1575 (M.D. Ala. 1993).

338. For purposes of the Constitution, it should not matter whether municipal disposal is actually within the jurisdiction, or at designation facilities elsewhere. A municipality should be allowed to choose an economical, long-term and environmentally sound disposal facility in another jurisdiction if this is best for its citizens.

339. *In re* Long-Term Out-Of-State Waste Disposal Agreement, 568 A.2d 547 (N.J. Super. Ct. App. Div. 1990), *cert. denied*, 583 A.2d 337 (N.J. 1990); *cf.* Borough of Glassboro v. Gloucester County Bd. of Chosen Freeholders, 495 A.2d 49,

J. Filiberto *Sanitation, Inc. v. New Jersey Department of Environmental Protection*,[340] the Third Circuit rationalized the state-mandated use of a local transfer station in part because the waste brought to the transfer station ultimately flowed to the very same out-of-state landfill used by petitioner Filiberto.[341] Therefore, as to the flow control law at issue, Filiberto could establish "no demonstrable effect whatsoever on the interstate flow of goods."[342]

Presumably, the Third Circuit would have had more difficulty justifying the ordinance had the waste been directed to a new sanitary landfill or incinerator for local eradication, since this would clearly deprive outsiders of the commodity. For example, the garbage industry would certainly argue that flow control to a municipal waste-to-energy facility, would "confer[ ] an advantage upon in-state economic interests," which the *Filiberto* court viewed as the essential question.[343] Because the court found no discrimination against interstate commerce, it viewed as unnecessary the need to conduct a *Pike* balancing test.[344]

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55 (N.J. 1985), *cert. denied*, 474 U.S. 1008, 106 S. Ct. 532, 88 L. Ed. 2d 464 (1985) (upholding injunction barring import of waste into private landfill). "[The injunction's] purpose is to permit emergency access to [the landfill] for the protection of the health, safety, and welfare of a limited number of municipalities in the tri-county area that have no alternative means of disposing of solid waste." *Id.* Presuming that the urgency of the *Borough of Glassboro* situation was such that it outweighed Commerce Clause considerations, there would nevertheless appear to be a "takings" issue which was not discussed. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987) (temporary taking compensable); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) (character of governmental action, economic impact, and interference with investment backed expectations of particular significance).

340. 857 F.2d 913 (3d Cir. 1988).

341. *Id.* at 921-22.

342. *Id.* at 922 (quoting Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 126-27 n.16, 98 S. Ct. 2207, 2214 n.16, 57 L. Ed. 2d 91, 100 n.16 (1978). The *Exxon* court upheld a statute prohibiting producers or refiners from operating gas stations, reasoning that the Commerce Clause protects the interstate market, not particular interstate firms. *Id.*

343. *Filiberto*, 857 F.2d at 919.

344. *Id.* at 922. Nevertheless, the Third Circuit was unmistakenly impressed by the "numerous legitimate [and beneficial] purposes" of the rule. *See id.* at 920.

The Third Circuit has subsequently reviewed the situation where solid waste was completely eliminated locally, in a regional landfill, though the challenge was by a waste hauler seeking to use the landfill, not bring the waste elsewhere. In *Swin Resource Systems, Inc. v. Lycoming County*,[345] the Third Circuit held that Lycoming County, acting as a market participant as to its landfill, could impose prohibitively expensive delivery fees upon haulers coming from outside the five and a half county local service area. The court rejected the contention that the market participant doctrine was unavailing because the landfill was a natural resource.[346] Instead it applied the doctrine,[347] noting that in this case "a state subdivision has used initiative to build a waste disposal facility to serve its needs."[348]

The *Swin* court did not directly discuss how the municipally-sponsored landfill might be viewed as depriving out-of-state interests of solid waste. The court observed that the County took measures to insure that local waste was delivered to the landfill.[349] The court did not discuss whether its conception of the market participant doctrine encompassed either such flow control measures or New Jersey's comprehensive regulatory approach to solid waste management.[350] It might be recalled that New Jersey uses a solid waste utility approach with twenty-two different utilities responsible for formulating and implementing solid waste management plans.[351] This New Jersey approach seems more regulatory than participatory for purposes of market participant discussion.

The *Swin* court also rejected the dissent's argument that the market participant doctrine was overruled under *Garcia* and therefore not properly used as a basis for decision.[352]

345. 883 F.2d 245 (3d Cir. 1989).
346. *Id.* at 254.
347. *Id.*
348. *Id.*
349. *Id.* at 248.
350. The difficulties in applying the market participant doctrine to solid waste management is discussed in the *Swin Resources* dissent. *Id.* at 257-62.
351. N.J. STAT. ANN. § 13:E (West 1991).
352. *Swin Resources*, 883 F.2d at 255.

The dialog between the majority and the dissent in *Swin* demonstrates the difficulty in applying Commerce Clause doctrine to what should be considered a local police power function involving a noisome environmental pollutant.

Straining the limits of Commerce Clause analysis is *Medical Waste Associates, Ltd. v. Mayor of Baltimore*,[353] where the court invents a new doctrine to avoid applying the Commerce Clause to local solid waste management. The City of Baltimore wanted a medical waste incinerator for the residents of the city. Medical Waste Associates Limited (MWAL) initiated a plan to build an incinerator and was granted approvals, including a conditional use zoning approval which limited (MWAL) to receipt of *local* medical waste. (MWAL) undertook construction of the facility. However, after more than two and one-half years into the process, just as operations were to begin, (MWAL) objected that it wished to bring in out-of-city medical waste, thereby raising the sword of the dormant Commerce Clause.

The argument was that the city itself could have built and operated this facility under the market participant exception to the Commerce Clause and that therefore, it would be in error to invoke the *per se* rule applied in *Philadelphia*. The Fourth Circuit found no Commerce Clause violation since the ordinance did not violate the *per se* rule in *Philadelphia* where it banned waste from only one facility within the city. Instead, the court adopted a "single facility exception" to the *per se* rule, noting that this allows private capital to solve a regional waste problem and also "reconcile[s] the 'market participant' rule with the practical way that cities and counties solve regional waste problems."[354] Consequently, the city's action was upheld.[355]

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353. 966 F.2d 148 (4th Cir. 1992).

354. *Id.* at 151. The Fourth Circuit did not discuss the utility option used in New Jersey.

355. Evergreen Waste Sys. v. Metropolitan Serv. Dist., 643 F. Supp. 127, 151 (D. Or. 1986). The Fourth Circuit also noted what it viewed as the similarity of *Medical Waste Associates* because the municipal entity there operated only a single landfill. *Id.*

Medical Waste Associates strains to invent a rationale for avoiding the Commerce Clause, and there is certainly some irony in its likening a commercial enterprise to a governmental market participant. Nevertheless, even if Baltimore itself operated the incinerator, the court fails to discuss the perils of the market participant doctrine discussed earlier in this article.[356]

The rationales set forth in this article could have been applied much more easily than those used by the Fourth Circuit. Local medical waste, incinerated at the city-designated incinerator is not an article of interstate commerce, and the citizens of Baltimore have the democratic right to manage their own medical and infectious waste — the right to waste self-governance. *Medical Waste Associates* is a case where confused and unprincipled Commerce Clause jurisprudence actually invited the litigation, and may have prevailed but for the court's willingness to formulate a new rule.[357]

There will always be analytical difficulty if dormant Commerce Clause doctrine is applied to local waste management. If garbage is commerce, municipal government will either attempt to exempt itself by squeezing into the market participant exception, or be required to justify the purported infringement on the garbage trade, either under the *Pike* balancing test or, if discrimination is present (as it arguably always is concerning *de jure* or *de facto* local waste export barriers), strict scrutiny.[358]

The above examples are typical and reveal that most of the cases which apply a dormant Commerce Clause analysis, but uphold the municipal waste management, involve pub-

356. For example, there is little doubt that Baltimore's Health Department regulates medical waste, and there is no discussion whether a flow control ordinance applies to flow the waste to the incinerator.

357. This new rule was the single facility exception of the market participant exception of the judicial (dormant) exception that the Commerce Clause's exclusive grant of power to Congress to regulate commerce.

358. A law which discriminates against out-of-state commerce is subject to strict scrutiny. *See, e.g.*, Maine v. Taylor, 447 U.S. 131, 106 S. Ct. 2440, 91 L. Ed. 2d 110 (1986). If "protectionism" is present, the offensive law is virtually *per se* invalid under *Philadelphia*, 437 U.S. at 617, 98 S. Ct. at 2531, 57 L. Ed. 2d at 475.

licly managed facilities. Some of these cases noted above, rely on the market participant doctrine to extricate the municipality from dormant Commerce Clause scrutiny. However, the market participant exception is an unsatisfactory safety valve because the exception vanishes when government regulates or when different markets are involved.

B. The *DeVito* Trilogy: Local Solid Waste Management Injudiciously Held as Violating the Commerce Clause

Unfortunately, a recent and pernicious line of cases has developed. Beginning with *Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp.*,[359] several cases have invalidated state and local attempts to manage locally generated waste, by interpreting the dormant Commerce Clause to preclude any interference with the flow of garbage to out-of-state locations.

Until recently, the courts had not gone so far as to invalidate local management of locally generated waste. Such waste management was viewed as an essential local function.[360] This situation changed dramatically after the First Circuit invalidated Rhode Island's statewide system for managing its waste.

1. The *DeVito* Case

In *Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp.*,[361] the state's waste management corporation (RISWMC) directed the flow of all commercially-generated solid waste to the RISWMC landfill.[362] Commercial generators were charged a higher tipping fee than DeVito charged for hauling the waste and arranging for out-of-state disposal.[363] The court found this objectionable.

359. 770 F. Supp. 775 (D.R.I.), *aff'd*, 947 F.2d 1004 (1st Cir. 1991).

360. Hybud Equip. Corp. v. City of Akron, 654 F.2d 1187, 1194 (6th Cir. 1981) (traditional management roles).

361. *DeVito*, 770 F. Supp. at 775.

362. *Id.* at 777.

363. *Id.* at 779 (noting that the "tipping fee" charged by the facilities to which DeVito transported waste was considerably less than the $49 per ton charged by RISWMC).

Businesses, the court said, "have a strong interest in having the freedom to dispose of waste at rates set by an unfettered interstate market rather than an artificially created monopoly."[364] The district court then applied a dormant Commerce Clause analysis predicated upon its view that the Rhode Island export ban was "essentially a protectionist measure [whose] immediate purpose and effect are to increase RISWMC's revenues by preventing commercially generated waste from being transported out of Rhode Island. . . ."[365]

The court only indirectly discussed whether Rhode Island could accomplish the same ends by forming a state-wide district and then assessing a user fee or special assessment equivalent to the $49 per ton tipping fee, in order to finance the state landfill.[366] The district court did note that RISWMC failed to explain why revenue bond financing would not be an alternative to an export ban. Nevertheless, the district court viewed RISWMC's export ban as "an absolute ban on interstate commerce."[367] It appears that the district court would view any governmental subsidy which induced in-state

364. *Id.* at 779.

365. *Id.* at 781.

366. Besides district assessments, another option would be to use general state tax revenues to finance state-run facilities or to guarantee the bonds for such facility, as suggested by plaintiff DeVito regarding RISWMC plans to build waste-to-energy facilities. *Id.* at 785. A zero tip fee for state residents would virtually guarantee a flow of waste to such facility. However, as discussed elsewhere in this article, the state's regulatory role in solid waste management may void its assertion of a "market participant" exception to the Commerce Clause. *Id.*

367. *Id.* at 785. Nevertheless, *DeVito* distinguishes J. Filiberto Sanitation v. New Jersey Dep't of Envtl. Protection, 857 F.2d 913 (3d Cir. 1988). *Filiberto* held that a state regulation requiring that waste be taken to a state operated processing station first did not violate the Commerce Clause because the station was not in competition with out of state landfills and therefore did not excessively burden interstate commerce. On the other hand, in *DeVito*, the state-operated facilities were in competition with out of state facilities and therefore found to be excessively burdensome on interstate commerce. *Cf.* Government Suppliers Consolidating Servs. v. Bayh, 975 F.2d 1267 (7th Cir. 1992) ("backhaul" provisions were facially neutral, yet impermissibly burdened interstate commerce). As a policy matter, allowing flow control to transfer stations but not municipal disposal facilities discourages local management of local waste, which tends to create a greater need for waste exportation through a transfer station.

waste to flow to the state facility as violative of the Commerce Clause because, vis a vis the garbage industry, RISWMC or Rhode Island would set "an artificially high rate in order to subsidize its other activities. RISWMC [or Rhode Island] is entitled to make that choice but not to make interstate commerce bear the consequences."[368]

In effect, *DeVito* thrusts a preemptive free market economic theory upon local solid waste management based upon the court's view that the Commerce Clause prohibits states from infringing on the flow of waste out of the state. The people's choice to manage their waste within the state is irrelevant. The *DeVito* rationale would, practically speaking, never allow a state-created entity such as RISWMC to favor itself over out-of-state competitors, *even if it were to manage exclusively in-state waste*. In essence, *DeVito* denies the state and its citizens any ability to manage solid waste other than purely as a simple market competitor.[369]

Under the reasoning used, it would not likely make any difference to the court were a state-wide referendum conducted and each citizen voted for managing his or her waste locally. By the logic used, out-of-state industry would still have a "right" to the waste, and would therefore usurp a sovereign state's democratic process.

2. *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*[370]

In *Southeast Alabama*, the garbage industry brought a challenge to municipal ordinances enacted by the cities of Headland, Geneva, and Ozark, Alabama.[371] The defendant solid waste authority was created as part of comprehensive solid waste management planning required by Alabama.

368. *DeVito*, 770 F. Supp. at 785.

369. The court referred to the RISWMC as a participant in the market for which the state's flow control law confers a direct economic advantage. 770 F. Supp. at 785. Regulations such as the flow control found in *DeVito* likely void the market participant exception to the dormant Commerce Clause.

370. 814 F. Supp. 1566 (M.D. Ala. 1993).

371. These cities were chosen as representative of 36 local governments, including four counties, in the area, some of which contractually obligated themselves to adopt export flow control laws regarding local solid waste. *Id.* at 1569.

Under the solid waste management plan, the authority would build a disposal facility and three transfer stations, and the participating municipalities would adopt flow control ordinances directing all local waste to the authority's facilities.[372] The Headland ordinance provided for either city or private collection and hauling. The Geneva ordinance was similar except that it vested in the city title to all local waste and prohibited private collectors from contracting directly with waste generators. The Ozark flow control ordinance was similar to Headland's except that it permitted collectors and haulers to export waste out of the state subject to certain reporting preconditions. Obviously, the intent was that at least one of these variations would survive judicial scrutiny, and therefore allow the community control over its waste.

Not surprisingly, the plaintiffs pointed out that each of the above ordinances required, either on its face or in effect, that all solid waste be delivered to the authority's facility, and thus prevented the waste from being disposed of out-of-state. They argued that this interfered with interstate commerce. The district court agreed. It quoted *Fort Gratiot's* holding that the dormant Commerce Clause "prohibits States from 'advanc[ing] their own commercial interests by curtailing the movement of articles of commerce, *either into or out of the state.*'"[373] The court further cited *Fort Gratiot* for the proposition that states are generally prohibited from taking actions that interfere with the free flow of trade among the states "unless the [interference] is demonstrably justified by a valid factor unrelated to economic protectionism."[374]

The solid waste authority and the three cities sought to apply the market participant exception to the Commerce Clause in their defense. The court rejected this almost out-of-hand, stating that the intermunicipal user contracts which required the flow control ordinances "expressly reflect that

372. *Id.* at 1569-70.

373. *Id.* at 1571 (quoting *Fort Gratiot*, 504 U.S. at —, 112 S. Ct. at 2023, 119 L. Ed. 2d at 147) (emphasis added).

374. *Fort Gratiot*, 504 U.S. at —, 112 S. Ct. at 2023-24, 119 L. Ed. 2d at 147 (quoting New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 108 S. Ct. 1803, 100 L. Ed. 2d 302 (1988)).

the intended effect of the ordinances is to assure the Authority's economic success by keeping locally generated solid waste out of interstate commerce and within the local area, and thus provide a steady and adequate supply for the Authority."[375]

As the court saw it, "the three cities entered the solid waste markets not to compete for their own individual profit . . . but rather . . . to assure the economic success of the Authority . . . " and in any case their ordinances "impermissibly regulate[d] outside the markets in which [they were] actual participants."[376] To more broadly define the market would allow the market participant exception to swallow the rule.[377] It was also obvious to the court that the ordinances were designed not only to set up a system of service in the various waste markets, but also to regulate these markets. Thus the primary purpose was not to participate in the waste markets, such as by operating a municipally-owned cement plant,[378] but rather to control and regulate these markets and exclude others.[379]

The district court went on to find that the vesting title provision of the City of Geneva's ordinance was a mere pretext, for the reason that "solid waste is generally by definition abandoned or discarded material" that is "universally regarded as a potential public nuisance" and that waste haulers charge a fee "to carry away something their customers most

375. *S.E. Alabama*, 814 F. Supp. at 1573.

376. *Id.*

377. *Id.* at 1574. The court noted that the cities may have been involved with the residential and commercial/industrial waste collection markets, but it was the authority, not the cities, which was involved with the waste disposal services market. Therefore, the cities' ordinances "reach[ed] outside the markets in which the cities participate." *Id.*; *see also* White v. Massachusetts Council of Constr. Employers, 460 U.S. 204, 103 S. Ct. 1042, 75 L. Ed. 2d 1 (1983); Swin Resource Sys., Inc. v. Lycoming, 883 F.2d 245, 259 (3d Cir. 1989) (Gibbons, C.J., dissenting).

378. *S.E. Alabama*, 814 F. Supp. at 1574 (citing Reeves, Inc. v. Stake, 447 U.S. 429, 444, 100 S. Ct. 2271, 2281, 65 L. Ed. 2d 244, 255 (1980)). The *Reeves* Court held that the fact that a state operated plant is a market participant does not preclude others from setting up cement plants within the same borders. 447 U.S. at 429, 100 S. Ct. at 2271, 65 L. Ed. 2d at 244.

379. *Id.* at 1575.

heartily do not want."[380] So why would a solid waste authority seek title to local solid waste? The court saw no bona fide reason. Instead, it viewed the notion of vested title as "a fakery and a pretext for requiring that all private waste collectors deliver waste to the Authority."[381]

In its final analysis, the *S.E. Alabama* court resorted to standard dormant Commerce Clause analysis pertaining to customary articles of commerce. It noted that where "'legislative objectives are credibly advanced *and* there is *no* patent discrimination against interstate trade,'" then the *Pike* balancing test can be applied.[382] But where, as here, the ordinances "'overtly block[ ] the flow of interstate commerce,'" it cannot be said that the "'effects upon interstate commerce are only incidental.'"[383] To the court, the flow control ordinances were pure economic protectionism to provide income to the authority. Comprehensive long-term solid waste management planning was a legitimate local purpose, but "legitimate and necessary goal[s] cannot be achieved by illegitimate and unnecessary means.[384]

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380. *Id.*

381. *Id.* at 1576. *See also* Hughes v. Oklahoma, 441 U.S. 322, 326-27, 99 S. Ct. 1727, 1731, 60 L. Ed. 2d 250, 255 (1978). Although the *Hughes* court refused to exempt state wildlife from potential Commerce Clause application, it did note that

> While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action, nor how to draw the line between what is and what is not commerce among the states. Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution.

441 U.S. at 326 n.2, 99 S. Ct. at 1731 n.2, 60 L. Ed. 2d at 255 n.2 (quoting H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 534-535, 69 S. Ct. 657, 663, 93 L. Ed. 865, 847 (1949)).

382. *S.E. Alabama*, 814 F. Supp. at 1581 n.18 (quoting Chemical Waste Management, Inc. v. Hunt, 504 U.S. —, — n.5, 112 S. Ct. 2009, 2014 n.5, 119 L. Ed. 2d 121, — (1992)) (emphasis in original) (citations omitted).

383. *Id* (citations omitted).

384. *Id.* at 1581 (citing *Philadelphia*, 437 U.S. at 626-27, 98 S. Ct. at 2536-37, 57 L. Ed. 2d at 483).

The court saw a number of options to a total ban on interstate commerce.[385] Among these were local bank financing, county warrants secured by their full faith and credit, municipal construction with competitive rates with municipal subsidization, private financing, ad valorem taxes or utility bill assessments.[386] After suggesting these alternatives, the court questioned whether such a facility was even needed for the health and safety of the communities.

The court's alternative discussion is necessarily superficial because of the unprincipled rationale relied on — that locally managed garbage is interstate commerce. The options *not* presented (municipal collection, formation of a utility, franchising, economic flow control) would direct waste to designated facilities just as thoroughly as a flow control ordinance. The options which the court did present urged competitive rates with municipal subsidization.[387]

Apparently, it is the court's view that local citizens must pay a premium for erecting facilities to process their own waste. They must not only pay for the facility, but must also make up the difference between the costs of the municipal facility and the prevailing market rates charged by the trash trade. Thus, the more citizens are willing to pay for environmentally sound disposal facilities, the greater the premium they must pay for depriving industry of its purported right to garbage.[388]

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385. *Id.* at 1581-82.

386. *Id.* at 1581.

387. Presumably if the municipal rates were so "competitive" as to deprive outside industry of waste, a Commerce Clause lawsuit would follow urging that municipal subsidization was depriving them of their right to solid waste.

388. If a municipal recycling facilitity costs $20 million to build, resulting in a net cost of $100 per ton, and industry can dispose of the waste for $20 at an unlined landfill (or at a disposal site at some foreign waste haven), then the logic of *S.E. Alabama* appears to be that the municipality is not permitted to charge more than $20 per ton. Note that if it charges less than $20 per ton, the municipal facility will receive all recyclables through economic flow control, and that this consequently deprives the garbage industry of recyclables due to the municipal subsidization. If, on the other hand, the municipality charges more than $20 per ton, it is overpriced and therefore should expect to receive no waste (it becomes a "white elephant"). Finally, if it charges exactly $20 per ton, there is no certainty that this market price will not fluctuate, resulting in a non-competitive price and a possible Commerce Clause lawsuit.

The court concluded by repeating that the flow control ordinances could not be used to finance the authority by isolating, and thus insulating, the "four-county region from the rough and tumble of interstate commerce and the economic competition that comes with it."[389] The court refused to address "the difficult hypothetical question" of whether a city could nationalize the solid waste services by completely undertaking collection and disposal of solid waste within its boundaries.[390]

Unfortunately for its analysis, this last issue is the one which the *S.E. Alabama* court should have addressed first. If the four counties could permissibly initiate joint municipal collection and disposal, it is difficult to see a meaningful difference using flow control, since the waste flows to the same facilities. If the authority and local cities could not undertake joint collection and disposal permissibly under the Commerce Clause, then the result would be to emasculate local solid waste management, and municipal waste self-rule.

3. *Waste System Corp. v. County of Martin*[391]

Perhaps the most egregious case prohibiting municipal management of local waste is *County of Martin*, where an Iowa landfill operator successfully challenged two flow control ordinances directing solid waste to an eight million dollar composting facility (the Prairieland facility) built by two counties.[392] The counties' designation ordinances directed all wastes to the Prairieland facility, which the district court

389. *S.E. Alabama*, 814 F. Supp. at 1583.

390. *Id.* at 1583 n.22.

391. 784 F. Supp. 641 (D. Minn. 1992), *aff'd*, 985 F.2d 1381 (8th Cir. 1993).

392. *Id.* Presumably this investment was deemed to be for the public welfare, and it is unlikely that local taxpayers considered that such an investment to compost local waste would be viewed by the judiciary as protectionist or discriminatory. After the *County of Martin* decision, certain local officeholders became unelected, perhaps in part due to their failure to foresee the fiasco of a federal judge finding that local management of local compostable material a burden on interstate commerce. The local Congressman, David Minge, has indicated that he will propose a congressional fix as a result of the court decision. *See* Jim Samuelson, *Minge Bill Will Let Communities Control Garbage*, FAIRMONT & SENTINEL, May 2, 1993, at 11; *Legislation Would Allow Flow Control*, FAIRMONT & SENTINEL, July 14, 1993, at 1.

also found was at the direct expense of the landfill which was receiving approximately 40% (10,400 tons) of the counties' solid waste.[393] The district court found, and the circuit court agreed, that the designation ordinances unconstitutionally interfered with the flow of waste into commerce because the counties' waste "otherwise available in interstate commerce is barred from transport across the state line."[394] The circuit court also agreed that the designation ordinances were enacted "as a protectionist measure to ensure the [financial] viability of the counties' own waste facility."[395] The circuit court saw no difference between the import restrictions invalidated in *Philadelphia* and *Fort Gratiot*, and the designation ordinances' export ban.[396]

Under the Eighth Circuit's economic view of the Commerce Clause, it would be impermissible for the citizens of Martin County to vote to build advanced state-of-the-art recycling and composting facilities to fully manage and eliminate virtually all local solid waste. First, the flow of waste to interstate commerce would cease (via total local management and elimination of the waste). Second, if today the garbage could be disposed of by an unscrupulous out-of-state firm for $20 per ton (perhaps in a different country), the court would require that the municipal recycling and composting facilities charge no more than $20 per ton and require the local taxpayers make up the difference.[397] Nevertheless the district court failed to explain how a taxpayer subsidy alternative would be

393. 784 F. Supp. at 645.

394. 985 F.2d at 1387 (citing *Philadelphia*, 437 U.S. at 624, 98 S. Ct. at 2535, 57 L. Ed. 2d at 481) (the ordinance "overtly block[s] the flow of interstate commerce at [the Counties'] borders").

395. *Id.* at 1388, *aff'g* 784 F. Supp. at 644.

396. As the Eighth Circuit explained, "[t]he case before us now involves ordinances which prevent export of in-state waste to out-of-state facilities. This difference, however, is of no consequence. Regulations which restrict transporting waste out of a state also are subject to the limitations of the Commerce Clause." 985 F.2d at 1386.

397. When discussing the designation ordinance, the district court said, "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." 784 F. Supp. at 645.

permissible in light of the court's view that "financing [a] 'good idea' on the back of interstate commerce is improper."[398]

The Eighth Circuit declined to offer an alternative.[399] This is because there simply are no viable alternatives under the constitutional interpretation being applied. If solid waste is *ab initio* an article of commerce, then a state and its political subdivisions have no business attempting to destroy it, such as by incineration, landfilling or composting. If the guaranty of a republican form of government and basic principles of federalism do not apply to citizens' efforts to rule their own waste, then local government will have no business recycling what can be more cheaply dumped into commerce.

It is unknown whether either the district or circuit court considered alternatives such as municipal collection, creation of a utility, or economic flow control through a district or authority even though these alternatives deprive the garbage industry of exactly the same waste. For example, if a municipality were to use taxpayer dollars to put up the composting facility such as the one found in *County of Martin*, and then charge no fee for disposal at the facility, the net result would be that taxpayers would bring their waste to the municipal facility at the expense of interstate firms.[400] There is the same result if the counties collect and deliver the waste municipally, or award a franchise.

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398. *Id.*

399. Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth., 814 F. Supp. 1566, 1583 n.22 (M.D. Ala. 1993) (declining to answer the "difficult hypothetical question" posed by the defendants, namely "whether it would violate the commerce clause if a single municipality completely occupied the collection and disposal of solid waste within its boundaries — that is, the city collected and disposed of all solid waste at its own landfill, and prohibited any participation by private parties"). In this regard, the Eighth Circuit was unlike the courts in *DeVito* and *S.E. Alabama*, which at least attempted to suggest options. The Eighth Circuit commented, "We sympathize with the Counties' efforts to establish a system of waste management. However, we must decide in accord with the principles of the dormant Commerce Clause." *County of Martin*, 985 F.2d at 1389.

400. This so-called economic flow control may be permissible under the market participant doctrine exception to the Commerce Clause. However, because local government is intimately involved in the regulation of solid waste, this exception could be held inapplicable. *See generally supra* part VI.C.

The Eighth Circuit thus avoided the logical extension, and "Achilles Heel," of its dormant Commerce Clause rationale. For the purposes of the Commerce Clause, the district and circuit courts in *County of Martin* equated garbage to an economically beneficial commodity.[401] Therefore, the courts viewed governmental efforts to stifle trade in that commodity as subject to constitutional scrutiny. The analysis is both inappropriate and anti-democratic.

It was judicial error (some might say arrogance) for the district court in *County of Martin* to look at the $8 million composting project for local solid waste and then declare, without further explanation, that "financing that 'good idea' on the back of interstate commerce is improper."[402] It is disgraceful to our system of government that the federal courts would tell the citizens of Martin and Faribault Counties after they have financed a composting facility for local waste, that they must now subsidize that facility because an outsider's landfill has a constitutional entitlement to their waste. This logic turns the Commerce Clause on its head.

The Commerce Clause theory promulgated in *Devito, S. E. Alabama* and *County of Martin* is that the out-of-state garbage industry has standing and the right to assert a constitutional entitlement to garbage. Under this theory, a local government's efforts to manage local solid waste (including the financing and construction of facilities) interfere with commerce because the interstate garbage marketplace is deprived of the waste. The interstate industry can join the competitive procurement process to participate in constructing and operating local waste facilities, and it has legal recourse if it is excluded.[403] Thus, interstate industry has standing to

401. 985 F.2d at 1387; *see* discussion *supra* at VI.C. "If the object of [the Counties] had been to obstruct the [export of all compostable solid waste], that object will be accomplished if the statute before us be enforced." 985 F.2d at 1387 (quoting Brimmer v. Rebman, 138 U.S. 78, 83, 11 S. Ct. 213, 214, 34 L. Ed. 862, 864 (1891)). *Brimmer* is a Commerce Clause case voiding a state statute which discriminated against out-of-state meat by requiring in-state inspection of meat killed more than a hundred miles from the place of sale. *Id.*

402. *County of Martin*, 784 F. Supp. at 645.

403. *See, e.g.*, N.Y. GEN. MUN. LAW § 120-w (McKinney 1986) (competitive proposals for solid waste facilities); N.Y. CIV. PRAC. L. & R. art. 78 (McKinney

offer competitive proposals for local solutions. However, it should not have standing to block a local solution, only to grab the garbage for a profit.

C. *C & A Carbone, Inc. v. Town of Clarkstown*:[404] An Opportunity for the Supreme Court to Articulate a Principled Constitutional Approach to Municipal Solid Waste Management

The Supreme Court has recently granted certiorari in a case with the potential to profoundly shape this nation's solid waste management landscape. In *Carbone*, the petitioners' brief states the question presented as follows: "Whether a local law requiring disposal of all trash, regardless of origin, at a designated local facility, and prohibiting the export of such trash out of state, constitutes a burden on and a discrimination against interstate commerce in violation of the Commerce Clause of the United States Constitution."[405] The case has been characterized as presenting to the Court the issue of whether export flow control is the mirror image of the import restrictions found unconstitutional by *Philadelphia*, *Fort Gratiot* and *Chemical Waste Management*.[406]

Petitioners in *Carbone*[407] claim to be brokers in trash and recyclables.[408] They accept solid waste at what they term a recycling center, and what the respondent Town char-

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1981) (proceeding to challenge arbitrary or illegal action of official or public body).

404. 182 A.D.2d 213, 587 N.Y.S.2d 681, *appeal denied*, 80 N.Y.2d 760, 605 N.E.2d 874, 591 N.Y.S.2d 138 (1992), *cert. granted*, — U.S. —, 113 S. Ct. 2411, 124 L. Ed. 2d 635 (1993) (the author wrote an amicus brief for the County of Rockland, N.Y., in support of the respondent town in the case pending before the United States Supreme Court). There is a related federal case granting preliminary injunction on Commerce Clause grounds, but later mooted by the subsequent state proceeding. C & A Carbone, Inc. v. Town of Clarkstown, 770 F. Supp. 848 (S.D.N.Y. 1991).

405. Brief for Petitioners at i, *Carbone*, — U.S. —, 113 S. Ct. 2411, 124 L. Ed. 2d 635 (1993) (No. 92-1402).

406. *Court Decisions, Interstate Commerce: C & A Carbone Inc. v. Clarkstown, 92-1402*, NAT'L L.J., June 7, 1993, at 39.

407. C & A Carbone, Inc.; Recycling Products of Rockland, Inc.; C & C Realty, Inc.; and, Angelo Carbone.

408. Petition for a Writ of Certiorari at 4, *Carbone*, (No. 92-1402).

acterizes as a transfer station.[409] The petitioners separate and sort out at least some of the recyclable components from the waste stream, and then send the sorted garbage and recyclables to different out-of-state disposal destinations.

Because of the closure of its landfill, the Town passed a flow control ordinance requiring that all acceptable waste (generally, garbage excluding recyclables)[410] be brought to the Town-sponsored transfer station.[411] This town transfer station charges $81 per ton, whereas the Carbone facility charges $70 per ton. The *Carbone* petitioners claim that by denying them the right to ship the solid waste, consisting of garbage and recyclables, to out-of-state destinations, interstate commerce is burdened.[412] The Town, on the other hand, claims there is no such impermissible burden because its ordinance is evenhanded[413] and, like the transfer station in *Filiberto*,[414] ultimately ships the waste it receives to out-of-state locations.

This is not a typical waste management case because it involves both out-of-state and in-town waste.[415] The petitioners attempt to use this to their advantage,[416] by characteriz-

409. *Id.* at 5 n.3.

410. *See Carbone*, 182 A.D.2d at 217, 587 N.Y.S.2d at 682.

411. The Town-sponsored transfer station is operated by a private company which has a "put or pay" contract with the Town which requires that the Town deliver a certain quantity of waste, or pay for such waste not delivered. Under New York law, such a contract should only be awarded after advertising for competitive proposals or bids, which was done in this case. Joint Appendix at 26, *Carbone* (No. 92-1402). *See generally* N.Y. GEN. MUN. L. §§ 103, 120-w (McKinney 1986).

412. 182 A.D.2d at 219, 587 N.Y.S.2d at 684.

413. *Id.* at 222, 587 N.Y.S.2d at 686.

414. 857 F.2d 913, 916 (3d Cir. 1988); *see supra* note 337 and accompanying text.

415. Nor does it involve a broad interest in comprehensive local planning. The town's interest is relatively temporal — how to manage town garbage due to the landfill closure. The town is not involved in broader solid waste management planning, which is the role of the county government. The county is the solid waste planning unit. *See, e.g.*, ROCKLAND COUNTY INTEGRATED SOLID WASTE MANAGEMENT PLAN & GENERIC ENVIRONMENTAL IMPACT STATEMENT (N.Y. Sept. 1991).

416. One commentator cited the National Solid Waste Management Association's (NSWMA) general counsel as stating that many state waste laws, though not as restrictive as that found in *Philadelphia*, violate the Commerce Clause

ing the whole case as involving what they label an export ban. However, there are in reality two aspects of this case. First concededly[417] the focus of the local law, is the Town's effort to manage its citizens' waste by efficient consolidation of waste formerly disposed of at the closed town landfill. Second is the aspect of the case which involves the purported importation of out-of-state waste, and the direction of such waste to the town-sponsored transfer station. This element of Clarkstown's law is not at all common to flow control ordinances.

The potentially catastrophic ruling in *Carbone* would be if the Supreme Court accepted the simplistic notion that local management of local waste, compelled by an export ban or other equivalent means, is constitutionally identical to the type of import ban found unconstitutional in *Philadelphia* and its progeny. Clarkstown should be allowed to manage its citizens' waste in any prudent manner, which it has done by sponsoring a transfer station.[418]

This basic local management of local waste question has another twist in the *Carbone* case. Rockland County plans to use the taxing or assessment powers of a solid waste authority or district to finance proposed new recycling facilities estimated to cost between $60 and $85 million.[419] This financing mechanism will allow free or below-market tip fees, thus ensuring a flow of County residents' recyclables to its recycling facility by force of economics. Such economic flow control will

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and, that given the staggering number of potential violations, the NSWMA has to be "selective in deciding which laws to challenge." *See* Meyers, *supra* note 306.

417. In collateral proceedings in federal district court, Carbone did not contest the right of a municipality to manage its own waste. *Carbone*, 770 F. Supp. at 854 n.2. However, this is not mentioned in the New York Court decision. *Carbone*, 182 A.D.2d at 213, 587 N.Y.S.2d at 681.

418. Under the Town's agreement with the operator of its transfer station, the station will eventually be turned over to the Town at a cost of one dollar. This should insure directly the benefit of the Town's citizens. Justification for requiring flow to a town-sponsored transfer station is fully described in J. Filiberto Sanitation, Inc. v. New Jersey Department of Environmental Protection, 857 F.2d 913, 920-21 (3d Cir. 1988).

419. *See* ROCKLAND COUNTY INTEGRATED SOLID WASTE MANAGEMENT PLAN & GENERIC ENVIRONMENTAL IMPACT STATEMENT (N.Y. Sept. 1991).

have one additional consequence — it will deprive the Carbone facility of local recyclables even more completely than through a flow control ordinance, since the public facility will be less expensive.

The record in *Carbone* is poor regarding import restrictions,[420] and arguably insufficient for Supreme Court review.[421] However, if the only out-of-state waste which the Carbone enterprise receives is waste which should have been managed locally in New Jersey, and thus illegally avoids New Jersey's flow control at the expense of New Jersey's management of its solid waste, then the issue comes full circle. It again becomes a question whether state and local governments can manage their citizens' waste.

Unfortunately, the Town's ordinance is itself a major source of confusion. For example, the Town ordinance could be interpreted as mandating that all garbage transported on Interstate 87 be delivered to the Town's transfer station,[422] though there is no suggestion that the Town would ever attempt this.

Aside from the smokescreens which petitioners and their *amici* attempt to raise concerning their view of market economics applied to the Constitution, *Carbone* essentially involves one local government's attempt to manage local solid waste under what may simply be an unartfully drafted ordinance.

Therefore, it is imperative that the Supreme Court see through the Commerce Clause rhetoric and get to the heart of the jurisprudential issue, which is whether the Constitution

420. Many of the specific facts involved in *Carbone* are not at all clear. For example, the record on appeal does not clearly establish the volume of out-of-state waste entering the Carbone facility. The record does, however, indicate that the New Jersey waste which may have been imported into the Town was done so in violation of New Jersey's export bans. As discussed earlier, New Jersey has a comprehensive program for managing its citizens' waste internally. *See supra* notes 65-67 and accompanying text.

421. For example, it is unclear to what extent New Jersey or other out-of-state trash was involved in C & A Carbone's operations.

422. Section 3(A) of Town of Clarkstown Local Law No. 9 of 1990 reads, in part, as follows: "The . . . transportation . . . of acceptable waste within . . . the Town of Clarkstown shall be exclusively disposed of, controlled and regulated by the Town . . . ." Brief for Respondent at 4, *Carbone* (No. 92-1402).

prohibits local citizens from choosing how to manage their own waste.[423] If Carbone genuinely wished to be an interstate broker in waste, it could likely satisfy the Town and perhaps the courts were it to be forthright about the origin of the waste it allegedly imports for processing and brokering. Otherwise, Carbone might merely wish to commingle local and non-local garbage so that it can have the best of both jurisdictions by bootlegging waste which should be processed in New Jersey to its lower-priced operation in Clarkstown, and also bootlegging Clarkstown waste for shipment to lower priced landfills, or roadside dumping.[424]

If Carbone wished to operate a municipal waste facility, it had three options. It could have offered a competitive proposal and become a town-sponsored facility. It could have, as part of the local political process, lobbied for the local flow control ordinance to take the Carbone facility into consideration, and perhaps allow it a joint franchise with the Town-sponsored transfer station. Finally, it could have established itself as a legitimate interstate vendor in waste processing services and thus be entitled to operate just like any other interstate business.[425] In the final analysis, Carbone should not be allowed to usurp the local democratic process regard-

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423. It is worthy to note that the federal district court, in a collateral proceeding, recognized that there is an essential difference between import restrictions and the local management of municipal waste through export flow control. *See Carbone*, 770 F. Supp. at 854 n.2. Southern District of New York Chief Judge Brieant stated:

> This Court assumes, without deciding the issue, that the Town can regulate the disposal of garbage generated *within* the Town's territorial limits. In fact, plaintiffs do not dispute that Clarkstown may regulate solid waste generated within its borders or that which the Town contracts to dispose of for other municipalities.

Id. (emphasis in original). *See also* Hancock Indus. v. Schaeffer, 811 F.2d 225 (3d Cir. 1987) (upheld county authority's ban of out-of-county garbage from landfill, where state imposed duty on county to dispose of own waste).

424. *See* Steve Lieberman, *Abandoned Trash in West Virginia is Traced to Local Carbone Site*, ROCKLAND J. NEWS, July 26, 1992, at B3.

425. This is not to say that the Town may not be able to impose reasonable restrictions consistent with the *Pike* balancing test as to imported waste which is part of the interstate waste disposal trade. For example, the Town should be allowed to treat all its manufacturers equally and, if part of local waste management, demand that commercial or industrial waste be brought to public facilities. This could apply to the residue of the purported recycling operation.

ing a matter of such uniquely local concern — municipal solid waste management.[426]

VIII. Dangerous Consequences: It Is Poor Law, and Bad Policy, to Include Local Waste Management in Interstate Waste Trade

There is serious danger in granting locally managed garbage status as a protected article of commerce under the Commerce Clause. If garbage, in its rawest curbside form, is considered a commodity of interstate commerce, illogical and inequitable consequences must follow.

A. Progressive Facilities Should Not Need to Compete

Government should leave profit-making to private business, but comprehensive local solid waste management is not profitable. Waste, by its very nature and definition, is discarded matter, yet this valueless matter must be moved, processed and disposed of somewhere. Particularly if done in an environmentally responsible way, this process is costly.

Waste disposal can be cheap, as with landfilling, or it can be expensive, as with incineration. More progressive methods of waste disposal include materials recycling and composting facilities. However, progressive methods of waste management may become impracticable if they must compete on an economic basis with older, less sound technologies. The impact on the environment could be extreme. This may be the outcome if the courts prohibit local government's subsidy of waste facilities by determining this as "on the back of interstate commerce."[427] Few, if any state-of-the-art and environmentally sound waste facilities can compete with an unlined landfill or dump on a dollar per ton basis, particularly if located in a cash-hungry pollution haven.

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426. In collateral proceedings in federal district court, petitioners did not challenge a municipality's right to manage its own waste. 770 F. Supp. at 854 n.2.

427. Waste Sys. Corp. v. County of Martin, 784 F. Supp. 641, 645 (D. Minn. 1992), *aff'd*, 985 F.2d 1381 (8th Cir. 1993).

If local garbage is equated with interstate commerce, applicable Commerce Clause doctrine will require, at a minimum, a *Pike* balancing test to insure that there is a legitimate public purpose and that the public benefit outweighs the interference with commerce.[428] If the local management discriminates against outsiders through the use of flow control or municipal collection, thus having more than an incidental effect,[429] either strict scrutiny or a *per se* rule will be applied.[430]

If solid waste is protected interstate commerce, a Commerce Clause challenge might be made against a political decision to build an environmentally sound and efficient local composting or recycling plant. Since alternatives already exist, the proposed plant would be seen as interference with existing interstate commerce.[431] Some communities have already been dissuaded from erecting facilities fearing possible Commerce Clause challenges that would deprive the facility of the flow of waste necessary for financing.[432]

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428. *Id.*

429. The balancing test set forth in Pike v. Bruce Church Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L. Ed. 2d 174, 178 (1970), and restated (but not applied) in *Philadelphia*, 437 U.S. at 624, 98 S. Ct. at 2535, 57 L. Ed. 2d at 482, is as follows:

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

Pike, 397 U.S. at 142, 90 S. Ct. at 847, 25 L. Ed. 2d at 178.

430. *See supra* Part VII.B.

431. In essence, this example is based upon the facts present in *County of Martin*, although the court there found that the flow control ordinance was protectionist and therefore, *per se* invalid. *See County of Martin*, 985 F.2d at 1385.

432. Ann R. Mesnikoff, Comment, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home*, 76 MINN. L. REV. 1219 (1992) (noting that the *County of Martin* decision has had significant repercussions in Minnesota). Counties are reassessing whether it is financially feasible without flow control to install composting facilities, and one county put its composting plans on hold fearing Commerce Clause litigation. *Id.* at 1241 n.107.

If a new facility were to eliminate the need to export waste, private haulers would have every incentive to tie up the proposed recycling plant in extended Commerce Clause litigation. Such litigation could not only stop a recycling and composting project, but also result in an award of damages[433] and attorneys fees[434] against the municipality. Environmentally progressive local government should not be faced with such financially and politically draining litigation risks.

It should not be a revolutionary idea that backyard trash does not necessarily involve interstate commerce.[435] It is hard to believe that the Supreme Court had anything of the sort in mind when it ruled in *Philadelphia*, and *Fort Gratiot*.[436] The Supreme Court in those cases was concerned with the movement of garbage already in commerce, as part of the country's burgeoning garbage trade.[437] To classify local waste as commerce protected by the dormant Commerce Clause is to broaden the reach of *Philadelphia* and *Fort Gratiot* far beyond anything which could have been imagined in those cases, and result in dire consequences for the nation's solid waste management.

433. *See, e.g.*, Dennis v. Higgins, 498 U.S. 439, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991).

434. 42 U.S.C. § 1988 (1989).

435. Yet most judges, lawyers and legal scholars who deal with garbage read *Philadelphia* and its progeny as equating solid waste to interstate commerce. *See, e.g.*, *Carbone*, 182 A.D.2d at 222, 587 N.Y.S.2d at 686. "[I]t is now beyond dispute that 'garbage' is an article of commerce within the meaning of the Commerce Clause of the United States Constitution." *Id.*

436. *Philadelphia*, 437 U.S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978); *Fort Gratiot*, 504 U.S. —, 112 S. Ct. 2019, 119 L. Ed. 2d 139 (1992).

437. *Philadelphia*, 437 U.S. at 617, 98 S. Ct. at 2531, 57 L. Ed. 2d at 475; *Fort Gratiot*, 504 U.S. at —, 112 S. Ct. at 2019, 119 L. Ed. 2d at 139. Nevertheless, most commentators who support this view have proposed what they regard as a necessary Congressional fix. *See also* Gold, *supra* note 302, at 21; Mesnikoff, *supra* note 432, at 1230-31; Kelly Outten, *Waste to Energy: Environmental and Local Government Concerns*, 19 U. RICH. L. REV. 373 (1985).

B. A Congressional Solution Is Unnecessary if the Supreme Court Uses a Principled Approach Allowing Local Management of Local Waste

Federal legislation is unnecessary to correct what is regarded by many as an irreconcilable conflict between the dormant Commerce Clause and essential waste management activities performed by state and local governments. What is needed is a principled constitutional interpretation which recognizes that waste and pollution are fundamentally different from commercial goods.

1. Import Bans

Since *Philadelphia*, there have been several congressional proposals which would allow import bans and restrictions. Some of these proposed bills would authorize specific state restrictions on interstate trade in waste haulage and disposal, and often include outright bans and discriminatory fees and taxes.[438] Import bans indirectly promote, and ultimately may compel, exporting jurisdictions to find waste disposal solutions for indigenous waste. However, import bans do this by denying the interstate waste trade its commerce in waste. Such bans also have the potential for creating extreme hardship in net waste export generating states.[439] It would be ironic indeed if Congress were to authorize import bans at the same time the Supreme Court rules that municipalities lack the power to prohibit waste exports for the purpose of managing local waste.

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438. *See, e.g.*, H.R. 2848, 103d Cong., 2d Sess. (1993). This bill, the Interstate Transportation of Municipal Waste Act of 1993, introduced on Aug. 3, 1993 by Rep. Philip Sharp, will allow governors the authority to impose importation disposal bans, import restrictions, and create landfill tonnage limitations. *Id. See also* S. 2877, 102d Cong., 2d Sess. § 2 (1992) (authorizing import freeze to 1991 or 1992 levels in some major importing states, restricting out-of-state waste levels and banning out of state waste at some landfills).

439. Imagine the chaos that would result if no rural jurisdiction accepted urban garbage. The cities would collapse from the weight of their trash, and everyone would move to the country. Unless, of course, the movement of urban people was also banned.

The arguments put forth for allowing import restrictions[440] are generally premised on the notion that a locality should be allowed to preserve and restrict for its citizens local waste facilities, such as landfills, even though these may be privately owned.[441] This is a generally protectionist effort,[442] which tends to Balkanize the country by creating isolated wastesheds.[443] If, for example, New Jersey had been allowed to bar Pennsylvania waste in 1978, then the converse may have been the case in 1992 when New Jersey had become a net exporter of waste.[444]

Import bans and restrictions are problematic, both legally and practically. They also may create unsound economics. If states are allowed to charge an entry fee at their border, some states (or foreign countries) may be willing dumping grounds with ensuing garbage disposal price wars and an incentive for minimal environmental protection in

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440. *See supra* note 434.

441. Besides the dormant Commerce Clause issue, there may be other constitutional issues involved with states or localities reserving locally-situated business activities to local citizens. For example, the Fifth Amendment says no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. It may be argued that public use of the private landfill's property constitutes a "taking" which violates this amendment. Other constitutional concerns are a denial of equal protection of the law and a violation of the Privileges and Immunity Clause. *See* U.S. CONST. art. IV, § 2, amend. XIV, § 1.

442. Arguably, these are not protectionist if the intent is to *force* neighboring states to act responsibly and for them to internally manage their waste. Although this is perhaps a "brotherly" approach, the intent is more likely protectionist, or at least "NIMBY" (not in my back yard).

443. *Interstate Transportation of Solid Waste: Hearings Before The Subcommittee on Transportation and Hazardous Materials*, 102d Cong., 1st Sess. 11 (1991) (testimony of Don R. Clay, Assistant Administrator for Solid Waste and Emergency Response).

444. Justice Stewart was prophetic in this regard when he wrote in his *Philadelphia* majority decision:

> Today, cities in Pennsylvania and New York find it expedient or necessary to send their waste into New Jersey for disposal . . . . Tomorrow, cities in New Jersey may find it expedient or necessary to send their waste into Pennsylvania or New York . . . . The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.

Philadelphia, 437 U.S. at 629, 98 S. Ct. at 2538, 57 L. Ed. 2d at 485.

these pollution havens. On the other hand, if disposal sites become scarce, there arises the opportunity for monopolistic or oligopolistic price gouging.

Most important, import restrictions simply do not address (or only indirectly address) the core issue of how to reduce, reuse and otherwise properly manage solid waste. Import bans and restrictions simply increase the costs of solid waste disposal for states which are unwilling or unable to manage their own waste. Additionally they grant a financial windfall, in the form of import fees, to states which are willing to accept waste by pandering landfill space.

2. Local Solid Waste Management: Export Bans

Legislative proposals allowing export bans are of recent vintage, and are a result of recent court decisions invalidating state or municipal laws directing local waste to designated facilities.[445] If the Supreme Court agrees with these lower courts, as it is being asked to do by the garbage industry in the *Carbone* case, local governments from around the country which depend on flow control to supply waste to local facilities will urgently seek a legislative fix. Such legislation, if passed, may then need to be implemented at the state and local levels accordingly. This could involve considerable time and uncertainty, particularly with the powerful garbage industry lobbying, every step of the way, for minimal restrictions. Unless Congress makes the blanket statement that all export flow control is permissible, the country may become fragmented in its approach to solid waste management, with strong industry efforts to privatize waste management wherever profitable.[446]

445. *See, e.g.*, H.R. 1357, 103d Cong., 1st Sess. (1993). This bill was introduced by Alex McMillan (R), representing North Carolina's 9th Congressional District. The legislation would give states flow control authority over municipal solid waste and may be granted to subdivisions of the state. However, the Congressman feels passage is unlikely unless his proposal is combined with other related issues in a larger bill, such as one granting a reprieve on RCRA Subtitle D municipal waste landfill regulations or a proposal to place limitations on the interstate transport of MSW (an import restriction).

446. Hopefully, the Supreme Court will not put the field of local solid waste management into such disarray by prohibiting export flow control. If it does, it

3. A Supreme Court Solution Will Solve the Crisis

This dire situation need not occur. Despite the urgings of many commentators on the subject, a congressional solution is neither required nor appropriate.[447] What is required is a principled interpretation of the Constitution by the Supreme Court and a judicial declaration that the Constitution does not prohibit democratically-elected local government from managing locally generated waste prior to the waste being placed into commerce. Such a judicial declaration would be immeasurably preferable to a legislative solution. A judicial declaration allowing local waste management would be consistent with both current federal law (i.e. RCRA), as well as the relationship of the state, local and federal governments under principles of federalism.[448]

This would be a prudential course for the Supreme Court, since Congress does not need to change anything. Export barriers, including flow control and similar methods of funneling local solid waste to municipal facilities, will allow local management of the waste, yet at the same time, discriminatory import restrictions will remain subject to strict scrutiny or *per se* invalidity under *Philadelphia* and *Fort Gratiot*. The Court can and should clearly distinguish between import restrictions, whereby the local body politic seeks to isolate itself from the national garbage problem, and export barriers where local voters responsibly choose to undertake the burden of managing and disposing their own waste.

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will be a bonanza for lobbyists seeking corrective legislation from Congress, for the legislators enacting corresponding laws at the state and local level, and for the big law firms which will prosecute and defend lawsuits against municipal management of local solid waste "on the back of interstate commerce." American taxpayers will pay a huge price for this chaos.

447. *E.g.*, Gold, *supra* note 302, at 44-48; Meyers, *supra* note 306, at 567; Hinshaw, *supra* note 302, at 511; Mesnikoff, *supra* note 432, at 1219.

448. As Justice Ginsburg said to the Senate Judiciary Committee during her confirmation hearings, "we must always remember that we live in a democracy that can be destroyed if judges take it upon themselves to rule as Platonic guardians" who impose their own vision of wise government upon society. Linda Greenhouse, *The Supreme Court: A Sense of Judicial Limits*, N.Y. TIMES, July 22, 1993, at A1.

IX. Conclusion

The Supreme Court has an opportunity to make a principled decision which is environmentally sound, economically sensible, non-discriminatory, non-protectionist and consistent with our democratic and federal system of government. It should declare that municipally-managed waste is not an article of interstate commerce and that in any event, local government, under principles of federalism can democratically decide how to manage, reduce, recycle and eradicate its solid waste without running afoul of the dormant Commerce Clause. Permitting local solid waste management is also consistent with Congress' explicit deference to state and local government as set forth in RCRA. The approach accords with common sense and the basic democratic principle that citizens should be able to control their own waste destiny.

Flow control is an effective, practical and non-discriminatory tool for enabling a municipality to perform its traditional function of managing local waste. For Commerce Clause purposes, flow control is no different from other means of directing local waste to local facilities, such as municipal collection, franchises or economic flow control. As to waste which a municipality declines to manage, such becomes an article of commerce, with the protections enunciated by the Supreme Court in *Philadelphia* and *Fort Gratiot*, when placed by the municipality into the interstate garbage market.

This home rule approach to waste will protect localities against protectionism, yet enable local government to perform the paramount and essentially local function of solid waste management. It will permit the only realistic solution to the problem of escalating solid waste — the empowerment of citizens to take responsibility for reducing, reusing, recycling and eventually eradicating their own garbage.

Appendix:
"Radical Recycling" Hypothetical

Scenario A — Village "Radical Recycling" Facility; waste viewed as "article of commerce"

1. Village voters chose radical recycling facility with flow control. HELD: Unconstitutional — deprives outsider garbage industry of "article of commerce"
2. Village voters chose radical recycling with waste district and no tip fee for residents. HELD: Unconstitutional — same as above.
3. Village voters chose radical recycling with municipal collection and delivery to village recycling facility. HELD: Unconstitutional — same as above. ("Market participant doctrine" inapplicable because of regulation of recyclables, and because recyclables processing and resale market is distinct from collection market.)

Scenario B — "Congressional Fix"

1. Congress Authorizes Import Restrictions. Twenty states implement total ban. Village chooses radical recycling financed by franchising, flow control or municipal collection. HELD: Same as above, because 30 other states accept waste, and some have landfills with current costs less than recycling.
2. Congress Authorizes Export Barriers (Flow Control). State and Local governments can choose to implement. RESULT: After two or more years of state and local lawmaking, village can again decide whether to finance and construct radical recycling facility for local waste. Private firms have had two years to begin recycling "cream" of recyclables (e.g., aluminum) and plan Fifth Amendment "takings" or due process challenge if village recycling facility intends to take aluminum and similar profitable items. Local solid waste plan placed in limbo becomes outdated.
3. Congress Authorizes Both Import Restrictions and Export Bans. RESULT: Same as B.1 and B.2 above.

Scenario C — Supreme Court Validates Local Waste Management

1. Village can immediately manage its waste, and begin constructing recycling facility.

2. Flow Control, Utility, Franchises, District, Authority, Municipal Collection, all validated as legitimate means of flowing local waste to local facilities. No risk of a Commerce Clause violation and attendant 42 U.S.C. § 1988 attorney fees.
3. Village need not worry that necessary police power waste "regulation" may void what it planned as a "Market Participant" facility, because doctrine is unnecessary as implicated.
4. No "Congressional fix" required with attendant delays and possible retroactivity issues.
5. Village can still freely export its processed, reduced and recycled waste into interstate commerce, since *Philadelphia* and its progeny still bar protectionist import restrictions by other jurisdictions.
6. Village solution to local problem is consistent with RCRA's deference to state and local government, the Tenth Amendment, *Garcia* and state and local SWMPs.
7. Village's recycling approach can be immediately emulated throughout the United States, if this experiment is successful in the Village laboratory.
8. Village approach will be: democratic, close to the people, non-discriminatory toward outsiders, environmentally and economically sound, and is consistent with the "Golden Rule" applied to waste management.