

FAIR WEATHER FEDERALISM AND AMERICA'S WASTE DISPOSAL CRISIS

*Paula C. Murray**

*David B. Spence***

A law professor at Harvard is said to have remarked facetiously, a generation ago, that the greatest constitutional cases had concerned the sale and distribution of milk Although the flood of milk cases has receded in recent years, it has given way to a federal docket that is just as clogged with—of all things—garbage.

—Judge José Cabranes in *SSC Corp. v. Town of Smithtown*¹

People utilize New York because we're a cultural center, because we're a business center. What goes along with being a business center is that we are very crowded, and we don't have the room here to handle the garbage that's produced So this is a reciprocal relationship.

—Former New York City Mayor Rudolph Giuliani, January 1999²

I. INTRODUCTION

The United States is currently involved in a mini-civil war—a trash war. Giuliani's remarks, quoted above, ignited a firestorm of controversy when he suggested that Virginia (the largest recipient of New York City's waste) and other states should be obligated (and happy) to help New York City dispose of its trash. Predictably, Virginia's governor and people were incensed by the report.³ This conflict demonstrates the problem facing every city and state in the nation: what to do with their garbage

* Professor, Legal Studies, McCombs School of Business, University of Texas; J.D., University of Texas, 1980; B.A., Baylor University, 1977.

** Assistant Professor, Legal Environment of Business, McCombs School of Business, University of Texas; Ph.D., Duke University, 1997; J.D., University of North Carolina, 1984; B.A., Gettysburg College, 1980.

¹ 66 F.3d 502, 504–05 (2d Cir. 1995).

² *Gilmore Takes Offense At Giuliani Trash Talk*, BULLETIN BROADFAXING NETWORK, INC., Jan. 15, 1999, available at LEXIS (last visited Nov. 24, 2002) (on file with the Harvard Environmental Law Review).

³ Dan Eggen, *In Charles City County, Trash Talk Hits Home; Residents Near Va. 'Mega-Landfill' Angry, Anxious*, WASH. POST, Jan. 17, 1999, at C1. Giuliani's remarks were in response to the news that as a result of the legal deadline to close New York City's Fresh Kills landfill on Staten Island by 2001, the city had contracted with several cities in central Virginia to accept the additional garbage. These shipments would triple the amount of outside garbage flowing into a state that was already the second-largest importer of trash. *Id.* at C7.

and how to deal with other people's garbage. Densely populated states like New York and New Jersey are challenged to find new and less expensive landfill space as their existing facilities reach capacity or are forced to close. For less densely populated states the challenge is to limit out-of-state access to their landfill space—realizing that the space will probably be needed for their own citizens' garbage. For poor communities the challenge is to keep landfills and incinerators out of their neighborhoods—a challenge that has spawned, in part, the environmental justice movement. These and other so-called “not in my backyard” or “NIMBY” groups exacerbate the siting problem. Thus waste distribution raises both legal and political controversies.

Federalism conflicts will inevitably arise as states and local communities attempt to handle these problems. Under the dormant Commerce Clause, state regulation may not impermissibly burden interstate commerce, making almost any attempt by a state to protect its landfill space vulnerable to a Commerce Clause challenge. In an earlier, companion study,⁴ we found that—like a majority of the high court—the lower federal judiciary appeared predisposed to preempt state and local regulation of environmental, health, and safety regulation without distinguishing regulation that is simply protectionist (NIMBY laws) from regulation that forces communities to internalize pollution costs.⁵ Thus federal judges have created, perhaps unconsciously, a national private market for pollution externalities, while at the same time hamstringing local efforts to address local environmental, health, or safety concerns.⁶ We argued that federal judges could better address the political distortions in the market for externalities if they took a more Pigovian (rather than Coasean) view of that market, one which distinguishes between state and local regulations that attempt to force a balancing of social benefits and costs and mere attempts to shift costs.⁷

⁴ David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125 (1999).

⁵ Economists speak of “external costs” or “externalities” as those costs that the generators of the costs (such as firms or communities) shift to others. When those costs are shifted to society at large, they are sometimes called social costs. Sometimes public policies seek to “internalize” those costs by forcing the generators of the externalities to pay for them. Pollution taxes, for example, seek to internalize pollution costs that way.

⁶ The importance of those local concerns is underscored by the repeated attempts of the local communities to continue to regulate in the face of judicial resistance. While most of those regulatory attempts fail, our analysis implied that the probability of success may be a function not only of the characteristics of the judge(s) deciding the case, but also of factors that proponents may be able to influence, such as the level of government (state or local) at which the regulation is enacted. *Id.* at 1187.

⁷ We argued that cost-internalizing local laws are better gauges of social welfare than waste disposal costs, not only because they force a better balancing of benefits and costs, but also because they are the product of a more inclusive collective choice and avoid the equity problems surrounding disparities in ability to pay. Thus it seems that cost-shifting regulation—not cost-internalizing regulation—is analogous to the kind of protectionist barriers about which the Founding Fathers were concerned. If more federal and state judges

In this Article we examine more closely the solid waste crisis triggered by the federal courts' Commerce Clause jurisprudence. First, we explore the doctrinal impediments to a Pigovian solution. We note, not surprisingly, that state courts seem not only more sensitive to local concerns than do federal courts, they also seem more inclined to uphold both cost-shifting and cost-internalizing local regulations against Commerce Clause challenges. Second, we develop further a proposed solution to the waste crisis mentioned in our earlier article. Based on the notion that neither the courts nor Congress seem likely to provide a solution to this problem in the foreseeable future, we propose that the Environmental Protection Agency ("EPA") use its regulatory authority over solid waste facility siting under Subtitle D of the Resource Conservation and Recovery Act to facilitate the internalization of environmental costs and thereby reduce cost shifting.⁸ The advantages of this proposal are twofold: (1) EPA is in a much better position to weigh all factors in siting decisions, including environmental justice issues; (2) Commerce Clause issues would be eliminated because state and local regulations would be removed or subordinated to federal siting policies.

II. THE IDEOLOGY OF THE CURRENT WASTE CRISIS

Solid waste disposal cases have dominated the Supreme Court's recent dormant Commerce Clause jurisprudence.⁹ Yet for all the attention the Court has paid to the matter, the cases keep coming for two reasons. First, the United States is in the throes of a waste crisis.¹⁰ EPA estimates that the United States generated 232 million tons of garbage in 2000.¹¹ This is approximately 4.5 pounds of waste per person per day, compared

distinguished between these two types of state and local regulation in their Commerce Clause decisions, the result would be a more efficient allocation of externalities. *Id.* at 1189–90. Chief Justice William Rehnquist makes exactly this argument in his dissent in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res.*, 504 U.S. 353, 368 (1992).

⁸ This argument is based on two important premises. First, we assume that limiting the ability of wealthier and more sophisticated communities to shift environmental costs to others is a desirable goal. That is, we reject the argument that cross-border waste flows represent conscious choices made by importing communities to accept these externalities for the economic benefits they bring. According to this argument, waste flows to communities whose willingness to accept those costs is greatest. To the contrary, we believe that waste flows to the path of least political resistance, for reasons stated in our earlier article, Spence & Murray, *supra* note 4, at 1187–91.

⁹ See *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992); *Fort Gratiot*, 504 U.S. at 353; *Or. Waste Sys., Inc. v. Dep't of Env't'l Quality Comm'n of Or.*, 511 U.S. 93 (1994); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

¹⁰ See Alice D. Keane, *Federal Regulations of Solid Waste Reduction and Recycling*, 29 HARV. J. ON LEGIS. 251, 253 (1992) (U.S. facing unprecedented crisis in municipal solid waste disposal).

¹¹ U.S. Environmental Protection Agency, *Municipal Solid Waste—Basic Facts*, at <http://www.epa.gov/epaoswer/non-hw/muncpl/facts.htm> (last visited Nov. 24, 2002) (on file with the Harvard Environmental Law Review).

to 2.7 pounds in 1960.¹² State and local governments are growing increasingly unwilling to serve as dumping grounds for anyone else's garbage. Second, the Supreme Court's dormant Commerce Clause case law has not provided adequate answers to the intergovernmental conflicts produced by the garbage problem.

Prior to the passage of the Resource Conservation and Recovery Act ("RCRA")¹³ in 1976, little thought was given to waste disposal. In its implementation of RCRA, EPA initially concentrated on the more pressing problem of hazardous waste disposal.¹⁴ Nevertheless, it rather quickly became apparent that the municipal solid waste ("MSW") problem deserved serious attention.¹⁵ Congress recognized the problem in 1984 and passed the Hazardous and Solid Waste Amendments ("HSWA") to RCRA.¹⁶ An EPA report found that, of the municipal solid waste landfills studied, more than 500 violated groundwater standards, 845 violated air quality standards, and 660 were cited for surface water contamination.¹⁷ HSWA strengthened the federal role in managing MSW under subtitle D of RCRA by requiring EPA to revise the criteria for facilities that receive hazardous household waste and hazardous waste from small generators.¹⁸ In addition, HSWA required that states adopt permit programs to assure compliance with the subtitle D revised criteria. If states did not adopt such a program, EPA could enforce its own criteria.¹⁹ The revised criteria established standards for siting, design, and closure of municipal landfills. Landfills were also required to monitor groundwater and to clean up any contamination.²⁰ At the time the new subtitle D standards were issued in October 1991, EPA estimated that there were 6000 non-hazardous waste landfills operating. EPA estimated that the new standards would cost approximately \$330 million per year to implement and that 3000 landfills would close within five years.²¹

As more and more landfills closed, new landfills became increasingly difficult to site. States began adopting permitting programs in ac-

¹² *Id.*

¹³ See 42 U.S.C. §§ 6901-6992 (2000).

¹⁴ Subchapter III of RCRA provides for "cradle to grave" regulation of hazardous waste. See *id.* §§ 6921-6939. Subchapter IV addresses wastes not considered to be hazardous. See *id.* §§ 6941-6949. As originally enacted, RCRA left the management of non-hazardous waste to the state and local governments. See *id.* § 6941.

¹⁵ Prior to the enactment of RCRA, hazardous and nonhazardous waste were sent to municipal landfills. Even after RCRA was enacted, a significant amount of hazardous waste was still being disposed of at landfills. This waste was generated from households and small generators that were exempt from Subchapter III. ROBERT V. PERCIVAL, ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 276 (2d ed. 1996).

¹⁶ Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221.

¹⁷ 53 Fed. Reg. 33,319 (Aug. 30, 1988). EPA also found that twenty-two percent of Superfund sites were solid waste landfills. *Id.*

¹⁸ 42 U.S.C. § 6942(b) (2000).

¹⁹ 42 U.S.C. § 6945(c) (2000).

²⁰ 56 Fed. Reg. 50,978 (Oct. 9, 1991).

²¹ PERCIVAL, ET AL., *supra* note 15, at 278.

cord with subtitle D as well as comprehensive waste management and recycling programs.²² Many states began exporting waste, while others increased the importation of waste.²³ A few populous states concentrated mainly in the Northeast are exporting waste to states in the South, West, and Midwest.²⁴

Interstate transfers raise several policy concerns. As reported in a study by Kirsten Engel, net-exporting states can dispose of waste much more cheaply by exporting it to states with lower tipping fees²⁵ than by disposing of it in-state.²⁶ States with lower tipping fees generally have more inexpensive land than net exporting states—most of which are in the east.²⁷ Waste exporters have greater population density than the waste importers, and waste density²⁸ in waste importer states is about fifty tons per square mile fewer than in waste exporters.²⁹ Thus, waste flows to “more rural states where the resident income levels are comparatively lower . . . and where the resident population is already burdened with comparatively higher levels of air pollution.”³⁰

This is the crux of the waste crisis. As poorer, rural states realized that they did not want to become the “dumping ground” for the more ur-

²² Paul Weiland & Rosemary O’Leary, *Federalism and Environmental Policy: The Case of Solid Waste Management*, 27 AM. REV. PUB. ADMIN. 211, 213 (1997). In 1993, forty-one states and the District of Columbia had recycling laws, and thirty-one states had waste reduction statutes. *Id.*

²³ From 1995 to 1997, interstate waste imports increased by thirty-two percent (six million tons). Twenty states reported increased shipments, led by Indiana, Pennsylvania, and Virginia. New York was the largest exporter of waste, with exports expected to rise dramatically after the closure of Fresh Kills Landfill in 2001. James E. McCarthy, Congressional Research Service, Interstate Shipment of Municipal Solid Waste: 1998 Update, (Aug. 6, 1998), available at <http://cnie.org/NLE/CRSreports/Waste/waste-7.cfm> (last visited Nov. 24, 2002). Unfortunately, this data was not complete because not all states require reporting of waste imports and few track exports. McCarthy was able to piece together a list of thirty-two states that import waste, ranging in amount from Pennsylvania (6,340,891 tons) to Utah (3511 tons). *Id.*

²⁴ *Id.* While the data is not complete, the trend is clear.

²⁵ Tipping fees are the fees charged by landfills to dispose of waste. They are usually charged on a per ton basis.

²⁶ Kirsten Engel, *Reconsidering the National Market in Solid Waste: Trade-Offs in Equity, Efficiency, Environmental Protection and State Autonomy*, 73 N.C. L. REV. 1481, 1490 (1995). She cites one report which found that tipping fees in the Midwest and Southwest ranged from \$11 to \$12 per ton while the costs rose to more than \$100 per ton in the Northeast. *Id.* at n.39.

²⁷ Margaret A. Walls & Barbara L. Marcus, *Should Congress Allow States to Restrict Waste Imports?*, RESOURCES, Winter 1993, at 7 (noting that even with transportation fees it is still cheaper for New York to dispose of waste in Indiana for \$21 per ton than at New York’s Fresh Kills Landfill at \$150 per ton).

²⁸ Waste density statistics are based on the theory that the amount of waste disposed of in a state is evenly distributed across the entire land mass of the state. Engel, *supra* note 26, at 1494 n.60.

²⁹ *Id.* at 1493–94. Engel notes that waste importers had, on average, a population density of 173 persons per square mile less than waste exporters. *Id.*

³⁰ *Id.* at 1495. Interestingly, her findings did not find that racial minorities were burdened with a greater share of waste. Engel found that waste importer states had a significantly lower percentage of minorities than waste exporters. *Id.* at 1494–95.

ban, densely populated states,³¹ they began to enact statutes and ordinances to attempt to protect precious landfill space, thus precipitating the waste crisis.

Contrary to the "race to the bottom"³² hypothesis—that communities would voluntarily lower environmental standards to attract jobs—communities are locked in a different kind of competition, a "race to the top" in which local governments seek to shift environmental externalities to others. Some of these governments enacted statutes banning waste imports outright.³³ Others implemented comprehensive waste management plans that restricted imports in more subtle ways.³⁴ Still others enacted so-called waste flow controls designed to ensure that local waste was disposed of locally.³⁵ It was inevitable that these conflicts would end up in the federal courts, and the primary vehicle for addressing them has been the dormant Commerce Clause.³⁶

A. *Evolving Supreme Court Doctrine*

The Court's garbage odyssey began with *City of Philadelphia v. New Jersey*,³⁷ which involved a New Jersey statute prohibiting the import of out-of-state waste.³⁸ The Court surveyed Commerce Clause jurisprudence

³¹ See, e.g., Eggen, *supra* note 3 (reporting Virginia's outrage over Mayor Giuliani's suggestion that Virginia should be happy to accept New York City's garbage).

³² See Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1212 (1977). Stewart argues that without a strong federal regulatory system, communities with high environmental standards may lose industry, and thus capital, to communities with lower standards. Thus, communities with high environmental standards will be forced to lower those standards to compete with less-regulated communities. *Id.*

³³ See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (considering New Jersey's ban on out-of-state waste).

³⁴ See, e.g., *Fort Gratiot*, 504 U.S. at 353 (considering Michigan's comprehensive waste-management plan authorizing county waste import restrictions).

³⁵ Many local governments contracted with private parties to build and run waste facilities. Typically, the government will guarantee the facility owner a minimum amount of waste per day by enacting an ordinance requiring any waste collected within the local boundaries be disposed at the private waste facility. See, e.g., *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) (flow control ordinance required all town's solid waste be sent to particular transfer station before being shipped out of town).

³⁶ The Commerce Clause grants Congress the power "to regulate Commerce . . . among the several States . . ." U.S. CONST. art. I, § 8, cl. 3. The clause not only gives Congress the authority to regulate commerce between the States, but also restricts the power of the States to discriminate against interstate commerce, thus the so-called "dormant" or "negative" power of the Commerce Clause. See *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979). 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." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949).

³⁷ 437 U.S. 617 (1978).

³⁸ The statute was enacted in 1974 and provided:

No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State . . . until the commissioner

and found the ban unconstitutional per se as simple economic protectionism.³⁹ The Court rejected New Jersey's argument that its statute was permissible quarantine legislation.⁴⁰ The Court reasoned that New Jersey failed to demonstrate that out-of-state waste was more dangerous than in-state waste.⁴¹

City of Philadelphia was the first time that the Court spelled out the tests to be used in determining the constitutionality of waste regulations. The first step was to determine whether the legislation facially discriminates against interstate commerce. If overt discrimination was found, then the regulation was virtually per se invalid.⁴² If the particular legislation was found not to be facially discriminatory, and legislative objectives were advanced, then the much more flexible balancing approach first set out in *Pike v. Bruce Church, Inc.* was applicable.⁴³ Under the *Pike* balancing test, "[w]here 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."⁴⁴ Thus there are two tiers of scrutiny: the strict scrutiny of the per se rule and the less rigid balancing test. The Court in *Pike* further refined the balancing test:

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.⁴⁵

[of the State Department of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare

Id. at 618-19 (quoting N.J. Stat. Ann. § 13:11-10 (West. Supp. 1978)).

Philadelphia brought suit in New Jersey state court, and the trial court found that the statute discriminated against interstate commerce. The New Jersey Supreme Court, however, upheld the statute on the grounds that the benefit to the state was great (protection of scarce landfill space) and the effect on interstate commerce was limited. *Hackensack Meadowslands Dev. Comm'n v. Municipal Sanitary Landfill Auth.*, 348 A.2d 505 (N.J. 1975).

³⁹ *City of Philadelphia*, 437 U.S. at 628.

⁴⁰ Such legislation may be facially discriminatory yet pass constitutional muster if the state can demonstrate that the regulation protects the health and safety of the state's residents. *Id.* at 628-29 (1978) (citing *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Bowman v. Chicago & Northwestern R. Co.*, 125 U.S. 465 (1888)).

⁴¹ *City of Philadelphia*, 437 U.S. at 628-29.

⁴² *Id.* at 624.

⁴³ 397 U.S. 137 (1970).

⁴⁴ *Id.* at 142.

⁴⁵ *Id.* Several state courts have used the *Pike* balancing test to uphold waste regulations. *See, e.g.*, *Borough of Glassboro v. Gloucester County Bd. of Chosen Freeholders*,

Justice Rehnquist's dissent in *City of Philadelphia* was the first of a series of dissents reflecting his predisposition to uphold local regulation of waste flows. Rehnquist concluded that the quarantine exception was dispositive of the case, and rejected the majority's conclusion that the imported waste must be different in kind from local waste⁴⁶ for the quarantine exception to apply:

New Jersey may require germ-infested rags or diseased meat to be disposed of as best as possible within the State, but at the same time prohibit the *importation* of such items for disposal at the facilities that are set up within New Jersey for disposal of such material generated *within* the State. The physical fact of life that New Jersey must somehow dispose of its own noxious items does not mean that it must serve as a depository for those of every other State.⁴⁷

Of course, *City of Philadelphia* did not settle the matter.⁴⁸ In *Chemical Waste Management, Inc. v. Hunt*,⁴⁹ the Court overturned an Alabama

495 A.2d 49 (N.J. 1985) (ban barring Philadelphia from using a privately held, state-regulated landfill in New Jersey upheld on basis that it was not merely economic protectionism and state interest in enforcing ban outweighed burden on interstate commerce); *Chemclene Corp. v. Commonwealth Dep't of Env't Res.*, 497 A.2d 268 (Pa. Commw. Ct. 1985) (statute requiring transporters of hazardous waste to file collateral bond as condition of obtaining transportation license only incidentally burdened interstate commerce); *In Re Long-Term Out-of-State Waste Disposal Agreement Between the County of Hunterdon and Glendon Energy Co. of Glendon, Pa.*, 568 A.2d 547 (N.J. Super. Ct. App. Div. 1990) (State's department of environmental protection's disapproval of long-term out-of-state waste disposal contract not economic protectionism and valid exercise of state police power).

⁴⁶ The Court in a number of cases held that a state could permissibly discriminate against interstate commerce if the prohibited item "would bring in and spread disease, pestilence, and death . . ." *City of Philadelphia v. New Jersey*, 437 U.S. at 631 (quoting *Bowman v. Chicago & Northwestern R. Co.*, 125 U.S. 465, 489 (1888)).

⁴⁷ *Id.* at 632.

⁴⁸ In the years following *City of Philadelphia*, Commerce Clause challenges to waste regulations have been myriad. Lower state and federal courts have purported to follow the "rules" set out in *City of Philadelphia* with widely varying results. *See, e.g., Harvey & Harvey, Inc. v. Del. Solid Waste Auth.*, 600 F. Supp. 1369 (D. Del. 1985). The challenged regulations in *Harvey* required Delaware's solid waste to be disposed in Delaware. The plaintiffs brought a Commerce Clause challenge and the Federal District Court held that the elaborate statement of purpose of the regulations (that they benefit the health and safety of the citizens of Delaware) clearly showed that they were not intended to be "protectionism" either in intent or effect. *Id.* at 1379. The court seemed to indicate, in a rather confused analysis, that the regulations would pass muster under either the *per se* rule or the *Pike* balancing test. The court also put the burden of showing less discriminatory alternatives on the plaintiffs rather than the state as required in *City of Philadelphia*. *Id.* at 1381.

But see Browning-Ferris, Inc. v. Anne Arundel County, 438 A.2d 269, 271-72 (Md. 1981) (Maryland's highest court striking down a local ban on disposal and transportation of hazardous waste originating outside of the county as clearly prohibited by *City of Philadelphia*).

The parties to these waste suits have used a wide variety of methods to circumvent the Court's Commerce Clause analysis. For example, Monroe County, Georgia banned out-of-county waste from its landfill. The city of Forsyth and a waste hauler filed suit in federal

statute that imposed a differential tax on waste imports from out-of-state,⁵⁰ finding it to be a per se violation of the Commerce Clause.⁵¹ Justice White, writing for the majority, found that the additional fee facially discriminated against out-of-state waste and that the statute's overall effect was to discourage the full operation of the Alabama disposal facility.⁵² Chief Justice Rehnquist once again dissented. In this case, however, he did not focus on the quarantine cases, but expressed the view that a state could take action to protect its scarce natural resources, in this case, the safe environment, even if that action incidentally burdened interstate commerce:

Taxes are a recognized and effective means for discouraging the consumption of scarce commodities—in this case the safe environment that attends appropriate disposal of hazardous wastes

court challenging the constitutionality of the ban under the Commerce Clause. On the same day, the County filed for an injunction against Forsyth and the hauler in state district court. Ultimately the federal district court found the ban in violation of the Commerce Clause and an appeal to the Eleventh Circuit was filed. The Supreme Court of Georgia found the doctrine of estoppel by judgment to be controlling, and reversed a lower court's ruling that the ban was constitutional. *Mayor and Alderman of Forsyth v. Monroe County*, 392 S.E.2d 865 (Ga. 1990). The Eleventh Circuit later upheld the unconstitutionality of the ban. *Diamond Waste, Inc. v. Monroe County*, 939 F.2d 941 (11th Cir. 1991).

One of the most bizarre results following *City of Philadelphia* involves two cases decided by the New York Court of Appeals on the same day. In *Dutchess Sanitation Serv., Inc. v. Town of Plattekill*, 417 N.E.2d 74 (N.Y. 1980), the court held that a ban on out-of-county waste violated the Commerce Clause under the *Pike* balancing test. However, in *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 417 N.E.2d 78 (N.Y. 1980), a different panel of court of appeals judges held a similar ban to be a legitimate exercise of police power not in violation of the Commerce Clause. The judge writing for the majority in *Dutchess* filed a stirring dissent in *Monroe-Livingston, Id.* at 81.

⁴⁹ 504 U.S. 334 (1992).

⁵⁰ The U.S.'s largest commercial hazardous waste facility was located in Emelle, Alabama, accepting waste from forty-eight states. In 1990 the Alabama legislature enacted a statute that capped the amount of waste that could be disposed of in any one year at 100,000 tons, and provided for a "base fee" of \$25.60 per ton of hazardous waste disposed of at commercial facilities and an "additional fee" of \$72 per ton for out-of-state waste. Ala. Code §§ 22-30B-1 to 22-20B-18 (1990 & Supp. 1991). The statute was challenged by the owners of the facility. The Alabama Supreme Court upheld the additional fee on the grounds that the fee advanced a local purpose that could not be adequately addressed by a nondiscriminatory alternative. *Hunt v. Chem. Waste Mgmt., Inc.*, 584 So. 2d 1367 (Ala. 1991).

⁵¹ *Chem. Waste Mgmt.*, 504 U.S. at 342-44.

⁵² Alabama argued that the additional fee served a legitimate local purpose, which included protecting the citizens' health and safety. However, the Court rejected this argument because "Alabama targets *only* interstate hazardous waste to meet these goals." *Id.* at 343. The Court found that there were less discriminatory alternatives to meet the legitimate local purpose, i.e., a per ton additional fee on all hazardous waste disposed in Alabama, a per mile tax on all vehicles transporting hazardous waste, or a cap on the total tonnage accepted at the facility. The Court also found that there was no difference in the danger of out-of-state waste vis-à-vis in-state waste. *Id.* at 344-45. The Court again rejected the quarantine argument, finding that the out-of-state waste posed no additional threat to health and safety. *Id.* at 347-48. Justice White, however, did hint at the possibility that the additional fee might be valid if it were based on the actual cost of disposing of the waste from other states. *Id.* at 346 n.9.

. . . . I therefore see nothing unconstitutional in Alabama's use of a tax to discourage the export of this commodity to other States, when the commodity is a public good that Alabama has helped to produce Nor do I see any significance in the fact that Alabama has chosen to adopt a differential tax rather than an outright ban.⁵³

At about the same time that the Alabama legislature enacted its waste legislation, Michigan was attempting to fashion a waste policy that could be distinguished from *City of Philadelphia*. Instead of trying to restrict waste imports, the Michigan statute required its counties to develop comprehensive waste management plans and to provide disposal capacity for county waste. The disputed portion of the statute required that no solid waste from outside the county could be accepted for disposal unless authorized in the county's waste plan. Thus, by making counties pay for disposal of their own waste, Michigan's plan attempted to force Michigan counties and out-of-state jurisdictions alike to internalize the full social costs of garbage disposal.

In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of National Resources*⁵⁴ the Supreme Court, Justice Stevens writing for the majority, held that the Michigan waste import restrictions were a per se violation of the Commerce Clause no different from New Jersey's ban on out of state waste in *Philadelphia v. New Jersey*.⁵⁵ Michigan had attempted to distinguish the restrictions from an outright ban of waste, arguing that waste from other Michigan counties was treated in the same manner as out-of-state waste.⁵⁶ The Court, however, rejected this argu-

⁵³ *Id.*, at 349. Rehnquist also pointed to the so-called market participation doctrine as a means that a state could employ to avoid a Commerce Clause challenge. Under this doctrine, if a state owns and runs its own facility, it can deal with (and ban) whatever waste it sees fit. *Id.* at 351. As Commerce Clause jurisprudence in this area evolved, the market participation doctrine has become increasingly important as more and more states and local communities attempt to come under the aegis of the doctrine. *See, e.g.*, County Comm'rs v. Stevens, 473 A.2d 12 (1984) (holding ban on disposal of out-of-county waste in county-owned and -operated landfill not in violation of the Commerce Clause because the county was acting as a market participant).

⁵⁴ 504 U.S. 353 (1992) (decided the same day as *Chemical Waste Management*).

⁵⁵ *Id.* at 358. The Court emphasized a distinction important in later waste regulation cases—the distinction between publicly owned facilities and privately owned and operated landfills. As the Court stated, “[n]or 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.” *Id.* at 358–59. Publicly owned facilities are not subject to Commerce Clause restrictions under the so-called market participation exception.

⁵⁶ *See City of Elizabeth v. State of New Jersey Dept. of Env't'l Prot.*, 486 A.2d 356, 361 (N.J. Super. Ct. App. Div. 1984) (upholding a similar New Jersey ordinance because there was no ban on import of waste).

ment and found that the county's ability to prohibit out-of-state waste had the same effect as a statewide ban.⁵⁷

Once again Rehnquist dissented. Michigan had attempted to justify the regulation on the grounds that it was not "economic protectionism," but part of a comprehensive health and safety regulation to protect limited landfill capacity. The state relied on the Court's statement in *Sporhase v. Nebraska*⁵⁸ that "a State that imposes severe withdrawal and use restrictions on its own citizens [use of water resources] is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State."⁵⁹ Rehnquist found the *Sporhase* reasoning controlling. In his view, Michigan was merely attempting to protect its landfill space, just as Nebraska was protecting its groundwater, and thereby protecting its environment from health and safety risks created by uncontrolled waste disposal.⁶⁰

⁵⁷ "[O]ur prior cases teach that a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself." *Fort Gratiot*, 504 U.S. at 361. The Court also rejected the argument that a distinction should be made from the New Jersey ban because the regulation allowed other counties to accept out-of-state waste. *Id.* at 363.

⁵⁸ 458 U.S. 941 (1982). Nebraska's prohibition of withdrawal of its groundwater by another state was held to be a Commerce Clause violation unless the other state granted reciprocal provisions. The Court in *Sporhase* found that although groundwater is privately owned, the States have traditionally played a role in the ownership and conservation of the groundwater such that it has taken on some indicia of a publicly owned good; however, the Court in *Fort Gratiot* rejected such an analogy for privately owned landfills. 504 U.S. at 366 n.7.

⁵⁹ *Sporhase*, 458 U.S. at 955-56. The state in *Fort Gratiot* analogized the protection of landfill capacity and the protection of its citizen's health to a state's legitimate interest in protecting its groundwater for the benefit of its own citizens. 504 U.S. at 364. The Court once again rejected this argument finding that although the Solid Waste Management Act prior to the Waste Import Restrictions amendments could be characterized as a health and safety regulation with no protectionist purpose, the same characterization could not be made for the restrictions themselves. Since the Court found that the restrictions "unambiguously discriminate" against interstate commerce, the State bore the burden of proof to demonstrate that the regulations furthered a valid health and safety purpose that could not be furthered by a nondiscriminatory alternative. The Court found that the State had not met this burden, stating, "[T]here is . . . no valid health and safety reason for limiting the amount of waste that a landfill operator may accept from outside the State, but not the amount the operator may accept from inside the State." *Id.* at 366-67. The Court identified a less discriminatory alternative to the ban: limiting the total amount of waste that a landfill operator could accept. *Id.* at 367. Following *Fort Gratiot*, the Michigan Court of Appeals held that the Solid Waste Management Act was not in violation of the Commerce Clause as applied to intrastate commerce. *Citizens for Logical Alternatives and Responsible Environment, Inc. v. Clare County Bd. of Comm'rs*, 536 N.W.2d 286 (Mich. 1995).

⁶⁰ *Fort Gratiot*, 504 U.S. at 372. Justice Rehnquist viewed Michigan's landfill capacity as a "resource [that] has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage." *Id.* (quoting *Sporhase*, 458 U.S. at 957). He further stated, "I see no reason in the Commerce Clause, however, that requires cheap-land States to become the waste depositories for their brethren, thereby suffering the many risks that such sites present." *Id.* at 373. For a complete discussion of the environmental risks of municipal landfills, see Kirsten Engel, *Environmental Standards as Regulatory Common Law: Toward Consistency in Solid Waste Regulation*, 21 N.M.L. REV. 13,

Two terms after *Chemical Waste Management* and *Fort Gratiot*, the Court faced another attempt to fashion a cost-internalizing state regulation in *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon*.⁶¹ In 1989 the Oregon legislature imposed an extra fee, a "surcharge," on out-of-state waste disposed of in Oregon. The amount of the charge was to be determined by the Environmental Quality Commission ("Commission") "based on the costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state which are not otherwise paid for' under specified statutes."⁶² With Justice Thomas writing for the majority, the Court held the surcharge facially invalid under the Commerce Clause.⁶³ The Court rejected the state's argument that the so-called "compensatory tax" might possibly be a justification for discrimination in this case because Oregon was unable

15 (1990). She reports that risk data indicates that solid waste landfills are nearly as toxic as hazardous waste landfills. *Id.* at 15-16.

Following the *Fort Gratiot* and *Chemical Waste Management* decisions, a number of similar statutes were struck down. *See, e.g.,* Southeast Ark. Landfill, Inc. v. Ark. Dep't of Pollution Control and Ecology, 981 F.2d 372 (8th Cir. 1992) (finding *Fort Gratiot* required reversal of an identical statute). *See also* BFI Med. Waste Sys. v. Whatcom County, 983 F.2d 911 (9th Cir. 1993) (overturning ordinance that banned out-of-county medical waste from being disposed of in county); Conn. Resources Recovery Auth. v. Comm. of the Dept. of Env't'l. Prot., Nos. CV 93-0524827-S, CV 93-0523894-S, CV 93-0524826-S, CV 93-0524825-S, 1994 WL 60061 (Conn. Super. Ct. Feb. 16 1994) (hazardous waste permit conditioned on only accepting in-state waste held in violation of Commerce Clause; it is interesting that neither party briefed the Commerce Clause issue; the judge raised it); City of Auburn v. Tri-State Rubbish, 630 A.2d 227 (Me. 1993) (Maine Supreme Judicial Court held ordinance requiring all waste within city be disposed of at designated site facially discriminatory). *But see* Tri-State Rubbish v. Town of Gray, 632 A.2d 134 (Me. 1993) (flow control ordinance identical to the one in *Auburn* held not to facially discriminate against interstate commerce so not invalid per se; Maine Supreme Judicial Court remanded so town could show reasons for ordinance other than economic protectionism). *See also* Conn. Res. Recovery Auth. v. Planning & Zoning Comm'n Town of Ellington, No. CV 9147424-S, 1992 WL 394459 (Conn. Super. Ct. Dec. 18. 1992) (dismissal of zoning appeal claiming Commerce Clause violation of requirement in special permit to operate landfill that only waste from four towns be deposited).

⁶¹ 511 U.S. 93 (1994).

⁶² *Id.* at 96. The Commission set the surcharge at \$2.25 per ton whereas the charge for in-state waste was capped at \$0.85 per ton. The surcharge was immediately challenged, and the Oregon Court of Appeals and the Oregon Supreme Court upheld the surcharge. The Oregon Supreme Court recognized that the Oregon surcharge resembled the Alabama fee that was invalidated in *Chemical Waste Management*, but found that the resemblance was not dispositive because the Oregon fee was a "compensatory fee" and thus facially constitutional. *Id.* at 97 (quoting Gilliam County v. Dep't of Env't'l Quality of Or., 849 P.2d 500, 508 (1993)).

⁶³ *Id.* at 108. It is interesting how the Court almost teases Oregon by noting two justifications that the Court intimates may have been successful:

At the outset, we note two justifications that respondents have *not* presented. No claim has been made that the disposal of waste from other States imposes higher costs on Oregon and its political subdivisions than the disposal of in-state waste. Also, respondents have not offered any safety or health reason unique to nonhazardous waste from other States for discouraging the flow of such waste into Oregon.

Id. at 101 (notes and citations omitted).

to identify the intrastate tax burden for which it is attempting to compensate, or to demonstrate that the amount of additional tax is roughly approximate to the additional costs borne by state taxpayers. The Court had no trouble in finding that “[r]espondents’ failure to identify a specific charge on intrastate commerce equal to or exceeding the surcharge is fatal to their claim.”⁶⁴

Chief Justice Rehnquist dissented again, this time joined with Justice Blackmun, emphasizing that a clean environment free from improper waste disposal was the real commodity at issue.⁶⁵

The State of Oregon is not prohibiting the export of solid waste from neighboring States; it is only asking that those neighbors pay their fair share for the use of Oregon landfill sites. I see nothing in the Commerce Clause that compels less densely populated States to serve as the low-cost dumping grounds for their neighbors, suffering the attendant risks that solid waste landfills present.⁶⁶

Rehnquist again cited *Sporhase* as authority for the proposition that a state “may enact a comprehensive regulatory system to address an environmental problem or a threat to natural resources within the confines of the Commerce Clause.”⁶⁷

⁶⁴ *Or. Waste Sys., Inc.*, 511 U.S. at 104. The State argued that the in-state disposers pay general taxes that out-of-state disposers do not; the Court rejected this argument because the in-state and out-of-state charges are not levied on substantially equivalent events—one is a tax on using landfills, and one is an income tax. *Id.*

The second argument put forward by Oregon was one of “resource protectionism:” citizens of Oregon have an interest in making sure that their natural resource, landfill space, is protected. The Court once again rejects this argument out of hand. “Even assuming that landfill space is a ‘natural resource,’ ‘a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources within its borders.’” *Id.* at 107 (quoting *City of Philadelphia*, 437 U.S. at 627). Thus, the Court seems to be indicating that virtually any time there is facial discrimination there is a Commerce Clause violation.

⁶⁵ *Id.* at 110. “In exercising its legitimate police powers in regulating solid waste disposal, Oregon is not ‘needlessly obstruct[ing] interstate trade or attempt[ing] to place itself in a position of economic isolation.’ Quite to the contrary, Oregon accepts out-of-state waste as part of its comprehensive solid waste regulatory program and it ‘retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.’ [quoting *Maine v. Taylor*, 477 U.S. 131, 151 (1986)]” *Id.* at 113.

⁶⁶ *Or. Waste Sys., Inc.*, 511 U.S. at 116. Justice Rehnquist also raised the issue of market participation. The majority stated that even if the surcharge could be characterized as a “user” fee imposed by a state-owned facility, it would still be in violation of the Commerce Clause. Justice Rehnquist specifically questioned this “dubious assertion” stating, “We specifically left unanswered the question whether a state or local government could regulate disposal of out-of-state solid waste at landfills owned by the government in *Philadelphia . . .*” *Id.* at 114. Many subsequent cases have picked up on the market participation theory as a means to avoid Commerce Clause problems. See notes 53–55 *supra* and accompanying text.

⁶⁷ *Or. Waste Sys., Inc.*, 511 U.S. at 110–11. Chief Justice Rehnquist found no difference between a comprehensive regulatory system of ground water and Michigan’s imposi-

Realizing that restricting or taxing imports was futile, some governments addressed the problem of disappearing landfill space by developing new waste incinerators or process facilities along with so-called "flow control ordinances" that restricted waste exports. However, not content to prevent local governments from restricting imports of waste, the Court next set out to prevent local governments from restricting waste exports in *C & A Carbone v. Town of Clarkstown*.⁶⁸ As more and more communities began building new incinerators, transfer stations, and recycling facilities,⁶⁹ many contracted with private developers to operate the new facilities. Local communities sought to minimize costs by guaranteeing a minimum daily waste delivery to the facilities. Thus they enacted flow control regulations that required all waste within the community to be delivered to a particular waste facility.⁷⁰ Such was the case in *Carbone*.⁷¹ Carbone, Inc. was discovered shipping household waste to a landfill in Indiana in violation of the ordinance,⁷² and sued the city to enjoin the flow control ordinance.

tion of "restrictions on the ability of its own citizens to dispose of solid waste in an effort to promote a 'clean and safe environment' . . ." *Id.* at 111. He found, just as the Court recognized vis-à-vis ground water in *Sporhase*, that the state was not in violation of the Commerce Clause by "preventing the uncontrolled transfer of out-of-state solid waste into the State." *Id.* The majority in *Oregon Waste* rejected the *Sporhase* analogy. The majority found that the *Sporhase* decision was based on the fact that water is essential for human life and therefore a state could grant a limited preference for its citizens. Thus, even if one characterizes landfill space as a "natural resource," the Court rejected the notion that landfill space is in any way analogous to ground water. *Id.* at 107. Interestingly, one of the early waste ban regulations was upheld by the Supreme Court of New Jersey against a Commerce Clause challenge finding that preservation of landfill space was analogous to preservation of ground water. *Borough of Glassboro v. Gloucester County Bd. of Chosen Freeholders*, 495 A.2d 49 (N.J. 1985).

⁶⁸ 511 U.S. 383 (1994).

⁶⁹ See James E. McCarthy, Congressional Research Service, Solid Waste Issues in the 105th Congress, (Dec. 23, 1998), available at <http://www.cnie.org/nle/CRSreports/Waste/waste-16.cfm> (last visited Nov. 24, 2002).

⁷⁰ The typical arrangement is for the owner of the facility to charge a "tipping fee" for each ton of waste disposed of at the site. The local government will usually be guaranteed a lower fee than outside dumpers. See *J. Filiberto Sanitation v. Dep't of Env't Prot.*, 857 F.2d 913 (3d Cir. 1988) (upholding a flow control ordinance as a legitimate, nondiscriminatory exercise of state police power that did not unduly burden interstate commerce). Accord *In re Fiorillo Bros. of N.J.*, 577 A.2d 1316 (N.J. Super. Ct. App. Div. 1990).

⁷¹ 511 U.S. at 387. The town of Clarkstown's ordinance required all solid waste to be processed at a particular transfer station before being shipped out of the municipality. The purpose of the ordinance was to guarantee processing fees to the station in order to amortize the cost of the facility. The cost of building the transfer station was \$1.4 million. A private operator agreed to build the facility, run it for five years, and then sell it to the town for \$1. During the five years the town guaranteed a minimum waste flow of 120,000 tons per year. The operator could charge the waste hauler a tipping fee of \$81 per ton (an amount exceeding the disposal costs on the private market). The ordinance required all nonhazardous solid waste within the town to be deposited at the transfer facility. Noncompliance was punishable by a fine of up to \$1,000 and up to fifteen days in jail. *Id.* at 386-87.

⁷² Carbone operated a recycling facility in Clarkstown and while Carbone could accept waste, the ordinance required Carbone to bring the nonrecyclable waste to the town's facility. Thus, Carbone could not ship nonrecyclable waste itself and was required to pay a tipping fee on waste that it had already sorted. Carbone was discovered shipping the waste

Justice Kennedy, writing for the majority, began by holding that the ordinance, indeed, did regulate interstate commerce,⁷³ finding the ordinance functionally equivalent to the local processing requirements that the Court invalidated in such cases as *Dean Milk Co. v. City of Madison*.⁷⁴ The city tried to justify the ordinance as a financing tool. The ordinance, in actuality, was designed to make sure that the facility was profitable. The Court, however, found that "the town may not employ discriminatory regulation to give [the transfer facility] an advantage over rival businesses from out of State."⁷⁵ Thus, the ordinance ran afoul of the Commerce Clause.

Once again there was a dissent; this time however, Justice Souter was the author and was joined by Rehnquist and Thomas. The dissent disputed the majority's claim that the ordinance was similar to the local processing cases.⁷⁶ The dissent argued that, although a private party currently had the monopoly of running the transfer station, ultimately that party is an agent of the municipality. Therefore, the city had entered the market and, according to the dissent, was a participant and not in violation of the Commerce Clause.⁷⁷ This so-called market participation ex-

without going through the town's facility when a tractor-trailer with twenty-three bales of solid waste hit an overpass on the Palisades Parkway. The Clarkstown police put the Carbone facility under surveillance and caught six more trucks leaving the facility on their way to out-of-state disposal sites. *Id.* at 388–89. The city sued Carbone in New York Supreme Court for an injunction requiring Carbone to ship waste to the city's facility. *Id.* at 388.

⁷³ *Id.* at 389. Since Carbone received waste from outside the city, requiring Carbone to send the nonrecyclable portion of the waste to the city's chosen facility would drive up the cost to out-of-state disposers. In addition, by selecting one favored operator, the city was depriving out-of-state businesses access to the local market. Either of these interstate economic effects was sufficient to invoke the Commerce Clause. *Id.*

⁷⁴ 340 U.S. 349 (1951) (holding that city ordinance requiring all milk sold within the city to be pasteurized within five miles of city limits violated Commerce Clause). As the *Carbone* Court stated:

The essential vice in laws of this sort is that they bar the import of the processing service Put another way, the offending local laws hoard a local resource—be it meat, shrimp, or milk—for the benefit of local businesses that treat it.

The flow control ordinance has the same design and effect. It hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility. The only conceivable distinction from the cases cited above is that the flow control ordinance favors a single local proprietor. But this difference just makes the protectionist effect of the ordinance more acute.

511 U.S. at 392.

The Court found that the city had a number of nondiscriminatory alternatives to assure the proper disposal of the waste, most notably safety regulations applicable to all disposers. *Id.* at 393.

⁷⁵ *Id.* at 394.

⁷⁶ *Id.* at 411. "What the majority ignores, however, are the differences between our local processing cases and this one: the exclusion worked by Clarkstown's Local Law 9 bestows no benefit on a class of local private actors, but instead directly aids the government in satisfying a traditional governmental responsibility." *Id.*

⁷⁷ *Carbone*, 511 U.S. at 430.

ception may be invoked if the state is "participating in a narrowly defined market as a proprietor rather than simply regulating the actions of other private market participants,"⁷⁸ and thus not within the purview of the Commerce Clause.

B. Lower Courts and the Internalization of Costs

The Supreme Court has been just as unsympathetic to local attempts to force the internalization of the full social costs of waste disposal as it has been to simple import bans. Despite the strength of the Supreme Court's opposition to local regulation, however, local governments continue to try to create ways to manage the flow of solid wastes within their borders.⁷⁹ These efforts, in turn, have provoked still more Commerce

⁷⁸ See *Chance Mgmt., Inc. v. South Dakota*, 97 F.3d 1107, 1111 (8th Cir. 1996). Chief Justice Rehnquist in his dissent in *Chemical Waste Management* first recognized the market participation exception as a potentially important mechanism that state and local governments might use to avoid Commerce Clause problems. 504 U.S. at 351. Under this exception a state or local government that owns and operates a waste facility is acting as a market participant, not a market regulator, and can accept or reject waste as it sees fit. At this time there were only four cases applying the doctrine. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (State of Maryland to pay bounties for destruction of any Maryland titled vehicle, but out-of-state scrap processors required to show extensive documentation to prove vehicle abandoned and processor had good title; held no Commerce Clause violation because state had entered the market as a participant); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (South Dakota limited sale of cement produced at state-owned plant to state residents; held no violation because South Dakota was a seller of cement and the citizens of South Dakota bore the expense and risk of setting up the plant); *White v. Mass. Council of Constr. Employees*, 460 U.S. 204 (1983) (city required at least one-half of workforce used on city-funded construction projects to be city residents; held requirement was within the market participation exception); *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82 (1984) (Alaska Department of Natural Resources published a notice that it would sell timber to highest bidder but bidder must agree to process timber in state; held not within market participation exception because policy went beyond normal buyer-seller relationship. The Court stated that the market participation doctrine "is not *carte blanche* to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity." *Id.* at 97).

An Eleventh Circuit decision, *GSW, Inc. v. Long County, Georgia*, 999 F.2d 1508 (11th Cir. 1993), involved one of the first attempts to avoid waste disposal Commerce Clause problems by using the market participation exception. The county contracted with the plaintiff to build a private solid waste facility, and attempted by ordinance to limit the origin of the waste accepted by the plaintiff to within 150 miles of the county. The court found that the contract did not fall within the market participation exception, primarily because the county had not invested or risked any public funds to build the facility. Once the court determined that the market participation doctrine was not applicable, the case fell squarely under the *Chemical Waste Management* and *Fort Gratiot* precedents. *Id.* at 1517.

⁷⁹ For example, in *County Comm'rs of Queen Anne's County v. Days Cove Reclamation Co.*, 713 A.2d 351 (Md. Ct. Spec. App. 1998), the county governing body passed an ordinance prohibiting private ownership of landfills. The Maryland court found that the ordinance was preempted by state law; however, it was not in violation of the Commerce Clause. *Id.* at 363. Interestingly, in the preface to the ordinance the planning commission stated: "Queen Anne's County should not become a convenient 'dumpsite' for waste products generated elsewhere . . ." *Id.* at 355. Clearly the county was attempting to access the market participation exception to manage its waste.

Clause challenges in both state and federal courts.⁸⁰ Among these lower federal court cases, some have upheld local government attempts to control the solid waste markets within their borders by becoming participants in those markets.⁸¹ Nevertheless, federal courts uphold local solid

⁸⁰ See, e.g., *Empire Sanitary Landfill, Inc. v. Commonwealth*, 684 A.2d 1047 (Pa. 1996) (Pennsylvania Supreme Court, purportedly following *Carbone*, striking down a flow control ordinance not as per se invalid, but as invalid under the *Pike* balancing test. *But see Delaware County v. Raymond T. Opdenaker & Sons, Inc.*, 652 A.2d 434, 438 (Pa. Commw. Ct. 1994) (a lower Pennsylvania court, also purportedly following *Carbone*, upheld a flow control ordinance because there was no showing that any out-of-state waste was rejected, and thus there was no discrimination against interstate commerce, and the benefits to the county far outweighed any burden on interstate commerce).

The federal courts have also heard many Commerce Clause challenges. See *Waste Sys. Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993) (county ordinance, enacted pursuant to state waste management statute, requiring all compostable solid waste to be transported to local composting facility held per se invalid); *Ben Oehrleins v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997) (flow control ordinance requiring in-state waste to be disposed of at county facility per se invalid); *Atlantic Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders*, 48 F.3d 701 (3d Cir. 1995) (flow control ordinance discriminated against interstate commerce in purpose and effect); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995) (not all flow control ordinances per se invalid; court must evaluate whether in-state and out-of-state businesses treated equally). In *Harvey*, the court found that not all flow control ordinances were per se invalid under the strict scrutiny test, but the individual court must look at the process. The *Harvey* court offered the following guidelines:

To determine whether these flow control schemes actually discriminate against interstate commerce (triggering strict scrutiny analysis) the court must closely examine: (1) the designation process; (2) the duration of the designation; and (3) the likelihood of an amendment to add alternative sites, for signs that out-of-state bidders do not in practice enjoy equal access to the local market.

Id. at 801. See also *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir. 2000) (ordinance requiring all garbage collected within city, except garbage destined for out-of-state disposal, be processed at city-owned transfer station, not per se invalid but burden on interstate commerce "clearly excessive" in relation to benefit).

But see On The Green Apartments L.L.C. v. City of Tacoma, 241 F.3d 1235 (9th Cir. 2001) (apartment's argument that, were it not for waste ordinance requiring use of local landfill, it would self-haul garbage to neighboring counties alleged only intrastate burden on commerce, thus Commerce Clause not implicated); *Maharg, Inc. v. Van Wert Solid Waste Mgmt. Dist.*, 249 F.3d 544 (6th Cir. 2001) (Indiana landfill operator refused to meet Ohio county's conditions for designation of landfill as approved disposal site—including collection of a per-ton surcharge to be remitted to county; held no violation of Commerce Clause—the surcharge was applied evenly to in-state and out-of-state facilities); *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999) (town's contract with single firm as exclusive hauler of town's garbage and ordinance directing all waste to be collected by that firm not in violation of Commerce Clause under *Pike* balancing test because town had strong interest in effective waste management).

⁸¹ See *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995) (flow control ordinance was attempt to regulate, not participate in market, but contract between town and garbage hauler upheld under market participation exception); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1291 (2d Cir. 1995) ("we conclude that the Town is engaging in market participation both when it purchases incinerating service from Ogden, and when it exercises its rights to use those services by letting BSSCI [the hauler] dump town garbage at the Incinerator for free"); *Nat'l Solid Waste Mgmt. Ass'n v. Williams*, 146 F.3d 595, 599 (8th Cir. 1998) (state, in mandating that its local subdivision follow the flow control ordinance, was "performing as a market participant"); *Sal Tinnerello & Sons, Inc. v. Town of*

waste laws against preemption challenges only thirty-eight percent of the time, a result that seems consistent with the Supreme Court's guidance on these issues.⁸² State courts, on the other hand, have been noticeably less inclined to preempt state or local laws regulating the flow of garbage across jurisdictional boundaries, upholding local laws sixty-six percent of the time.

Indeed, some state courts have been fairly creative in their efforts to give effect to local regulations. Some have ignored Commerce Clause problems.⁸³ Others have applied extremely creative readings of Supreme Court precedent to reach the same result.⁸⁴ Likewise, it appears that state courts, like federal courts, make a distinction between cost-internalizing and cost-shifting regulation.⁸⁵ Table One summarizes preemption rates in both the federal and state courts, depending upon the type of state or local law at issue. Both state and federal courts were less likely to preempt local laws that attempted to internalize waste disposal costs (including flow control ordinances⁸⁶) than laws that attempted merely to shift environmental costs to others,⁸⁷ but the state courts preempted those laws a

Stonington, 141 F.3d 46 (2d Cir. 1998) (town's waste management plan based on ones upheld in *Smithtown* and *Babylon* squarely within the market participation exception). *But see* *Huish Detergents, Inc. v. Warren County, Kentucky*, 214 F.3d 707 (6th Cir. 2000) (county's award of exclusive franchise to company to collect and process all solid waste in county and dispose of it at local landfill not within market participation exception); *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245 (2d Cir. 2001) (county ordinance requiring all waste generated within county to be disposed at county-owned facilities and imposing penalties for violation invoked sovereign power and thus county regulating the market).

⁸² See Table One.

⁸³ See *Profill Dev., Inc. v. Dills*, 960 S.W.2d 17 (Tenn. Ct. App. 1997) (upheld state flow control statute without mentioning Commerce Clause other than fact that trial court found no Commerce Clause issue); *Tucker v. Humphreys County*, 944 S.W.2d 613 (Tenn. Ct. App. 1996) (regulation allowing governing bodies to approve private solid waste landfills not in violation of Commerce Clause).

⁸⁴ See *County Comm'rs v. Stevens*, 473 A.2d 12 (Md. 1983) (ban on disposal of out-of-county waste in county-owned and -operated landfill not in violation of Commerce Clause because the county was acting as a market participant); *Waste Mgmt. of Alameda County v. Biagini Waste Reduction Sys., Inc.*, 74 Cal. Rptr. 2d 676 (Cal. Ct. App. 1998) (city ordinance granting waste collector exclusive franchise upheld citing *Babylon*). *But see* *Sanifill, Inc. v. Kandiyohi County*, 559 N.W.2d 111 (Minn. Ct. App. 1997) (county not acting merely as market regulator in charging waste "service" fee on waste generated in county because competitors did not have similar option).

⁸⁵ This analysis treats local laws that require local disposal, or are part of a regional local disposal scheme, as cost-internalizing laws. Laws that merely restrict imports without imposing any kind of local disposal obligation are treated as cost-shifting rules.

⁸⁶ Flow control ordinances and state statutes that required local governments to provide for local disposal of their own waste were classified as cost-internalizing local laws. Statutes or ordinances that merely banned or restricted waste imports were classified as cost-shifting laws.

⁸⁷ In our earlier article, Spence & Murray, *supra* note 4, we found that when we controlled for other factors, federal judges did not seem to make this distinction between cost-internalizing and cost-shifting regulation. Our earlier analysis was different from this one in that it (1) focused only on federal courts, (2) included both Supremacy Clause and Commerce Clause preemption cases, and (3) used multivariate statistical techniques to

mere thirty-three percent of the time. Even in cases involving import bans and restrictions, state courts preempted local laws less than half the time, compared with a sixty-three percent preemption rate in federal courts.

TABLE 1: COMMERCE CLAUSE PREEMPTION RATE, COST-INTERNALIZING LOCAL LAWS VS. OTHER LAWS

	Overall percentage of laws preempted	Cost-Intern. Laws (including internal flow control) and disposal regulation Pct. Casetype Preempted (No. preempted/total)	Cost-shifting laws (including import bans or restrictions) Pct. Casetype Preempted (No. preempted/total)
Federal Courts	62% (16/26)	53% (8/15)	63% (5/8)
State Courts	34% (16/47)	33% (9/27)	42% (5/12)

We have argued previously that this distinction between cost-shifting and cost-internalizing local regulation is significant and that the Commerce Clause reflects the Founders' hostility to cost-shifting regulation but not to cost-internalizing regulation.⁸⁸ But is the Supreme Court's failure to make this distinction necessarily a problem? If the Commerce Clause preempts *all* local solid waste laws, doesn't that rule weaken rich and poor communities alike in their attempts to shift social costs to others? If the market allocates these costs disproportionately to poorer communities, is that because the market is directing those costs (through price signals like land prices and labor costs) to the locations that are most willing to accept those costs? Similarly, might not relatively weak local government regulation reflect a conscious balancing of costs and benefits by those local governments and an implicit decision that the benefits of that policy (jobs) are at least equal to the costs (environmental externalities)?⁸⁹

measure the independent affect of individual variables. We could not undertake a multivariate analysis of state court decisions because we were unable to obtain party affiliation information for most state judges. Hence, we cannot know whether this apparent effect is real when we control for other variables like judges' ideology, or whether it is an effect that exists only in connection with Commerce Clause cases.

⁸⁸ Spence & Murray, *supra* note 4, at 1193-95.

⁸⁹ See Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992); see also DAVID SCHOENBROD, *TIME FOR THE FEDERAL ENVIRONMENTAL ARISTOCRACY TO GIVE UP POWER* (Center for the Study of American Business, Policy Study No. 144, 1998) (echoing Revesz); Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14:2 (Symposium) YALE L. & POL'Y REV. 23, 31 (1996) (echoing Revesz's ar-

These arguments rest on weak premises. First, disposal costs are a poor translator of society's willingness to pay to avoid environmental costs.⁹⁰ Depending on the laws of the importing state, disposal costs may reflect only the interests of a single disposal facility operator or only a subset of those affected. That is, in the usual case a firm's disposal costs reflect the tipping fees charged by the owner of the disposal facility. While in some cases the disposal facility may face regulations designed to minimize environmental impacts at the facility, those costs generally do not reflect the full value of all the externalities created by the disposal of the wastes, such as noise, truck traffic, vermin, air pollution, odor, and resulting diminution in property values. In addition, even if we could measure everyone's willingness to pay to avoid the externality, that price will be a function of ability to pay. This means that the intense preferences of the poor are assigned a lower value than the mild preferences of the rich.⁹¹ Second, and more importantly, the argument ignores the political distortions that already exist in the absence of government-imposed solutions to these problems. Exporting states are able to export environ-

gument); Wallace E. Oates, *Thinking About Environmental Federalism*, RESOURCES, Winter 1998, at 14 ("the central idea emerging from the literature in public economics is that the responsibility for providing a particular public service should be assigned to the smallest jurisdiction whose geographical scope encompasses the relevant benefits and costs associated with the provision of the service"). For a good, recent discussion of this debate, see Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom"?*, 48 HASTINGS L.J. 271, 275 (1997) (defending the race-to-the-bottom rationale for federal regulation). Revesz's argument is generally inapplicable, however, to those NIMBY movements that seek to exclude hazards from communities while retaining the benefits of the activity that produced the hazard at issue, since such cost-shifting distorts the balance of costs and benefits. See Daniel E. Ingberman, *Siting Noxious Facilities: Are Markets Efficient?*, 29 J. ENVTL. ECON. & MGMT. S-20 (1995), whose analysis also demonstrates that this problem exists even when all costs and benefits remain within the jurisdiction, because, if impacts are concentrated on those closest to the noxious facility, a majority of voters within the jurisdiction will suffer less than average impacts.

⁹⁰ See, e.g., RONALD DWORKIN, *A MATTER OF PRINCIPLE* 242-46 (1985); Herbert Hovenkamp, *Marginal Utility and the Coase Theorem*, 75 CORNELL L. REV. 783 (1990); Herbert Hovenkamp, *Positivism in Law and Economics*, 78 CAL. L. REV. 815, 840 (1990) ("Two people with precisely the same willingness to pay may have very different utility functions"); Joshua D. Sarnoff, *A Reply to Professor Revesz's Response in "The Race to the Bottom and Federal Environmental Legislation,"* 8 DUKE ENVTL. L. & POL'Y F. 295, 298 (1998) ("we cannot directly measure such willingness-to-pay, because economic markets do not exist in which individuals pay regulators to regulate").

⁹¹ A common way of illustrating how willingness-to-pay fails to measure accurately the intensity of preferences is the example of two people who want a carton of milk. One is a destitute man who wants the milk to feed his family; the other is a wealthy man who wants the milk so he can pour it down the drain (because he likes the sound it makes). The poor man is willing to pay his last dollar for the milk, while the rich man is willing to pay \$1.50. In this case, the rich man's greater "willingness-to-pay" seems a poor reflection of the relative value each places on the milk. As others have noted, the Coase Theorem ignores these distributional concerns. However, they are very real concerns in this context, given the income disparities between exporting and importing states. For a good discussion of the relationship between willingness-to-pay and ability-to-pay in Coasean theory, see Richard Schmalbeck, *The Justice of Economics: An Analysis of Wealth Maximization as a Normative Goal*, 83 COLUM. L. REV. 488, 502 (1983) (book review).

mental costs partly because politically powerful NIMBY groups can prevent the development of new disposal capacity, if not through litigation then through the exercise of political influence. Conversely, the relative lack of political sophistication and clout exhibited by prospective NIMBY groups in importing states partly accounts for their states' greater disposal capacity and ability to import environmental costs. In other words, the current interstate market for externalities is driven, in part, by disparities in political sophistication and clout. The relationship between disposal costs and social welfare is mediated by politics, and solid waste moving in commerce may be following the path of least *political* resistance.⁹² Thus, when judges issue decisions striking down (state and local) legislative solutions, they impose a market solution that has itself been distorted by politics.

III. THE NEED FOR A NATIONAL WASTE POLICY: A PROPOSED SOLUTION

A policy that makes local governments responsible for the full social costs of disposing of their solid wastes is needed. The courts seem unlikely to fashion, or to permit the states to fashion, such a policy in the foreseeable future, despite the persistent efforts of states and local governments.⁹³ Chief Justice Rehnquist's dissent in *Chemical Waste Management* was correct in predicting that the Commerce Clause waste decisions would generate much more litigation in this area: "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

⁹² This is exactly what James Hamilton found to be the case in his analysis of decisions by hazardous waste facilities to expand their operations: levels of political activism were negatively associated with the probability of expansion, controlling for socioeconomic and other factors. See James T. Hamilton, *Politics and Social Costs: Estimating the Impact of Collective Action on Hazardous Waste Facilities*, 24 RAND J. ECON. 101 (1993); James T. Hamilton, *Testing for Environmental Racism: Prejudice, Profits, Political Power?*, 14 J. POL'Y. ANALYSIS & MGMT. 107 (1995). See also Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1002 (1993) ("siting decision makers often take the path of least resistance—choosing sites in neighborhoods that are least likely to protest effectively").

⁹³ Minnesota, in particular, has been very persistent in attempting to fashion a statute that will pass Constitutional muster with very little success. The Minnesota Waste Management Act of 1980 required each county to adopt a comprehensive waste management plan. As the counties began adopting waste management plans as per the statute, the Commerce Clause challenges began. In *Waste Systems v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993), the Eighth Circuit struck down an ordinance requiring all compostable solid waste to be transported to the local composting facility as per se invalid. The next challenge came in 1995 in *National Solid Waste Mgmt. Ass'n v. Williams*, 877 F. Supp. 1367 (D. Minn. 1995) in which the District Court held the county's elaborate flow control ordinance, although facially neutral, had a discriminatory effect and was subject to the per se rule. Finally, another county's effort to craft a flow control ordinance that would survive Commerce Clause challenge was struck down in *Ben Oehrleins v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997). The Eighth Circuit found that the ordinance was written to give an absolute preference to the local facility and, as applied to waste to be disposed of out-of-state, was subject to strict scrutiny and in violation of the Commerce Clause. *Id.* at 1385.

effects. In sum, the only sure byproduct of today's decision is additional litigation."⁹⁴ The solution, therefore, must come from another source.

A. Congressional Action To Authorize State Regulation of Waste Flows

Congress could step in to settle the confusion in Commerce Clause jurisprudence because of its Commerce Clause power.⁹⁵ Justice O'Connor's *Carbone* concurrence specifically recognized that if Congress enacted legislation approving flow control ordinances, the Court would be bound by the legislation.⁹⁶ Unfortunately Congress has been unable to reach consensus on any type of waste statute. The 106th Congress filed seven bills dealing with municipal waste management.⁹⁷ These bills generally allowed states to ban or limit import of out-of-state waste and/or authorize flow control ordinances. Unfortunately, the 106th Congress, like its predecessors, ended without acting on any of the bills.⁹⁸ Each of the five previous Congresses has tried to pass some sort of waste legislation and failed.⁹⁹ Figure One illustrates the persistence—and continuing failure—of these attempts to forge a legislative solution. Despite the introduction of 134 bills since 1989, only two have ever been voted upon by either house of Congress, and none have been enacted into law.

⁹⁴ *Chem. Waste Mgmt.*, 504 U.S. at 351.

⁹⁵ The so-called "dormant" nature of the Commerce Clause ensues from Article I of the Constitution: "Congress shall have Power . . . to regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8. The "dormant" Commerce Clause is based upon the negative inference that judicial review of state laws under the Interstate Commerce Clause "is intended to ensure that States do not disrupt or burden interstate commerce when Congress' power remains unexercised . . ." See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982).

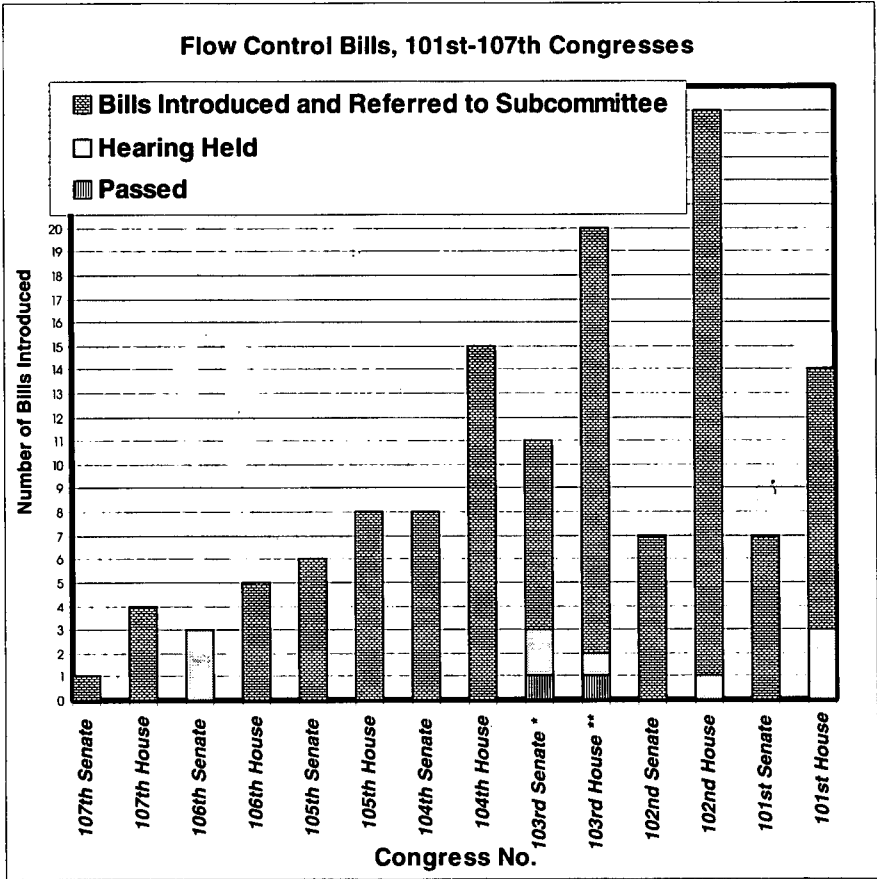
⁹⁶ *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 410 (1994) ("It is within Congress' power to authorize local imposition of flow control. Should Congress revisit this area, and enact legislation providing a clear indication that it intends States and localities to implement flow control, we will, of course, defer to that legislative judgment.")

⁹⁷ The Senate bills are S. 533, 106th Cong. (1999); S. 872, 106th Cong. (1999); S. 663, 106th Cong. (1999). The House bills are H.R. 378, 106th Cong. (1999); H.R. 379, 106th Cong. (1999); H.R. 891, 106th Cong. (1999); H.R. 1190, 106th Cong. (1999).

⁹⁸ See James E. McCarthy, Congressional Research Service, *Solid Waste Issues in the 106th Congress (2000)*, available at <http://www.cnie.org/nle/CRSreports/waste/waste-27.cfm>.

⁹⁹ *Id.* The reasons for the failure involve differences in whether state or local governments will have the authority to restrict waste shipments, as well as opposition by elements of the waste management industry. The waste control bills have some key differences based on differences in the Senate and House approach to the legislation. The Senate bills allow for local governments to ask the Governor to restrict imports but not to act individually. In the House bills, the local governments can decide whether or not to allow interstate waste to be processed at local facilities. Another difference in approach is the presumption of waste control: in the House versions, there would be a presumptive ban on new waste shipments unless the local government gave permission. In the Senate version, waste shipments would be allowed unless the Governor stopped them. The flow control bills also have a few differences: most of them would grandfather flow control systems in existence as of May 15, 1994 (the day before *Carbone* was decided). The grandfathering authority would expire at the end of the facility's useful life or the repayment of the facility's capital costs. *Id.*

FIGURE 1



The prospects for legislation remain bleak. As of this writing, the 107th Congress is again considering an array of waste management bills. Three of the bills pending in the House would allow states to ban or restrict waste shipments from other states and foreign countries.¹⁰⁰ A flow control authorization bill has also been introduced.¹⁰¹ Both the flow control bill and the waste ban bill were initially given high hopes of passing since the new EPA Administrator, Christine Todd Whitman, had previously strongly supported flow control legislation during her tenure as New Jersey's governor. However, there is little hope for passage at this writing.¹⁰² Although the House Energy and Commerce Subcommittee on the Environment and Hazardous Materials held a hearing on the waste restriction bills in August 2001,¹⁰³ there has been no further Congressional action on the bills. Based on the past inaction of Congress, it seems extremely unlikely that Congress will pass waste legislation in the near future. More importantly, most of the proposed legislative solutions are not really solutions at all. Most would merely authorize states to exclude waste while imposing no obligation on those states to dispose of their own wastes locally. Such legislation would force the internalization of waste disposal costs only if all states banned out-of-state garbage imports.

B. Multi-State Regional Compacts

Another possible solution has been proposed by Kirsten Engel.¹⁰⁴ She suggested legislation modeled on the Low-Level Radioactive Waste Policy Act of 1980 ("LLRWPA"),¹⁰⁵ which requires states to take responsibility for disposal of low-level waste generated within the state by requiring states either to site their own disposal facilities or to enter into multi-state regional compacts jointly responsible for disposal of waste

¹⁰⁰ The House bills are Solid Waste Interstate Transportation Act of 2001, H.R. 1213, 107th Cong. (2001); Solid Waste Compact Act, H.R. 667, 107th Cong. (2001); and Solid Waste International Transportation Act of 2001, H.R. 1927, 107th Cong. (2001).

¹⁰¹ Municipal Solid Waste Flow Control Act of 2001, H.R. 1214, 107th Cong. (2001).

¹⁰² See Solid Waste Association of North America ("SWANA"), H.R. 1214 Analysis 1 (2001), available at <http://www.swana.org/PDF's/HR1214WFC.Analysis.PDF> (noting no action on the flow control bill); SWANA, H.R. 1213 Analysis 1 (2001), available at <http://www.swana.org/PDF's/HR1213Analysis.PDF> (noting no action on the waste ban bill).

¹⁰³ *State Officials Urge House Passage of Bill Allowing Restrictions on Shipment*, 148 Daily Env't Rep. (BNA) A-16 (Aug. 2, 2001). At this hearing the states that receive the largest shipments of out-of-state waste (most notably Pennsylvania at 9.8 million tons in 2000) were firmly in support of the bill, while the major exporting states (New York, with the closure of the Fresh Kills landfill) argued in favor of the status quo. In the wake of the September 11 attacks, Fresh Kills has reopened but only to receive waste shipments from the World Trade Center site.

¹⁰⁴ Engel, *supra* note 24, at 1552-60.

¹⁰⁵ Pub. L. No. 96-573, 94 Stat. 3347 (1980) (codified in scattered sections of 42 U.S.C.), amended by Pub. L. No. 99-240, 99 Stat. 1842 (1986) (codified in scattered sections of 42 U.S.C.).

within the region.¹⁰⁶ The LLRWPA model is a cost-internalizing approach to the problem. Engel recognized that the current solid waste crisis is remarkably similar to what the nation faced in dealing with low-level radioactive waste.¹⁰⁷ The LLRWPA provides that once Congress ratifies a compact, the states in the compact may exclude waste from non-compact states;¹⁰⁸ states that fail to join a compact are not authorized to exclude out-of-state waste.¹⁰⁹ Engel proposed that Congress allow states to enter into regional MSW compacts and allow the compacts to exclude waste from non-compact member states:¹¹⁰

[i]n order to give states time to form compacts and create the disposal capacity necessary to achieve compact self-sufficiency in waste disposal, Congress should duplicate the approach [adopted by the LLRWPA of 1985] and allow states accepting out-of-state waste to charge graduated surcharges over a several-year period, at the end of which the states would be permitted to ban the importation of solid waste generated outside the region.¹¹¹

Although this is a workable solution in theory, it has failed in practice. In September 1999 the General Accounting Office ("GAO")¹¹² found that virtually all efforts by the states (and compacts) to site new disposal facilities had stopped.¹¹³ The report states: "States, acting alone or within compacts of two or more, have collectively spent almost \$600 million

¹⁰⁶ Engel, *supra* note 24, at 1552–53.

¹⁰⁷ Low-level radioactive waste includes hospital waste, waste from nuclear power plants, and waste from various types of research facilities. See MARY R. ENGLISH, SITING LOW-LEVEL RADIOACTIVE WASTE DISPOSAL FACILITIES: THE PUBLIC POLICY DILEMMA 2–3 (1992).

¹⁰⁸ 42 U.S.C. 2021 (d) (c).

¹⁰⁹ The Act was amended in 1985 to add financial incentives for non-sited states. Pub. L. No. 99-240, 99 Stat. 1842 (1986) (codified at 42 U.S.C. § 2021(e) (1988)). Both the 1980 Act and the 1985 amendments authorized only states in compacts to exclude waste generated outside the compacts. Pub. L. No. 96-573, 94 Stat. 3347 (1980) (codified in scattered sections of 42 U.S.C.), amended by Pub. L. No. 99-240, 99 Stat. 1842 (1986) (codified at 42 U.S.C. § 2021(e) (1988)).

¹¹⁰ Engel, *supra* note 24, at 1555.

¹¹¹ *Id.* "Regional compacts thus present a viable solution for those uncomfortable with the extreme tradeoffs resulting from either retaining the national market or authorizing state restrictions such as import bans. Regional compacts may also present a viable political compromise if Congress finds itself split between proposals to retain or alter the status quo." *Id.*

¹¹² GEN. ACCT. OFF., LOW-LEVEL RADIOACTIVE WASTES: STATES ARE NOT DEVELOPING DISPOSAL FACILITIES (1999) [hereinafter GAO REPORT]. This report was requested by Sen. Frank Murkowski (R-Alaska), the chairman of the Senate Committee on Energy and Natural Resources.

¹¹³ *Id.* at 3. According to the report, California licensed a facility, but the federal government refused to transfer the federal land on which the facility was to be built. Three other states' proposed sites were rejected by the state regulatory agency. North Carolina was considering a site, but the project was stopped for alleged budgetary reasons. *Id.*

over the last 18 years attempting to find and develop about 10 sites for disposing of commercially generated low-level radioactive wastes However, none of these efforts have been successful."¹¹⁴ The reason for the failure is public and political opposition to hosting waste sites at all levels of state government. States participate in these compacts in order to avoid hosting their own disposal facility.¹¹⁵ Not only does the report paint a bleak picture of the current status of the compact system, but it does not really offer any recommendations for the future.¹¹⁶ Thus, we do not believe that adopting a similar system for solid waste would be any more successful than the LLRWPA's system.

While there seems to be little hope for a *new* national statutory solution, we believe that the best solution would be based on a statute already in place. RCRA authorizes EPA to regulate solid waste disposal sites, an

¹¹⁴ *Id.* at 2-3. Currently there are ten existing compacts: (1) the Appalachian compact (Pennsylvania, Delaware, Maryland, West Virginia) has halted siting activity; (2) the Central compact (Nebraska, Arkansas, Kansas, Louisiana, Oklahoma) had its site license application denied by Nebraska; (3) the Central Midwest compact (Illinois, Kentucky) has halted siting activity; (4) the Midwest compact (Indiana, Iowa, Minnesota, Missouri, Ohio, Wisconsin) has halted siting activity; (5) the Northeast compact (Connecticut, New Jersey) has halted siting activity; (6) the Northwest compact (Washington, Alaska, Hawaii, Idaho, Montana, Oregon, Utah, Wyoming) uses the existing Richland facility located on DOE's Hanford site; (7) the Rocky Mountain compact (Colorado, Nevada, New Mexico) contracted with the Northwest compact to use Richland; (8) the Southeast compact (North Carolina, Alabama, Florida, Georgia, Mississippi, Tennessee, Virginia) saw North Carolina shut down its siting agency and withdraw from the compact in July 1999; (9) the Southwestern compact (California, Arizona, North Dakota, South Dakota) has halted siting activity; and (10) the Texas compact (Texas, Maine, Vermont) had its initial license application rejected by Texas's licensing authority, and no further action was taken. Unaffiliated states (District of Columbia, Massachusetts, Michigan, New Hampshire, New York, Puerto Rico, Rhode Island) either have halted siting efforts or have no plans for a facility. South Carolina's Barnwell facility accepts waste from all states except North Carolina (however, the Northwest and Rocky Mountain Compacts generally use the Richland site in Washington). *Id.* at 5, 27-28.

¹¹⁵ *Id.* at 4. The Southeast compact's situation is illustrative of the problem. South Carolina was a member of the Southeast compact. From mid-1994 its Barnwell facility was restricted to waste generators within the Southeast compact. However, in July 1995 South Carolina withdrew from the Southeast compact because of North Carolina's progress in developing a new facility for Southeast compact waste. South Carolina reopened Barnwell to states outside the compact except for North Carolina. *Id.* at 19. Subsequently, North Carolina has been sued by the Southeast compact for \$90 million in a dispute over developing the facility. Andrew M. Ballard, *Southeast Compact Sues for \$90 Million From North Carolina in Dispute Over Facility*, 31 *Env't Rep.* (BNA) 1464 (July 14, 2000).

¹¹⁶ The report does discuss solutions proposed by various groups. One, of course, would be to leave the compacts alone; however, given the current state of the compacts and the declining amount of wastes (due to waste minimization practices), the report does not believe the compacts could ever be successful without overcoming the political opposition to siting. GAO REPORT, *supra* note 112, at 4. Another suggested approach is to repeal the compact system and allow private industry to develop new sites, but again, private industry will run into the same problem with the unwillingness of states to allow development of new sites that the compacts have encountered. A third approach is to turn the responsibility of the waste disposal to DOE. Existing facilities at DOE's Hanford and Nevada test sites currently have large unused capacities. However, once again, getting Nevada and Washington to accept the additional waste is a problem. *Id.* at 8. The report makes no recommendation as to which of the three proposals is the most feasible.

authority that went unexercised by the agency for many years, for all practical purposes. In the next section, we argue that EPA could use that authority to encourage the development of waste management programs that internalize the full costs of solid waste disposal.

C. *The EPA Solution*

Congress may have intended to give EPA more authority over solid waste management issues than EPA is currently exercising. EPA already has the authority under Subtitle D of RCRA to regulate solid waste landfills¹¹⁷ through its power to approve state solid waste management plans. As part of that approval process, the statute seems to contemplate EPA oversight of political and location issues that are the very crux of the interstate waste flow disputes clogging the courts.

While RCRA's primary focus is the management of hazardous waste under Subtitle C, Congress recognized the importance of solid waste management planning and so included Subtitle D in the statute. As amended in 1984, Subtitle D provides that states shall submit for EPA approval solid waste management plans,¹¹⁸ and requires EPA to promulgate regulations "containing guidelines to assist in the development and implementation of State solid waste management plans . . ." ¹¹⁹ While EPA regulations promulgated in compliance with this requirement address mostly technical issues of design and operation of landfills,¹²⁰ the statutory language requires that EPA consider "the political, economic, organizational, financial, and management problems affecting comprehensive solid waste management."¹²¹ This is a broad charge, one that easily encompasses consideration of the socioeconomic impacts of cross-border waste flows.

Indeed, the management planning process outlined in Subtitle D seems to envision an EPA-directed version of the kind of planning process outlined in Kirsten Engel's solid waste management compact proposal. The statute directs each state's governor to identify regions within the state which "as a result of urban concentrations, geographic conditions, markets, and other factors, [are] appropriate for carrying out regional solid waste management,"¹²² and to specify which management activities will take place within the state and which will be devoted to

¹¹⁷ 42 U.S.C. § 6949a (2000). Subtitle D is found in RCRA sections 4001–4010, 42 U.S.C. §§ 6941–6949a.

¹¹⁸ "The [EPA] Administrator shall, within six months after a State [solid waste management] plan has been submitted for approval, approve or disapprove the plan." 42 U.S.C. § 6947(a).

¹¹⁹ *Id.* § 6942(b).

¹²⁰ *See* 40 C.F.R. § 258.10–.19 (2002).

¹²¹ 42 U.S.C. § 6942(c)(9).

¹²² *Id.* § 6946(a).

regional authorities (also identified by the governor).¹²³ Subtitle D requires EPA to review and revise the guidelines for state plans every three years,¹²⁴ and specifies that EPA's evaluation of state plans should be based, in part, upon the location of disposal facilities; population density, distribution, and projected growth; and the political, economic, organizational, financial, and management problems affecting waste management.¹²⁵ Thus, RCRA seems to contemplate EPA oversight of a process in which states bear the environmental costs associated with disposal of their wastes either individually or as part of a regional plan. One need not stretch the statutory language to conclude that EPA has the power to consider social, economic, and political impacts of cross-border waste flows when evaluating state management plans.

EPA's existing RCRA regime could accommodate EPA oversight of solid waste management plans of this kind fairly easily. EPA's decision criteria for approving state plans could be revised to require that approvable state plans must: (1) provide for local disposal of wastes generated

¹²³ *Id.* § 6946(c).

¹²⁴ *Id.* § 6942(b). This section requires the EPA administrator to consult with federal, state, and local authorities and then promulgate regulations to assist in the development of the State's solid waste plan.

¹²⁵ *Id.* § 6942(c)(2), (4), (9). The complete list is as follows:

- (1) the varying regional, geologic, hydrologic, climatic, and other circumstances under which different solid waste practices are required in order to insure the reasonable protection of the quality of the ground and surface waters from leachate contamination, the reasonable protection of the quality of the surface waters from surface runoff contamination, and the reasonable protection of ambient air quality;
- (2) characteristics and conditions of collection, storage, processing, and disposal operating methods, techniques and practices, and location of facilities where such operating methods, techniques, and practices are conducted, taking into account the nature of the material to be disposed;
- (3) methods for closing or upgrading open dumps for purposes of eliminating potential health hazards;
- (4) population density, distribution, and projected growth;
- (5) geographic, geologic, climatic, and hydrologic characteristics;
- (6) the type and location of transportation;
- (7) the profile of industries;
- (8) the constituents and generation rates of waste;
- (9) the political, economic, organizational, financial, and management problems affecting comprehensive solid waste management;
- (10) types of resource recovery facilities and resource conservation systems which are appropriate; and
- (11) available new and additional markets for recovered material and energy and energy resources recovered from solid waste as well as methods for conserving such materials and energy.

Id. § 6942(c).

within the state, or disposal at a regional site pursuant to an agreement between the states involved; and (2) include a disposal facility permitting/siting program that takes into account the socioeconomic effects of siting and permitting decisions. The agency's Subtitle D regulations already require that the states institute "capacity assurance planning." That is, if a state finds that it has fewer than two years of projected capacity, the state plan is required to provide for action to acquire suitable facilities.¹²⁶ EPA could use a similar process to ensure that the largest solid waste exporting states provide for adequate local solid waste disposal capacity in their solid waste management plans rather than simply shift environmental costs to others. Thus, if a state does not provide a plan adequately covering its own waste and eliminating the need to export waste, the administrator would reject the plan and withhold federal financing.¹²⁷

EPA is already incorporating socioeconomic criteria in its review of permitting decisions in the area of environmental justice.¹²⁸ Specifically, EPA's Office of Solid Waste and Emergency Response ("OSWER") Environmental Justice Action Agenda calls for states to consider various factors when evaluating siting decisions. These factors include "increasing public involvement by tailoring outreach activities to affected communities, factoring unique environmental justice considerations into public health surveys or assessments, evaluation demographics (e.g., examine population and income levels at various RCRA sites), and including specific permit conditions to address demographic concerns."¹²⁹ This process could be more formally integrated into EPA's solid waste management plan approval process under Subtitle D, thereby killing two birds with one stone: encouraging states to bear more of the environmental costs of waste disposal while advancing the agency's environmental justice goals.¹³⁰

The idea that RCRA delegates the power to regulate cross-border waste flows was advanced by the National Association of Bond Lawyers

¹²⁶ 40 C.F.R. § 256.42 (2002).

¹²⁷ 42 U.S.C. § 6947 (a)-(b). We are not advocating that EPA require local disposal of in-state waste, just that states have adequate disposal capacity. This will remove the necessity of exporting the waste.

¹²⁸ See EPA, OSWER Environmental Justice Action Agenda, EPA 540/R-95/023 (1995), available at <http://www.epa.gov/swerosps/ej/html-doc/ejaa0595.htm> [hereinafter Action Agenda].

¹²⁹ *Id.*

¹³⁰ On February 11, 1996 President Clinton issued Exec. Order No. 12,898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 3 C.F.R. 859 (1994), which directed federal agencies, including EPA, to develop environmental justice strategies to combat the disproportionately high health and environmental effects suffered by minority or low-income communities. In the Action Agenda, OSWER calls for Regions and States to address environmental justice concerns in the RCRA permitting process. See Action Agenda, *supra* note 128.

("NABL") in an amicus curiae brief filed in *Carbone*.¹³¹ NABL argued that Congress had affirmatively authorized waste flow control legislation in Subtitle D's requirement of development and implementation of state solid waste management plans. Specifically, NABL focused on the requirement in the statute that local governments not be prohibited from "entering into long-term contracts for the supply of solid waste to resource recovery facilities, from entering into long-term contracts for the operation of such facilities . . . or from securing long-term markets for material and energy recovered from such facilities"¹³² The Association believed that this statutory language, along with the legislative history of Subtitle D, clearly indicated Congress' intent to remove any legal impediments to the construction of solid waste facilities and, more importantly, the financing of such facilities.¹³³ As NABL stated, "RCRA's solid waste management planning requirements are imposed on state and local governments. Congress intended to give those state and local governments *all* of the tools needed to establish rational solid waste management planning mechanisms that would lead to the environmentally sound disposal of solid waste in more costly state-of-the-art facilities."¹³⁴

¹³¹ Brief of Amici Curiae National Association of Bond Lawyers at 17, *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) (No. 92-1402) [hereinafter Amicus Brief]. NABL's interest in *Carbone* involved the issuance of bonds to finance municipal solid waste facilities. The Association worried that if the Court struck down the flow control legislation, the security of billions of dollars of bonds would be in question and the ability of communities to secure financing would be severely undermined. *Id.* at 1-2.

¹³² 42 U.S.C. § 6943(a)(5).

¹³³ Amicus Brief, *supra* note 131, at 18-19. The Brief cites several instances in the legislative history of Subtitle D that the Association believes indicate Congress' intention to give states the power to regulate interstate commerce. One House Report states:

The reasons for the [requirement that state and local laws prohibiting long-term contracts be abolished] are that currently a number of private companies capable of and willing to enter resource recovery ventures if a sufficient volume of refuse can be generated over a sufficiently long period of time [*sic*]. Often municipalities are constrained in their ability to enter long term contracts (5 to 30 years) by their own charters or by state laws The federal government will not commit technical or financial resources to aid states in the establishment of resource recovery systems if these states maintain barriers to the establishment of such systems.

Id. at 19 (quoting H.R. Rep. No. 1491, 94th Cong., 2d Sess., pt. I, at 34 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6245, 6248, 6272).

The Association also found support for Congressional intent to authorize state and local governments to adopt waste flow control statutes in the Solid Waste Disposal Act Amendments of 1980. The Brief pointed to the Amendments' authorization of EPA to assist state and local governments to develop solid waste plans and resource recovery systems. Congress, in the Amendments, specifically authorized the issuance of revenue bonds by state or local governments to finance such facilities, and to create special authorities "having the power to secure the supply of waste of a project." *Id.* at 21 (quoting Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, § 32(f), 94 Stat. 2334, 2355, codified at 42 U.S.C. § 6948(d)(3)(C) (2000)).

¹³⁴ *Id.* at 22 (citation omitted).

The Supreme Court was not swayed by NABL's argument. Interestingly, Justice O'Connor in her concurrence commented directly on NABL's contention that Congress, in RCRA, expressly authorized the type of flow control ordinance at issue in *Carbone*, and thus removed it from the purview of the dormant Commerce Clause.¹³⁵ She rejected this argument on the grounds that there was not an "unmistakably clear"¹³⁶ indication from Congress that *states* were explicitly authorized to implement flow control legislation.¹³⁷ Justice O'Connor also noted that the "reference to local authority to 'secure the supply of waste,' is contained in § 6948(d)(3)(C), which is a delegation not to the States but to EPA of authority to assist local government in solving waste supply problems."¹³⁸ She then pointed to EPA's implementation regulations that explicitly require state plans to provide for unrestricted movement of waste across state boundaries.¹³⁹ Thus, Justice O'Connor's rejection of NABL's argument appears to be two-fold: first, the statutory language of Subtitle D is not sufficiently clear to demonstrate that Congress intended to authorize flow control, and secondly, EPA has explicitly refused to authorize state plans that do not allow waste to freely move across state lines.

Justice O'Connor was correct in her assessment of NABL's argument—Congress did not intend to give states and local governments unrestricted ability to implement solid waste management plans. Rather, Congressional intent was to give EPA a broad delegation of authority to approve state solid waste management plans and to promulgate regulations that encompass the types of cost-internalization criteria that should be the hallmark of any approved plan. Although at the present EPA has not chosen to exercise the full extent of its delegated authority, the statutory language is quite expansive.¹⁴⁰ Even though the statute does not expressly mention the Commerce Clause or a state's right to regulate in-

¹³⁵ *Carbone*, 511 U.S. at 408–09.

¹³⁶ The Court has consistently held that Congressional intent must be "unmistakably clear" before the Court will conclude that Congress authorized state regulation that would otherwise be in violation of the Commerce Clause. *Id.* at 408 (citing *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984)).

¹³⁷ *Id.* at 409–10 (emphasis added). Although Justice O'Connor did find some indication that Congress expected the local governments to implement flow control, those references "neither individually nor cumulatively rise to the level of the 'explicit' authorization required by our dormant Commerce Clause decisions." *Id.* at 409.

¹³⁸ *Id.* at 409–10 (emphasis added). Justice O'Connor acknowledged that although the House Report seemed to contemplate flow control legislation, that intent was not reflected in the statutory language as the Court requires. *Id.* at 410 (citing *U.S. v. Nordic Vill., Inc.*, 503 U.S. 30, 37 (1992) and *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) (both holding that if statutory language is unclear, then clarity can not be provided by a committee report)).

¹³⁹ 40 C.F.R. § 256.42(h) (2001) ("The State plan should provide for sub-state cooperation and policies of free and unrestricted movement of solid and hazardous waste across State and local boundaries").

¹⁴⁰ See 42 U.S.C. § 6942(c) (1994) (guidelines for state plans) *id.* § 6947(a) (Supp. V 1999) (giving EPA Administrator the power to review plans and impose new minimum requirements).

terstate commerce, Congress makes EPA responsible for ensuring that each state develops a solid waste plan that addresses a wide variety of technical, legal, political, and socioeconomic concerns.¹⁴¹ Justice O'Connor's implicit assumption in her concurrence in *Carbone* is that EPA has the power to authorize plans that provide for flow control, even if the agency has not chosen to exercise that authority.

IV. CONCLUSION

It has been nearly twenty-five years since the Supreme Court decided *City of Philadelphia v. New Jersey*, thereby opening the doors of the courthouse to a flood of litigation challenging the constitutionality of local attempts to control the flow of garbage across state and local borders. While Congress seems unable or unwilling to enact new legislation authorizing states or local governments to regulate waste flows, some progress could be made without congressional action. EPA can choose to use its authority to approve state solid waste management plans under RCRA to prevent states from merely shifting the environmental costs associated with waste disposal to others, to force states to internalize more of those costs, and to attend to some of the distributional issues which give rise to so much garbage litigation.

We recognize that our solution is not without difficulty. First, EPA must accept the challenge and begin promulgating regulations incorporating more cost-internalizing criteria as minimum requirements for plan approval. Thus, it is promising that EPA Administrator Christine Todd Whitman has assured EPA staff that she is committed to the environment and to working with states and businesses to forge solutions to environmental issues.¹⁴² Whitman was governor of New Jersey when the Supreme Court handed down *Carbone*,¹⁴³ and as governor was strongly supportive of congressional action to authorize flow control. Thus, even though Republicans generally favor less government regulation, this may be just the type of regulation that Whitman would champion, particularly since congressional action is unlikely.

Finally, transferring some decision-making authority from the private sector and local regulators to EPA will probably not eliminate Commerce Clause litigation, but it may discourage some suits.¹⁴⁴ By

¹⁴¹ See 42 U.S.C. § 6941 (1994) (objectives of Subtitle D); *id.* (1994) (authorization to enter into long-term contracts for supply of waste).

¹⁴² See Susanna Duff, *All for One; EPA Must Strive for Unity, Whitman Says*, WASTE NEWS, Feb. 12, 2001, at 4, available in LEXIS, News Library.

¹⁴³ See Susanna Duff, *Senate OKs Whitman for EPA*, WASTE NEWS, Feb. 5, 2001, at 3, available in LEXIS, News Library.

¹⁴⁴ Presumably, the use of RCRA to force the creation of in-state disposal capacity will not prevent local communities from trying to impede the siting of new facilities within their boundaries. This ensures the continuation of litigation. However, once courts confirm the authority of EPA under RCRA to oversee the landfill siting process, that litigation

granting decision-making authority to an administrative agency, judicial oversight of agency actions would come under the *Chevron, U.S.A. v. National Resource Defense Council, Inc.* standard.¹⁴⁵ Thus, not only is there clear, unambiguous statutory authority in RCRA authorizing EPA to oversee state waste management plans, but also where the statute is silent or ambiguous *Chevron* clearly requires that courts defer to the agency interpretation.

We believe that there is a solution to the waste disposal problem that avoids legal impasse in courts and Congress. By exercising its solid waste management plan approval authority more broadly under RCRA, EPA may be able to help states craft solid waste management plans that internalize disposal costs, help preserve and protect precious landfill resources, and address environmental justice concerns. There can be a truce in the trash war.

should become more futile, and hence, rarer.

¹⁴⁵ 467 U.S. 837 (1984). In *Chevron*, the Supreme Court held that courts should defer to an agency's interpretation of applicable statutory language so long as Congress has not directly spoken on the matter, and, if the intent of Congress is not clear, then the only question for the court is whether the agency's interpretation is a reasonable interpretation of the statutory language. *Id.* at 842–44. The Supreme Court recently reaffirmed the deferential standard of *Chevron* in *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457 (2001). The Court held that if a statute is "silent or ambiguous" concerning the litigated issue (in this case, EPA's ability to set ambient air quality standards under the Clean Air Act) the court must defer to the agency's reasonable interpretation. *Id.* at 481 (quoting *Chevron*, 467 U.S. at 844).

