

Cleaning Up the Mess: *United Haulers*, the Dormant Commerce Clause, and Transaction Costs Economics

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INTRODUCTION

The validity of “flow control” laws, which are laws designed to restrict the exportation of solid waste from a state or local government's jurisdictional boundaries, has been hotly debated within both legal academia and the Supreme Court itself. In 2007, the Supreme Court released their path-breaking holding, *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*,¹ which significantly altered the legal framework for analyzing the validity of flow control laws specifically, and perhaps the dormant Commerce Clause generally. The decision held that local flow control ordinances that require all waste be delivered to publicly owned and operated facilities, and that treat all in-state and out-of-state private haulers the same, do not discriminate for purposes of the dormant Commerce Clause. In other words, under this new public-private distinction, publicly owned and operated waste disposal facilities are not per se invalid, but rather should be analyzed under the Pike balancing test.

The holding, however, left several lingering and vital questions unanswered for the lower courts confronted with flow control challenges and for local governments seeking to resolve their environmental and financial problems while conforming to the limits of the dormant Commerce Clause. Utilizing the Coase Theorem and case precedent, this article both elucidates the decision's unanswered questions and attempts to set forth a model for how those ambiguities should be resolved.

This article, which focuses on municipal flow control regulations in light of *United Haulers*, has two general purposes: to demonstrate that the dormant Commerce Clause doctrine can foster economic efficiencies and equities otherwise absent without it and to offer recommendations for its future applicability to flow control disputes. This article will utilize the Coase Theorem to identify both the efficiency benefits and limitations of municipal flow control regulation as a method of addressing the problem of externalities in solid waste disposal. Based upon this analysis, this article advocates judicial enforcement of the dormant Commerce Clause as a viable judicial option for economically efficient business regulation. Given that the precise framework set forth in *United Haulers* is still unclear, this article suggests two recommendations

1. 550 U.S. 330, 127 S. Ct. 1786 (2007).

for the courts to achieve economically efficient outcomes in flow control cases: courts should not adopt a sweeping rule of validity for all flow control regulations that require waste to be delivered to public facilities and also should not afford factual deference to what local benefits are actually conferred under the Pike balancing test.

A. The Dormant Commerce Clause

The Commerce Clause provides that “Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”² The Court has long interpreted the very existence of Congress’ powers under the Commerce Clause to implicitly preclude the states from imposing excessive restrictions on this power.³ This implicit Constitutional restriction upon the states is known as the “dormant” or “negative” Commerce Clause doctrine.

Courts currently employ a two-tier analysis to determine whether a statutory scheme violates the dormant Commerce Clause.⁴ Under the first tier, if the court finds that state legislation facially discriminates against interstate commerce, or effects “simple economic protectionism,” the court will strike down the statute as a *per se* constitutional violation.⁵ If the statute passes the *per se* analysis, the court may nevertheless find constitutional infirmity under the second tier of analysis, commonly referred to as the *Pike* balancing test.⁶ Here, the question is whether the ordinance imposes a burden on interstate commerce that is “clearly excessive in relation to the putative local benefits.”⁷

B. Flow Control Regulations

Flow control is the practice of local governments restricting exportation of solid waste from their jurisdictional boundaries.⁸

2. U.S. CONST. art. I, § 8, cl. 3.

3. *Dennis v. Higgins*, 498 U.S. 439, 447 (1991).

4. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

5. *Id.* There is a narrow exception to the rigid application of the *per se* rule that exempts statutes that advance legitimate local interests that can not be fulfilled by other reasonable, non-discriminatory alternatives. *Maine v. Taylor*, 477 U.S. 131 (1986). This exception, however, is rarely invoked successfully by states.

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

7. *Id.*

8. Often, the power to implement flow control legislation is granted to municipalities by

Such laws are enacted as financing measures to protect both new and pre-existing waste disposal sites⁹ from the competitive pressures of the marketplace.¹⁰ Limited by means and extent of taxation, local governmental entities, such as municipalities, counties, and special districts, make decisions regarding waste disposal within the context of constrained financial capacity. One traditional method of cutting cost has been to privatize, in part or in whole, refuse collection, processing, and disposal.¹¹ But even when these services are not entirely privatized, local governments often still contract out the construction of new waste disposal facilities to a solid waste management company and allow the same to operate the facility for a set number of years to recoup its investment.¹² Typical of such contracts are “put or pay” clauses, whereby the local government guarantees a minimum flow of waste, often at set “tipping fees,”¹³ to the newly constructed

their respective state. In some states, however, flow control legislation is implemented by counties either exclusively or jointly with municipalities.

9. The terms “waste disposal sites” and “waste disposal facilities” are generically used and meant to encompass a range of facilities, such as transfer stations, waste-to-energy facilities, incinerators, and non-hazardous landfills. Additionally, non-hazardous landfills can include municipal solid waste, industrial waste, construction and demolition debris, and bioreactors. U.S. ENVIRONMENTAL PROTECTION AGENCY, LANDFILLS, <http://www.epa.gov/osw/nonhaz/municipal/landfill.htm> (last visited Nov. 28, 2008). The subject of hazardous waste is omitted from discussion as it is governed by a separate and distinct regulatory regime.

10. Undoubtedly, flow control laws are sometimes adopted with the primary purpose of protecting public health and safety. See Bradford C. Mank, *Are Public Facilities Different From Private Ones?: Adopting a New Standard of Review for the Dormant Commerce Clause*, 60 SMU L. REV. 157, 165–69 (2007) (arguing for deferential review under the *Pike* balancing test since the current analytical paradigm lacks sensitivity to the needs of local governments struggling with waste disposal issues). Frequently enough, however, municipalities implement flow control purely for financial survival. In these cases, flow control is enacted primarily for financial protection, irrespective of whether that protection is an end in itself or is a means to accomplish other indirect purposes.

11. Stephen Moore, *How Contracting Out City Services Impacts Public Employees*, in CONTRACTING OUT GOVERNMENTAL SERVICES 211, 211–12 (Paul Seidenstat ed., 1999). The percentage of publicly-owned landfills declined from 83 percent in 1984 to 64 percent by 1998. See Geoffrey F. Segal & Adrian T. Moore, *Privatizing Landfills: Market Solutions for Solid-Waste Disposal*, Policy Study No. 267 (Reason Public Policy Institute, 2000), available at <http://www.reason.org/ps267.html> (last visited Dec. 17, 2008).

12. Waste disposal facilitates can encompass a range of facilities, such as basic landfills, incinerators, and transfer stations to more advanced processing facilitates. See Eric S. Petersen & David N. Abramowitz, *Municipal Solid Waste Flow Control in the Post-Carbene World*, 22 FORDHAM URB. L.J. 361, 365–66 (1995) (describing different types of financial and structural arrangements that localities sometimes form with private entities for waste collection and disposal).

13. A “tipping fee” is the charge levied upon a quantity of waste, usually per ton, received at a waste processing or disposal facility.

facility.¹⁴ If the flow of waste is insufficient, the local government must pay the private company an amount equal to the difference between the required amount and the actual amount received.¹⁵ Under these and similar structural arrangements, a flow control ordinance provides local governments protection against competing outlets for waste disposal, which is especially desirable if the set tipping fees are above the market rate.

Flow control ordinances are not limited to the protection of new facilities, as local governments often contemplate such measures to protect pre-existing waste disposal facilities.¹⁶ Whether the decision to enact a flow control ordinance for a pre-existing waste disposal facility is reactionary in nature (as in the case of new or increased competition from other facilities) or preemptive in nature, the result is the same as enacting it for new waste disposal facilities—it ensures adequate revenue generation.

During the last two decades, flow control laws have become an increasingly popular financing tool for local governments. Through the Resource Conservation and Recovery Act (“RCRA”), the federal government provided incentives to states to implement solid waste management plans¹⁷ that impose stricter minimum standards for waste disposal and encourage recycling and reuse programs.¹⁸ Faced with the option of renovating existing facilities at a hefty price or contracting out disposal services to private firms, many municipalities choose the latter. In fact, between the early 1970s and the late 1980s, the number of landfills in the United States dropped from approximately 20,000 to 6,000,¹⁹ and by 2004

14. Waste disposal facilities normally must operate at near or full capacity to be profitable due to their economies of scale.

15. LARRY S. LUTON, *THE POLITICS OF GARBAGE: A COMMUNITY PERSPECTIVE ON SOLID WASTE POLICY MAKING* 133 (Bert Rockman ed., Univ. of Pittsburgh Press 1996).

16. See *Quality Compliance Servs., Inc., v. Dougherty County*, 553 F. Supp. 2d 1374, 1375–77 (2008) (upholding a local flow control ordinance that was enacted after projections showed that operation of a new private private transfer station would hinder the financial viability of the local landfill, which was the funding source for local recycling and reuse programs).

17. See Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6942 (1991). For an overview of the history of RCRA, especially with regards to state management plans, see Anne R. Mesnikoff, Note, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home*, 76 MINN. L. REV. 1219, 1220–33 (1992). See also Kim Diana Connolly, *Small Town Trash: A Model Comprehensive Solid Waste Ordinance for Rural Areas of the United States*, 53 CATH. U. L. REV. 1 (2003) (providing a guide for rural towns implementing solid waste management plans).

18. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992 (1991).

19. Edward W. Repa, *Solid Waste Disposal Trends*, WASTE AGE, Apr. 1, 2000,

the number had further dropped to 1,654.²⁰ Moreover, many of the states that decided to keep their pre-existing landfills open did so in part because they erroneously predicted that demand would be met through a rise in aggregate waste production.²¹ During this same period, the private sector introduced new integrated disposal methods²² and expanded existing landfill space, which, coupled with the closing of smaller local landfills, led to the regionalization of landfills.²³ Therefore, flow control laws are implemented to guarantee sufficient financial revenues, whether necessitated purely by intensified competition or by a need to implement recycling and reuse programs, without providing subsidies.²⁴

C. *United Haulers*: A First Glance and Potential Extensions

Until recently, the Supreme Court has generally prohibited waste restriction regulations under the dormant Commerce Clause.²⁵ The prohibition followed from the logic that flow control laws discriminate against the stream of interstate commerce because they allow only the favored local waste disposal operator to process waste that is within a town's jurisdiction.²⁶ Therefore, recalling the *per se* analysis, such laws unconstitutionally discriminate against interstate commerce by prohibiting the free flow of municipal waste—whether the statute discriminates on its face or just in effect.

States and commentators alike have chastised the doctrine. States and localities view it as a practical limitation on their ability

http://wasteage.com/mag/waste_solid_waste_disposal/.

20. JAMES E. MCCARTHY, CRS REPORT FOR CONGRESS, INTERSTATE SHIPMENT OF SOLID WASTE: 2007 UPDATE 12 (2007) (hereinafter CRS REPORT, INTERSTATE SHIPMENT OF SOLID WASTE).

21. See RICHARD PORTER, THE ECONOMICS OF WASTE 110 (RFF Press, 2002).

22. Many private companies are able to perform all aspects of the disposal process, from collection of the waste to its disposal at an incinerator, regional landfill, or processing facility. They also may serve as transportation intermediaries through ownership of transfer stations. *Id.*

23. CRS REPORT, INTERSTATE SHIPMENT OF SOLID WASTE, *supra* note 20, at 12. This trend towards regionalization is projected to continue, leading to even more interstate shipment of solid waste. *Id.*

24. More than 20 states had enacted flow control legislation by 1994. *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 406 (1994) (O'Connor, J., dissenting).

25. See *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). See also *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353 (1992); *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93 (1994); *Carbone*, 511 U.S. at 383, 391.

26. *Carbone*, 511 U.S. at 391.

to solve financial and environmental problems in the waste disposal industry,²⁷ while many commentators view it as judicial enshrinement of laissez-faire economics, harkening back to an era of substantive economic due process.²⁸

To be sure, the criticisms concerning the application of the dormant Commerce Clause to flow control have not been homogenous. Some denounce the dormant Commerce Clause as a pernicious doctrine, lacking textual, structural, and economic foundation, and note that the Court is subverting state policy choices for its own.²⁹ Others recognize the doctrine's inherent existence and efficacy, but still chide the per se approach arguing its application blindly prefers judicial expediency over an analysis of benefits derived from flow control.³⁰

27. See, e.g., Brief for the States of New York et. al. as Amici Curiae Supporting Respondents, *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 127 S. Ct. 1786 (2007).

28. See e.g., Stanley E. Cox, *Garbage In, Garbage Out: Court Confusion About the Dormant Commerce Clause*, 50 OKLA. L. REV. 155, 214–15 (1997) (“In their rush to embrace the current Court’s emphasis on illegitimacy of different impact, some courts are too eager to claim that any harmful effects to out-of-state business equals unconstitutional Commerce Clause harm. . . . These Courts misread the basic purpose of the dormant Commerce Clause as being to protect business interests per se rather than to prevent discrimination against outside interests. Such return to *Lochner*-style constitutional valuing of private rights is not warranted under the dormant Commerce Clause.”); C.M.A. McCauliff, *The Environment Held in Trust for Future Generations or the Dormant Commerce Clause Held Hostage to the Invisible Hand of the Market?*, 40 VILL. L. REV. 645, 674 (1995) (“[C]arbone harks back to the attempt earlier in the century to shape similar results under the Due Process Clause in *Lochner v. New York* by adapting a particular economic philosophy.”); Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra*, 71 OR. L. REV. 409, 449 (“Perhaps the most cherished of ‘state’s rights’ under our federal system—the right to exercise police powers to protect public health and safety—is sacrificed by the Court on the constitutional alter to advance private economic ‘free-trade’ interest.”); Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191, 1236 (1998) (“The Court’s dormant Commerce Clause cases still embrace the economic assumption that its substantive due process cases rejected over fifty years ago—that free competition necessarily increases the welfare of the nation as a whole.”); Robert R.M. Verchick, *The Commerce Clause, Environmental Justice, and the Interstate Garbage Wars*, 70 S. CAL. L. REV. 1239, 1246 (1997) (“[T]he Court’s Commerce Clause doctrine is moving uncomfortably close to a notion of economic orthodoxy reminiscent of the *Lochner* era.”).

29. See *United Haulers*, 127 S. Ct. at 1799 (Thomas, J., dissenting) (“Because this Court has no policy role in regulating interstate commerce, I would disregard the Court’s negative Commerce Clause jurisprudence.”); See also Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L. J. 425 (1982).

30. See, e.g., McGreal, *supra* note 28, at 1279–89 (using the Prisoner’s Dilemma game to advocate a three-step test approach focusing on actual harm to the national economy). Justice Scalia, on the other hand, does not denounce the per se application, but rather denounces the *Pike* balancing test. See *United Haulers*, 127 S. Ct. at 1798–99 (Scalia, J.,

Recently, the doctrine's antagonists won the day in the landmark case, *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*.³¹ In this case, the Court held that county flow control ordinances that require all waste be delivered to facilities owned and operated by a state-created *public* benefit corporation, and that treat all in-state and out-of-state private haulers the same, do not discriminate facially or in effect for the purposes of the dormant Commerce Clause.³² Under this public-private distinction, a state or municipal ordinance will not be subject to per se invalidation if it requires both local and out-of-state haulers to deliver all waste to a publicly-owned facility. In part, the Court justified the distinction by pointing to state and local government's traditional role in managing waste disposal.³³ Further, when balancing local benefits against interstate burdens under the *Pike* balancing test, the Court also noted that revenue generation for the purpose of sustaining the economic viability of a publicly-owned disposal facility is a legitimate benefit.³⁴

In deciding *United Haulers*, it seems clear that the Court has signaled a shift in dormant Commerce Clause jurisprudence. Whether this shift represents a fundamental crack in the vanguard of per se invocation or whether it is limited to flow control remains to be seen. One thing is certain, however—astute litigators will vehemently use the facts and reasoning of *United Haulers* to test future cases.³⁵ Indeed, some commentators have already pointed to

concurring).

31. 127 S. Ct. 1786. Given that many of the doctrine's strongest antagonists have come from the Supreme Court itself (Justices Rehnquist, Blackmun, Scalia, Thomas, and now perhaps Chief Justice Roberts), the decision was almost predictable. See also, Richard J. Roddewig & Glenn C. Sechen, *Municipal Solid Waste: The Uncertain Future of Flow Control a Municipal Perspective*, 26 URB. LAW. 801, 815 (1994) (suggesting that "*Oregon Waste Systems* and, to a greater extent, *Carbone*, represent the high water mark of advancement of Commerce Clause Protection into interstate waste issues. . . . *Carbone* may well be limited to its facts.").

32. *United Haulers*, 127 S. Ct. at 1790.

33. *Id.* at 1796.

34. *Id.* at 1798.

35. See, e.g., State of Al. Dep't of Revenue v. Hoover, Inc., No. 2060142, 2007 WL 2460086, at *1, *4–5 (Ala. Civ. App. Aug. 31, 2007) Alabama argued a statutory tax exempting state governmental entities from paying sales tax on transactions in which a state sales tax would normally apply would not violate the dormant Commerce Clause in light of the *United Haulers* decision. This argument was summarily discounted, the appellate court refusing to extend *United Haulers* in the face of direct authority by the state's highest court, and adding "United Haulers did not specifically hold that all regulations treating in-state and out-of-state private entities, and out-of-state public entities, the same do not facially discriminate against interstate commerce." *Id.*

areas such as public water rights, contractual regulation of energy facilities, and state exemption of interest exclusively for in-state municipal bonds as potential areas for extension.³⁶ At a minimum, the decision inspires a plethora of unanswered questions concerning the precise contours of the holding itself.³⁷ As is often the case with controversial landmark decisions that split the Court,³⁸ more questions may have been raised than answers provided.

Part I of this article will provide an overview of the analytical structure sketched by case precedent for challenged flow control laws, including a brief exegesis of different Justices' opinions. This overview will demonstrate just how resilient the Supreme Court's application of the pre-*United Haulers* dormant Commerce Clause doctrine was to creative attempts at evasion by states and localities. After explaining the Coase Theorem and the fundamental role transaction costs play in regulatory policy analysis, Part II of this article will demonstrate how, absent transaction costs, an ideal market for waste disposal should function. Following from that economic model, and accounting for potential transaction costs interfering with the ideal market, Part III of the article will compare different existing regulatory alternatives against the ideal, concluding that the dormant Commerce Clause can be a useful judicial tool to economize on solid waste disposal transactions.

I. SUPREME COURT TREATMENT OF MUNICIPAL WASTE DISPOSAL REGULATIONS

This Section provides a landscape of Supreme Court precedent on the application of the dormant Commerce Clause to governmental waste disposal restrictions. The purpose of this

36. Samantha Bohrman, *All Signs Point to Unsuccessful Dormant Commerce Clause Challenges in the High Court*, THE OFFICIAL BLOG OF THE AALS SECTION ON AGRICULTURAL LAW, June 28, 2007, <http://aglaw.blogspot.com/2007/06/all-signs-point-to-unsuccessful-dormant.html>; Patricia Weisselberg, *Shaping the Energy Future in the American West: Can California Curb Greenhouse Gas Emissions From Out-of-State, Coal-Fired Power Plants Without Violating the Dormant Commerce Clause*, 42 U.S.F.L. REV. 185, 210–12 (2007); Ethan Yale & Brian Galle, *Muni Bonds and the Commerce Clause after United Haulers*, 115 TAX NOTES 1037 (2007).

37. See *infra* Part I.D.

38. The *United Haulers* majority opinion, written by Chief Justice Roberts, was joined in full by Justices Souter, Ginsburg, and Breyer. Justices Scalia and Thomas filed separate concurrences. Justice Alito filed a dissenting opinion, joined by Justices Stevens and Kennedy. *United Haulers*, 127 S. Ct. at 1789–90.

survey is to demonstrate the Court's typical rationale for frequently invalidating such restrictions. This rationale will be juxtaposed against economic modeling in Part III, enabling important strengths and weaknesses of the doctrine to be deduced.

The Supreme Court has only decided two cases that deal specifically with the legality of flow control: *C & A Carbone, Inc. v. Town of Clarkstown*,³⁹ and *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*.⁴⁰ However, the doctrinal foundation on which these two cases rest owes much to their regulatory analogue—waste *import* restriction precedent. Consequently, to gain a complete understanding of the Court's justifications for its rulings on waste disposal cases, a brief synopsis of the four waste import restriction cases is provided.

A. *Philadelphia* and its Progenies

The Court first confronted the legality of waste restrictions in the landmark case of *City of Philadelphia v. New Jersey*.⁴¹ In that case, New Jersey had enacted a general prohibition against importation of out-of-state waste to its landfills.⁴² New Jersey argued that the regulation served the environmental purpose of mitigating health and safety concerns by ensuring adequate landfill space.⁴³ Although the asserted purpose of the environmental protection was contested,⁴⁴ the Court found the question to be immaterial, stating:

whatever New Jersey's ultimate purpose, it may not be accomplished

39. 511 U.S. 383 (1994).

40. 127 S. Ct. 1786.

41. 437 U.S. 617 (1978).

42. The statute read: "No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner [of the State Department of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State." N.J. STAT. ANN. § 13:11-10 (West 1978).

43. *Philadelphia*, 437 U.S. at 625.

44. *Philadelphia* argued "while outwardly cloaked in the currently fashionable garb of environmental protection, . . . [the statute] is actually no more than a legislative effort to suppress competition and stabilize the cost of solid waste disposal for New Jersey residents" They cite passages of legislative history suggesting that the problem addressed by [the statute] is primarily financial: Stemming the flow of out-of-state waste into certain landfill sites will extend their lives, thus delaying the day when New Jersey cities must transport their waste to more distant and expensive sites." *Id.* at 625-26.

by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, [the statute] violates this principle of nondiscrimination.⁴⁵

In effect, then, the Court set forth a hard and fast rule that states may not erect statutory walls around their borders to block waste imports if the only reason is the imports' out-of-state origins.

The next waste restriction case to come before the Court was *Chemical Waste Management v. Hunt*.⁴⁶ In that case, petitioners brought a challenge to an Alabama statute designed to limit the importation of hazardous waste. The statute operated by charging an additional fee on hazardous waste generated out-of-state and disposed of in-state.⁴⁷ The statute was functionally equivalent to the one in *Philadelphia*, save that the out-of-state waste was heavily taxed as opposed to banned outright. Finding that distinction constitutionally irrelevant, the Court applied strict scrutiny to invalidate the statute.⁴⁸

The Court in *Chemical Waste Management* noted there was no evidence that out-of-state waste was more dangerous than in-state waste.⁴⁹ Further, although limiting amounts of hazardous waste disposed of in-state was a legitimate environmental aim, there were at least three non-discriminatory alternatives for accomplishing that end. First, the state could apply an additional fee on *all* hazardous waste disposed of in the state (not just out-of-state waste). Second, the state could impose a per-mile tax on *all* vehicles hauling hazardous waste on state roads. And third, the state could set an even-handed cap on the total tonnage of waste disposed of at the landfill each year.⁵⁰

Decided with *Chemical Waste Management*, the statute at issue in the next case, *Fort Gratiot Sanitary Landfill, Inc. v. Michigan*

45. *Id.* at 626–27.

46. 504 U.S. 334 (1992).

47. In addition to charging a base fee of \$25.60 per ton, which applied irregardless of the wastes' origins, the statute added: "For waste and substances which are generated outside of Alabama and disposed of at a commercial site for the disposal of hazardous waste or hazardous substances in Alabama, an additional fee shall be levied at the rate of \$72.00 per ton." Ala. Code § 22-30B-2(b) (1991).

48. *Id.* at 342.

49. *Id.* at 343–44.

50. *Id.* at 345.

Department of Natural Resources,⁵¹ suffered from similar constitutional infirmities to previous waste import cases. Michigan enacted a statute that prohibited private landfill operators from accepting solid waste that originated outside the *county* in which their facilities were located.⁵² Thus, Michigan creatively attempted to avoid the per se rule by erecting statutory borders around each county as opposed to the state generally. Defending the statute as non-discriminatory, Michigan pointed out that the statute required counties to prohibit waste imports from both other in-state counties and other states.⁵³ This argument did not persuade the Court.⁵⁴

Recognizing that Michigan was attempting to do by county what it could not do as a single political unit, the Court surmised, "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."⁵⁵ Accordingly, the Court invalidated the Michigan statute under strict scrutiny, finding it indistinguishable from earlier precedent.⁵⁶

The last of these cases was *Oregon Waste Systems v. Department of Environmental Quality*.⁵⁷ Oregon enacted a law that imposed, in addition to a standard per-ton surcharge fee on all waste disposed in-state, an extra per-ton surcharge on waste imported from

51. 504 U.S. 353 (1992).

52. The statute read: "A person shall not accept for disposal solid waste . . . that is not generated in the county in which the disposal area is located unless the acceptance of solid waste . . . that is not generated in the county is explicitly authorized in the approved county solid waste management plan." MICH. COMP. LAWS § 299.413a (1995).

53. *Fort Gratiot*, 504 U.S. at 361. Although the statute permitted the counties to independently decide whether to accept out-of-state waste, this fact did not seem to affect the Court's analysis. *See id.* at 363.

54. *Id.* at 363.

55. *Id.* at 361. As a caveat, the dormant Commerce Clause would presumably not prohibit a statute that vested counties with the authority to block imports from only other in-state counties, but which still allowed imports from other states. This is evident in the doctrine's purpose—to protect *interstate* commerce, not intrastate commerce. *See Or. Waste Sys. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 106–07 n.9 (1994). However, even this ostensive truism may not be without objection, at least from former Justice O'Connor. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 407 (1994) (O'Connor, J., concurring). For further discussion, see *infra* notes 122–24 and accompanying text (discussing O'Connor's tier-two balancing test analysis of flow control regulation and its potential "balkanization" effect on the interstate shipment of waste).

56. *Fort Gratiot*, 504 U.S. at 363.

57. 511 U.S. 93 (1994).

another state.⁵⁸ Oregon's main defense of the statute was that it only imposed a cost-based surcharge designed to compensate⁵⁹ the state for disposing of out-of-state waste.⁶⁰ As the Court noted, however, Oregon's reliance on this argument was misplaced since the importers of waste neither imposed greater harm to the state vis-à-vis in-state waste, nor did the importers receive any benefit commensurate with the additional surcharge.⁶¹ Having distilled the statute down to its basic nature—a discriminatory tax based upon out-of-state origin—the Court correctly viewed it as a carefully crafted reincarnation of the statute already invalidated in *Chemical Waste Management*.⁶²

B. Rehnquist: Yesterday's Dissent Becomes Today's Rule?

In the realm of waste import restrictions, the majority opinions in the four cases above provided a straightforward framework for analyzing and striking down the challenged statutes. It would be the consistent dissenting opinions by former Chief Justice Rehnquist, however, that ultimately planted the philosophical seeds underpinning current flow control jurisprudence.⁶³ Rehnquist's

58. *Or. Waste Sys.*, 511 U.S. at 96. The private in-state landfill operators, as opposed to those from another state, actually challenged the statute because the surcharge on out-of-state imports reduced the overall amount of waste they received—an effect the Oregon legislature clearly intended.

59. In *Chem. Waste Mgmt.* the Court left open the possibility of a valid discriminatory surcharge if justified on a cost-basis. See 504 U.S. 334, 346 n.9 (1992). Describing the narrow exception available under the compensatory tax doctrine, the Court in *Or. Waste Sys.* quoted the always eloquent prose of Cardozo: “the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed.” 511 U.S. at 103 (quoting *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1937)). For a comprehensive review of the history and modern applications of the comprehensive tax doctrine see Heddy Bolster, *The Commerce Clause Meets Environmental Protection: The Compensatory Tax Doctrine as a Defense of Potential Regional Carbon Dioxide Regulation*, 47 B.C. L. REV. 737, 747–60 (2006). See also Michael Haag & Michael Boekhaus, *The Final Nail in the Compensatory Tax Coffin? The Impact of the Supreme Court's Decision in Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), on *the Doctrine of Compensatory Taxes*, 21 HAMLINE L. REV. 451, 458–62 (1998).

60. *Or. Waste Sys.*, 511 U.S. at 100.

61. *Id.* at 105.

62. See *id.* at 99 (“In *Chemical Waste*, we easily found Alabama's surcharge on hazardous waste from other States to be facially discriminatory because it imposed a higher fee on the disposal of out-of-state waste than on the disposal of identical in-state waste. We deem it equally obvious here that Oregon's \$2.25 per ton surcharge is discriminatory on its face.”) (internal citations omitted).

63. Justice Blackmun did not joined the Court when it decided the waste restriction cases

dissenting opinions, in contrast to the majorities', never explicitly set forth a unified framework for addressing waste import restrictions. There are, however, some salient motifs running throughout each of Rehnquist's dissents. First, the four dissenting opinions employ a coherent, albeit rudimentary, application of the *Pike* balancing test. Second, when applying the *Pike* balancing test, the dissents consider comprehensiveness of the attacked legislation as a factor when deciding whether protectionism was a primary motivator. Third, because a state's own citizenry is hurt by increases in costs of consumption via higher tipping fees caused by flow control, the dissents assume that the political process approach should favor such restrictions. And fourth, although the dissents never advocated a public-private distinction under the dormant Commerce Clause within the context of flow control, Rehnquist did emphasize the regulatory flexibility potentially available to states under the state participation doctrine.

Rejecting per se invalidation, Rehnquist instead applied the *Pike* balancing test. Rather than viewing the import restriction laws as a form of local economic protection, the dissents assume that they enable the states to cope with environmental and safety concerns inherent in diminishing landfill space.⁶⁴ Given those legitimate concerns, the argument runs, it is judicially oppressive to force upon states a Hobson's choice between maintaining no landfills or, as the sole alternative, accepting interstate waste from any and all.⁶⁵ Diametrically opposed to that per se result, Rehnquist would have the court defer to the state's judgment concerning the waste restriction's underlying motivation, thus loading the dice in favor of constitutional legality.⁶⁶

prior to *Fort Gratiot*. Justice Burger joined Rehnquist's dissenting opinion in *Philadelphia*, but left the Court prior to the later cases.

64. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 632 (1978).

65. *Id.* at 631. Complementing the premise that the statutes are not a form of simple economic protectionism, Rehnquist even goes so far as to suggest, but only suggest, that commandeering such an outcome facilitates environmental racism, opining "I see no reason in the Commerce Clause, however, that requires cheap-land States to become the waste repositories for their brethren, thereby suffering the many risks that such sites present." *Fort Gratiot v. Mich. Dep't. of Natural Res.*, 504 U.S. 353, 373 (1992) (stated after referencing Alm, "Not in My Backyard:" *Facing the Siting Question*, 10 EPAJ. 9 (1984)).

66. Reading Rehnquist's dissents on the waste import cases, one may ponder whether he prioritizes economic protectionism over free trade principles. That comparison, however, is likely balancing the wrong priorities upon the beam, as Rehnquist's dissents probably do not represent a rejection of free trade ideals, but rather embrace a political philosophy of Jeffersonian federalism. Variegated throughout the Rehnquist Court decisions on disputed

In Rehnquist's view, when determining whether a waste import restriction is predicated upon local economic protectionism, its passage as but one part of a more general, comprehensive scheme should serve as a factor that favors answering in the negative.⁶⁷ Curiously, in both *Fort Gratiot* and *Oregon Waste Systems*, the cases in which the Rehnquist asserts this position, there is no substantive discussion of its justification. Nevertheless, this strand of analysis turns out to be quite potent as it is later reflected in *United Haulers*.

To be sure, it is plausible that a waste import restriction law is less likely to be enacted for only local economic protectionism if a state troubled itself to position the restriction within a comprehensive waste disposal scheme. But, such legislative structuring does not make it true that the legislation is concerned primarily with health and safety. Perhaps, serving as camouflage, the comprehensive waste disposal "safety" package is a typical, run of the mill municipal legislation, with the enactment of a waste import restriction serving as the primary objective. Or, more realistically, a state or municipality could, at a minimum, pass a waste restriction law for local economic protectionism but claim it as a simple *addition* to an allegedly pre-existing comprehensive scheme.

The third motif of the Rehnquist dissents is that they claim that the political process is another factor militating in favor of waste import restriction laws.⁶⁸ In *Fort Gratiot*, Rehnquist explained how a Michigan waste import restriction law might work to its own disadvantage,

because, by limiting potential disposal volumes for any particular site, various fixed costs will have to be recovered across smaller volumes, increasing disposal costs per unit for Michigan consumers. The regulation also will require some Michigan counties—those that until now have been exporting their waste to other locations in the State—to confront environmental and other risks that they previously have avoided.⁶⁹

constitutional norms can be found a common, strong thread of state sovereignty prioritization. *See, e.g., Alden v. Maine*, 527 U.S. 706 (1999) (interpreting the 11th Amendment Sovereign Immunity to extend to citizens suits against their own state); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (limiting Congress' enforcement powers under the 14th Amendment); *U.S. v. Lopez*, 514 U.S. 549 (1995) (limiting Congress' powers under the Commerce Clause).

67. *Fort Gratiot*, 504 U.S. at 369–70.

68. *See, e.g., Fort Gratiot*, 504 U.S. at 370.

69. *Id.* (internal citations omitted).

Thus, protectionism concerns should be abated given that the state's own citizenry will be hurt by increases in cost of consumption, i.e., increased disposal fees.⁷⁰ This rationale will be explored in Part III, as it too becomes controversial in the context of flow control regulations in *United Haulers*.

Finally, in *Oregon Waste Systems*, Rehnquist prophesized (or perhaps inspired) the coming debate that took center-stage in flow control jurisprudence: whether a public-private distinction should exist among disposal sites for purposes of the dormant Commerce Clause.⁷¹ He began by noting, "[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*."⁷² Rehnquist offered his own advice, surmising that the state participation doctrine, an exception to the dormant Commerce Clause, vests discretion to state-owned or locally-owned disposal facilities in both accepting waste and charging fees.⁷³

Under the state participation doctrine, a state or locality that acts as a participant in a market, as opposed to acting as a regulator of a market, is permitted to discriminate against interstate commerce in the same way that a private entity can.⁷⁴ Thus, if a state regulation prohibits state-owned landfills from accepting out-of-state waste, all else being equal, the regulation conforms with the state participation doctrine because state-owned landfills directly participate in the disposal market.⁷⁵ Rehnquist's suggestion that

70. *Id.*

71. *Or. Waste Sys. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 114, 115 n.9 (1994) ("We will undoubtedly be faced with this [public-private distinction] question directly in the future as roughly 80 percent of landfills receiving municipal solid waste in the United States are state or locally owned."). *Id.*

72. *Id.* at 114 (citing *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 n.6 (1978)).

73. *Or. Waste Sys.*, 511 U.S. at 114.

74. *Compare* *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (upholding Maryland's program of buying only Maryland-titled junk automobiles for scrap conversion), *with* *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984) (striking down Alaska's regulation that required purchasers of state-owned timber to process the timber in Alaska prior to export).

75. *See* *Swin Res. Sys. v. Lycoming*, 883 F.2d 254, 250-51 (3d Cir. 1989); *accord* *Lefrancois v. Rhode Island*, 669 F. Supp. 1204, 1211 (D.R.I. 1987) (stating that although Rhode Island's statute deprived out-of-state disposers of the services of the state-owned disposal facility, it has not "precluded any party, in-state or foreign, from purchasing property upon which to construct a sanitary landfill open to all waste regardless of origin").

the exception would allow a publicly owned disposal facility to refuse out-of-state solid waste or to charge differential taxes seems, therefore, on mark. Why then have states not pulled that doctrinal arrow from their constitutional quiver to resolve their waste disposal dilemmas? Probably because the Court's waste import precedent involved regulations of general application, going beyond mere market participation. In other words, the challenged state regulations applied to all facilities within the state, irrespective of ownership.⁷⁶ Consequently, while states are constitutionally vested with a degree of discretion for regulation of waste imports, that discretion is seriously limited.

Likewise, if the state participation doctrine were applied to flow control, the regulatory analogue of waste import restrictions, states would be similarly limited. For example, if a state or locality owned both the disposal facility and the waste hauling entity, it could freely choose, as a market participant, to deliver all waste to the public facility.⁷⁷ That constitutional right makes sense; private haulers regularly structure equivalent intra-firm arrangements.⁷⁸ However, a state or locality could not institute a blanket regulation requiring all waste haulers, public and private alike, to deliver waste to a particular disposal facility because it would then be considered a market regulator.⁷⁹ Therefore, adopting Rehnquist's suggested reliance on the state participation doctrine would still not afford many states the regulatory options they seek, like flow control. Against this backdrop, the ingenuity of *United Haulers* is illuminated. The Court was able to avert the proverbial Achilles' heel of the state participation doctrine for flow control regulations by creating a public-private distinction within the dormant Commerce Clause itself.

76. See *supra* Part I.A.

77. Some argue the market participant doctrine would also apply where a locality enters into contractual relations with a waste hauler and requires the collected waste to be disposed at the facility. See, e.g., *LeFrancois*, 669 F. Supp. 1204.

78. CRS REPORT, INTERSTATE SHIPMENT OF SOLID WASTE, *supra* note 20, at 12.

79. See *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 512-13 (2d Cir. 1995); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1282-83 (2d Cir. 1995); *Atl. Coast Demolition & Recycling, Inc. v. Bd. Of Chosen Freeholders*, 48 F.3d 701, 717 (3d Cir. 1995); *GSW, Inc. v. Long County*, 999 F.2d 1508, 1510-16 (11th Cir. 1993); *Washington State Bldg. & Constr. Trades v. Spellman*, 684 F.2d 627, 631 (9th Cir. 1982).

C. *Carbone* and *United Haulers*: Flow Control Jurisprudence

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

In 1989 the town of Clarkstown, New York arranged to close its landfill and build a new solid waste transfer station that would process waste for disposal.⁸⁰ The town contracted with a local private contractor to build the facility and operate it for five years, after which time the town would buy it back for nominal cost.⁸¹ To ensure the local private contractor recouped its investment, the town negotiated with the contractors for a “pay or put” clause that guaranteed a minimum waste flow of 120,000 tons per year, for which the contractor could charge set tipping fees of \$81 per ton.⁸² The open market made such an arrangement impossible, however, because the above market price prevented the guaranteed minimum waste flow.⁸³ The town’s solution was to enact a flow control ordinance.⁸⁴ C & A Carbone, a similar processing facility in the town that was now required to deliver its processed waste to the above facility, challenged the ordinance claiming it violated the dormant Commerce Clause.⁸⁵

The Court agreed with C & A Carbone, stating such ordinances are unconstitutional because, “[s]tate and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities.”⁸⁶ The ordinance affected interstate commerce because requiring C & A Carbone, which received out-of-state waste, to deliver portions of processed waste to the favored facility drove up the cost for out-of-state interests.⁸⁷ In addition, the ordinance deprived potential out-of-state processing competition access to the

80. Transfer stations are facilities where solid waste is unloaded from collection vehicles, stored and/or processed, and eventually transferred to permanent disposal facilities. The transfer station at issue in *Carbone* would receive bulk solid waste, separate recyclable from non-recyclable items, then ship the waste to a recycling facility and landfill or incinerator. *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 387 (1994). For a thorough exegesis of *Carbone*, see Mank, *supra* note 10, at 168–78.

81. *Carbone*, 511 U.S. at 387.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 387–88.

86. *Id.* at 394.

87. *Id.* at 389.

local market.⁸⁸ Accordingly, the Court deemed the ordinance invalid under the per se test because the ordinance discriminated in effect, by “[squenching] competition in the waste-processing service altogether, leaving no room for investment from outside.”⁸⁹ Nor did the Court find it material that both in-state and out-of-state processors were covered equally by the ordinance.⁹⁰ Finally, responding to arguments that the ordinance was necessary for both environmental protection and financing measures, the Court gave examples of non-discriminatory alternatives, including uniform safety regulations for the former and direct subsidies through general taxes or municipal bonds for the latter.⁹¹

2. *United Haulers, Inc. v. Oneida-Herkimer Solid Waste Management Authority*

Decided in 2007, *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Management Authority*⁹² unquestionably provides a new dynamic for litigation involving the dormant Commerce Clause.⁹³ Oneida and Herkimer counties, located in central New York, enacted a flow control ordinance whereby all solid waste generated within the counties was required to be delivered to a processing facility owned by a public benefit corporation, known as the “Authority.”⁹⁴ The Authority, unlike the quasi-public facility in *Carbone*, was owned directly by the state from the time of its initial incorporation.⁹⁵ The Authority was created because of a perceived local solid waste “crisis,” involving problems ranging from state regulatory violations by private landfill operators to “price fixing, pervasive overcharging, and the influence of organized crime.”⁹⁶

The mandate of the Authority was to “collect, process, and

88. *Id.*

89. *Id.* at 392.

90. *Id.* at 391–92.

91. *Id.* at 393–94. In concurrence, Justice O’Connor, sarcastically proffered another alternative suggesting that the town could drop the tipping fee for processing down to a competitive price. *Id.* at 405–06 (O’Connor, J., concurring).

92. 550 U.S. 330, 127 S. Ct. 1786 (2007).

93. See *supra* note 36 for novel applications of *United Haulers* that have already been suggested by commentators.

94. The Authority was created by the state at the behest of the two counties for the distinct purpose of managing solid waste disposal. *United Haulers*, 127 S. Ct. at 1791.

95. *Id.*

96. *Id.*

dispose of solid waste generated in the Counties.”⁹⁷ To augment the standard functions performed by waste disposal facilities, the Authority also provided a gamut of additional services including sophisticated recycling, composting, and household hazardous waste disposal.⁹⁸ The Authority therefore charged significantly higher tipping fees than those charged for waste disposal on the open market.⁹⁹ As a consequence, a flow control ordinance was enacted to prevent waste haulers from delivering collected waste to facilities with lower tipping fees.¹⁰⁰ The two counties were contractually bound to foot the bill of the Authority if its operating cost and debt service was not recouped through sufficient tipping fees and other charges.¹⁰¹ In sum, the facts closely mirror those in *Carbone*, except that the waste disposal facility was unquestionably public.¹⁰²

The Court prefaced the opinion by noting that the “only salient difference” between *Carbone* and *United Haulers* was the public-private distinction in ownership and operation of the waste processing facility.¹⁰³ The Court then announced that this distinction was “constitutionally significant.”¹⁰⁴ The opinion offered three “[c]ompelling reasons [that] justify” treating flow control laws enacted by a publicly-owned and operated waste processing facility differently from private facilities.¹⁰⁵

First, public and private businesses should not be categorized together because, “[c]onceptually . . . any notion of discrimination assumes a comparison of substantially similar entities.”¹⁰⁶ State and local governmental entities are not substantially similar to their private counterparts because “government is vested with the responsibility of protecting the health, safety, and welfare if its

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. Quoting the lower court, the Supreme Court clarified the ambiguity of the facts in *Carbone* by pointing out “in *Carbone* [we] were divided over the *fact of whether* the favored facility was public or private, rather than on the import of that distinction.” *Id.* at 1794 (quoting *United Haulers, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 259 (2d. Cir. 2001)).

103. *United Haulers*, 127 S. Ct. at 1790.

104. *Id.*

105. *Id.* at 1795–97.

106. *Id.* at 1795 (internal citations and quotations omitted).

citizens.”¹⁰⁷ This police power obviates the need for treating “with equal skepticism” laws that favor local government because the laws “may be directed toward any number of legitimate goals unrelated to protectionism.”¹⁰⁸

Second, the contrary approach would lead to undue judicial encroachment into state and local policy decisions reserved for the legislative domain.¹⁰⁹ Reminiscent of earlier Rehnquist undertones, the Court added that the judiciary is prohibited from such policy-driven decisions as it does not possess a “roving license” to weigh what “activities must be the province of private market competition.”¹¹⁰

Third, judicial restraint is of particular importance in this case since “[w]aste disposal is both typically and traditionally a local government function.”¹¹¹ The importance of this function is underscored by language in RCRA stating that, “collection and disposal of solid waste should continue to be primarily the function of state, regional, and local agencies.”¹¹²

In addition to the aforementioned reasons not to strike down the flow control regulation under the per se approach, the Court also attempted to reconcile the holding on grounds other than a public-private distinction, claiming that, “the most palpable harm imposed by the ordinances—more expensive trash removal—is likely to fall upon the very people who voted for the laws.”¹¹³ Under this familiar political process principle, some ancillary burdens upon out-of-state interests are tolerated when the populaces of the regulating state are the ones acutely burdened.

The Court’s reliance on the political process principle is misplaced for two reasons. First, its application in this context is

107. *Id.*

108. *Id.* at 1795–96.

109. *United Haulers*, 127 S. Ct. at 1796.

110. *Id.*

111. *Id.* (internal citation and quotation omitted).

112. *Id.* (citing Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901(a)(4)). Whether out of sincere belief or out of respectful comradeship, the Court did not opine that RCRA is Congressional authorization of flow control or overly emphasize the statute, as Justice O’Connor had previously discussed its impact at length in her *Carbone* concurrence. See *C. & A. Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 407–10 (1994) (O’Connor, J., concurring) (concluding that the statutory language of RCRA, “neither individually nor cumulatively rise[s] to the level of the ‘explicit’ authorization required by our dormant Commerce Clause decisions”). The opinions of most commentators are consonant with Justice O’Connor’s. See, e.g., Mesnikoff, *supra* note 17, at 1234.

113. *United Haulers*, 127 S. Ct. at 1797.

inconsistent with the Court's own precedent generally and is at odds with *Carbone* directly.¹¹⁴ The Court goes far in demonstrating this point itself by declaring the public-private distinction to be the only "salient difference" between *United Haulers* and *Carbone*.¹¹⁵ Because the two cases are factually congruent, save for technical ownership of the waste processing facilities, the citizens of Clarkstown would have been similarly burdened by increased price for trash removal under their ordinance. Yet, there the Court implicitly rejected the political process approach stating, "[t]he ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition."¹¹⁶ Second, and as will be discussed more fully in Part III, the political process approach is unmoored from reality within the context of flow control when viewed through the prism of which parties, in-state or out-of-state, are more *transparently* influenced by its effects.¹¹⁷

Having concluded that the flow control law did not discriminate per se, the Court then considered whether it was invalid under the *Pike* balancing test.¹¹⁸ In terms of local benefits conferred, the Court decided, "[w]hile revenue generation is not a local interest that can justify *discrimination* against interstate commerce . . . it is a cognizable benefit for purposes of the *Pike* test."¹¹⁹ The Court, however, also made clear that the ordinances were more than simple financing tools.¹²⁰ Rather, the flow control law made possible an "integrated package of waste-disposal services" that conferred "significant health and environmental benefits" by improving incentives for, and enforcement of, recycling.¹²¹

In terms of burdens imposed on out-of-state business, the Court was dismissive. It noted that the Second Circuit referred to, but

114. See e.g., *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't. of Natural Res.*, 504 U.S. 353, 361–63 (1992); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 n.4 (1951) (invalidating an ordinance, applicable to both in-state and out-of-state entities, that prohibited the sale of milk unless bottled within five miles from the central square of Madison). See also, Natalie K. Mitchell, Note, *United Haulers v. Oneida-Herkimer Solid Waste Management Authority: Introducing the "Public Benefit" Exception to the Dormant Commerce Clause*, 21 TUL. ENVTL. L.J. 135, 148 (2007).

115. *United Haulers*, 127 S. Ct. at 1790.

116. *Carbone*, 511 U.S. at 391.

117. See *infra* Part III.A.

118. *United Haulers*, 127 S. Ct. at 1797–98.

119. *Id.* at 1798 (internal citations and quotations omitted).

120. *Id.*

121. *Id.*

stopped short of endorsing, “a rather abstract harm that may exist because the Counties’ flow control ordinances have removed the waste generated in [the two counties] from the national marketplace for waste processing services.”¹²² Justice O’Connor had previously argued in her dissenting opinion in *Carbone*, however, that the proliferation of flow control laws would cause “the free movement of solid waste in the stream of commerce to be severely impaired. . . [resulting in] the type of balkanization the [dormant Commerce Clause] is primarily intended to prevent.”¹²³ Regardless, the Court conveniently sidestepped this debate by simply declaring that “any arguable burden” does not clearly exceed the public benefits conferred.”¹²⁴

To ensure the significance of this case would not be overlooked, the Court concluded with an austere forewarning, underscored by its reference to *Lochner*. The Court stated that when considering challenges to laws that favor certain public entities it will give deference to these laws as, “[the challenges] are invitations to rigorously scrutinize economic legislation passed under the auspices of the police power.”¹²⁵ And although the Court had previously “presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. . . [w]e should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause.”¹²⁶

122. *Id.* at 1797 (internal citations and quotations omitted).

123. *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 406 (1994) (internal citations omitted). See Michael H. Abbey, *State Plant Closing Legislation: A Modern Justification for the Use of the Dormant Commerce Clause as a Bulwark of National Free Trade*, 75 VA. L. REV. 845, 870–76 (describing general confusion over how to apply the *Pike* balancing test). *But cf.* McGreal, *supra* note 28, 1279–81 (arguing that game theory disproves the neoclassical economic assumption that interference with interstate competition will necessarily harm interstate commerce). The problem with O’Connor’s view may not be with her economic postulations, but with the untoward practical results of such an approach. Under her approach, all flow control ordinances would burden interstate commerce, even when the facts of a specific case indicate that no interstate commerce is affected by the regulation. In other words, assuming a plaintiff could demonstrate no direct impact to interstate commerce, courts would still need to balance an ordinance’s benefits and burdens—burdens not created by the ordinance itself but, rather, from the possibility that similar ordinances in other jurisdictions would excessively burden interstate commerce in the aggregate.

124. *United Haulers*, 127 S. Ct. at 1797.

125. *Id.* at 1798.

126. *Id.* (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

D. Lingering Questions

United Haulers successfully took an initial step in defining the contours of the new public-private distinction, but left several vital questions unanswered for lower courts. These questions can be categorized as those applicable to the public-private distinction generally and those on flow control laws specifically. First, as a general matter, is a typical and traditional government function required, or merely one factor to be considered under this new distinction? At what point does a government function become “typical and traditional”? Of course, both of these questions are premised on the assumption that the holding in *United Haulers* extends beyond the subject of flow control.

Second, with respect to flow control, what characteristics of ownership must an entity possess to be considered “public”? In *United Haulers*, the Authority both owned and operated the waste processing facility and thus was considered to be “public.”¹²⁷ In *Carbone*, the town of Clarkstown neither owned nor operated the waste processing facility, and although a contract existed to transfer ownership after five years, it was nevertheless considered to be “private.”¹²⁸ In between those two fact patterns, however, an array of possibilities for structuring ownership exists.¹²⁹ For example, what if a state or municipality directly owned, but did not operate, a waste processing facility? If mere ownership were sufficient, what if the state or municipality leased the facility, retaining only a reversionary interest? These hypothetical questions are intended to determine the degree of attenuated ownership permissible.

Finally, as noted above, the Court in *United Haulers* decided that revenue generation was a “cognizable benefit” for purposes of the balancing test, but simultaneously emphasized that the flow control law, enacted during a solid waste “crisis,” made possible an “integrated package of waste-disposal services” that conferred “significant” health and environmental benefits by improving incentives for, and enforcement of, recycling.¹³⁰ The question the Court implicitly recognized but did not address is whether revenue generation *alone* is a sufficient benefit. For example, must a flow control law be enacted because of a solid waste “crisis?” Given the

127. *United Haulers*, 127 S. Ct. at 1791.

128. *Carbone*, 511 U.S. 387.

129. See Petersen & Abramowitz, *supra* note 12, at 365–66.

130. *United Haulers*, 127 S. Ct. at 1790–91, 1798.

majority's parting allusion to *Lochner*, this is unlikely. What if a county or municipality enacts flow control simply to protect the financial viability of a disposal facility? Does the type of disposal facility—landfill, incinerator, or processing facility—alter the analysis?

These questions are not entirely academic. States and local governments are actively seeking means to finance disposal facilities pinched by the competitive pressures resulting from regionalization of the disposal industry and increasing trade in interstate commerce.¹³¹ While *United Haulers* will provide state and municipal governments some relief from the dormant Commerce Clause's tight hold on waste restriction regulations, it risks littering the doctrinal path with a byzantine series of precedent. The purpose of the next two parts is to suggest an effective way for lower courts to approach constitutional challenges to flow control ordinances under the *United Haulers* framework.

II. THE COASE THEOREM, THE WASTE DISPOSAL MARKET, AND ECONOMIC EFFICIENCY

This part begins with an introduction to the Coase Theorem, demonstrating the fundamental role that transaction costs should play in regulatory policy analysis. The discussion then proceeds to describe an "ideal" waste disposal market in which transaction costs do not exist. In such a market, governmental regulations, including legal institutions themselves, would be unwarranted. When transaction costs are high enough to prevent an efficient outcome, it may be useful to compare alternative regulatory methods of correcting those prohibitive forces. By analyzing transaction costs in the solid waste disposal market and how laws may economize on these costs, we can assess how *United Haulers* may affect the dormant Commerce Clause, as well as the efficiency of the municipal solid waste disposal market.

A. The Coase Theorem

The Coase Theorem¹³² essentially posits that in the absence of transaction costs,¹³³ efficient outcomes can be achieved through

131. See CRS REPORT, INTERSTATE SHIPMENT OF SOLID WASTE, *supra* note 20, at 12.

132. See R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

133. Examples of "transaction costs" include negotiation costs, information asymmetries,

bargaining, regardless of how the law initially allocates rights.¹³⁴ To illustrate, consider a doctor and confectioner, who operate in close proximity. The doctor provides services worth 60, but requires quiet. The confectioner provides services worth 40, but requires the operation of loud baking equipment. Because both cannot operate simultaneously, their combined social value is either 40 or 60. Now suppose that the confectioner can sound proof his walls for 20. If the confectioner is required by law to do so, he will pay 20 to comply and still earn 20. This scenario leads to an economically efficient result. The doctor produces services worth 60 and the confectioner is still profitable at 20, for a social value of 80.¹³⁵ In the absence of a legal obligation, the parties will bargain to the same efficient outcome and the confectioner will still sound proof his walls because the doctor will bargain for such a result. In a world without transaction costs, the doctor will pay the confectioner between 20 and 60, as the confectioner will not accept less than 20 and the doctor's practice is unprofitable above 60. Assuming the bargain is struck at 20, the confectioner totals 40 and the doctor totals 40, with a total sum of 80. Thus, the particular liability regime is immaterial; in the absence of transaction costs, both arrangements result in the same socially efficient outcome. This is because the problem of harm is reciprocal in nature. Although the confectioner's work harms the doctor, the reverse is also true: the doctor's need for silence also "harms" the confectioner.

To demonstrate the immateriality of the liability regime further, suppose now that the doctor can relocate for a cost of 18,¹³⁶ and that the confectioner is liable. In this case, the doctor will relocate

imperfect information, enforcement uncertainties, free riders, holdouts, and bilateral monopolies. See Pierre Schlag, *The Problem of Transaction Costs*, 62 S. CAL. L. REV. 1661, 1673 (1989).

134. For a legal primer on the Coase Theorem, see Michael I. Swygert and Katherine Earle Yanes, *A Primer on the Coase Theorem: Making Law in a World of Zero Transaction Cost*, 11 DEPAUL BUS. L.J. 1 (1998). See also A. Mitchell Polinsky, *AN INTRODUCTION TO LAW AND ECONOMICS* (3d ed. 2003).

135. Economic "efficiency" describes a state where all mutually beneficial trades are made, i.e., no party can be made better off without making another worse off. This state is commonly known as Pareto optimality. "Equity" on the other hand is concerned with economic distribution. Or, to be a bit more illustrative, efficiency is concerned with the size of the pie, while equity is concerned with its distribution.

136. As noted by Coase, assume the cost of mitigation includes all change in income, such as altering methods of production, relocation expenses, necessary changes in product, etc. Coase, *supra* note 132 at 9 n.9.

because the confectioner will pay the doctor at least 18 (cost to relocate), but no more than 20 (cost to sound proof walls). Assuming the bargain is made at 18, the confectioner totals 22 and the doctor totals 60, with a total sum of 82. Absent liability, the same total economic value is achieved; the doctor will mitigate by relocating, thus totaling 42, while the confectioner will not mitigate, thus totaling 40. Again the total is 82.

Now comes the wrinkle in Coase's theorem: transaction costs may prevent an otherwise efficient result. Thus, a liability regime, or lack thereof, can be determinative of economic efficiency. Suppose in the above example that the cost of transacting is 25.¹³⁷ Assuming the confectioner is liable, recall that he would pay the doctor between 18 and 20 to relocate. With transaction costs, however, this bargain will not be struck, as 25 (transaction costs) plus 18 (assumed bargain price to relocate) is more than services produced by the confectioner (40). In this instance, the confectioner will simply sound proof his walls, producing a sum total of 80. Conversely, absent liability no transaction costs arise, as the doctor—the low cost mitigator—will simply relocate, producing a greater combined output of 82. The theorem demonstrates that the law can maximize total surplus by shifting the liability burden to the low cost mitigator.¹³⁸

The lessons and applications of the Coase Theorem are not limited to nuisance law. To the contrary, the Coase Theorem reveals fundamental threads of economic truisms that weave together a patchwork of economic applications.¹³⁹ Whenever there are no transaction costs, the market should function efficiently without governmental regulations.¹⁴⁰ But whenever there is cost involved with a transaction, which is typical,¹⁴¹ the law may impede

137. In the example transaction costs may include such costs as negotiations and enforcement.

138. This is simply to say that when the law imposed no liability on the confectioner he had a "right" to create externalities, which in turn was a "burden" to the doctor.

139. See generally, RICHARD A. POSNER, *OVERCOMING LAW* 407–25 (1995); Harold Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEGAL STUD. 13 (1972); Yoram Barzel & Levis A. Kochin, *Ronald Coase on the Nature of Social Cost as a Key to the Problem of the Firm*, 94 SCAND. J. OF ECON. 19 (1992).

140. But see Donald H. Regan, *The Problem of Social Cost Revisited*, 15 J.L. & ECON. 427 (1972) (critiquing implicit assumptions of transaction cost economics in light of strategic behavior).

141. R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 114 (1988).

or facilitate economic efficiency.¹⁴² Whether the law is impeding or facilitating economic efficiency depends first on the transaction costs involved and, if they are high enough, on which party is the low cost mitigator. Analyzing transaction costs should therefore serve as a polestar to economic analysis and conclusions on the necessity of a regulation or comparisons between institutional choices.

B. The “Ideal” Market

Recall that the Coase Theorem posits that governmental regulations, such as flow control, are immaterial to economic efficiency in a market without transaction costs. Under such ideal conditions, all parties to the solid waste disposal market would reach an efficient bargain when confronting negative externalities. However, a cursory analysis of the actual solid waste disposal market reveals high transaction costs, which make possible regulations that may economize on those costs.

The process of solid waste disposal is essentially a process of collecting, transporting, and disposing of waste. Although the service providers of the waste disposal processes can and do vary by location, imagine a basic model of a waste disposal market in which one firm collects a community’s solid waste and transports it to the firm’s landfill.¹⁴³ Negative externalities spring to mind at the mere thought of waste collection and disposal, such as noise pollution from dump trucks, disposal site odor, ambient air quality, various leachate contaminations with attendant health risks, and decreases in surrounding property values, to name just a few.

To be clear, negative externalities are not in and of themselves transaction costs necessarily justifying a regulatory reaction. This concept is often confused and mistreated in academic literature, especially in the field of environmental protection. It is the lack of internalization, *caused* by transaction costs, which is of policy concern. Recall Coase’s example. Even though the confectioner’s business produced a negative externality, loud noise, a liability

142. As noted by Richard Posner, any notion of market failures must be balanced against one of government failures. In other words, the governmental regulation may actually create transaction costs that exceed those that existed naturally. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 271 (2d ed. 1977).

143. See CRS REPORT, *INTERSTATE SHIPMENT OF SOLID WASTE*, *supra* note 20, at 12 for a brief discussion of local solid waste management structural arrangements.

regime imposed on the confectioner did not necessarily promote economic efficiency. Because an efficient bargain would still be orchestrated privately, society need not impose liability onto the confectioner just because it produces an externality. Only when transaction costs such as costs of negotiations and enforcement prevent that bargain will regulatory intervention be fruitful.

Having described the ideal market, we may account for the transaction costs that might exist in such a market. A cursory reflection of the potential transaction costs that could arise quickly reveals incorrigibly high transaction costs. The private disposal firm would lack incentive to institute its own mitigation measures since the community would be prohibited from bargaining through local government. Thus, each household would have to implement mitigation methods, whether they were noise pollution prevention, installation of stronger water purifying mechanisms, or even relocation if in close proximity to the landfill. Moreover, even the initial cost of knowledge is prohibitive—knowing potential risks a site poses, what mitigation methods are needed, and how to implement those methods requires a level of technical expertise that can be quite costly and sometimes nearly impossible to obtain.¹⁴⁴

A commonsensical approach, then, to an ideal solid waste disposal market demonstrates the obvious: the waste disposal industry is in a superior position to mitigate its negative externalities. Accordingly, the concepts of economic efficiency and regulatory interference into the solid waste disposal market are not at loggerheads, but rather the former *could* be improved by the imposition of the latter. Unfortunately, whether past or present laws, promulgated at the federal, state, or local levels, *optimally* economize on these transaction costs is a prodigious inquiry, and although important, is beyond the scope of this article.¹⁴⁵

144. See 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, 1020 ("The argument that . . . [locally undesirable land uses] decrease the market value of property also assumes that buyers and sellers of affected properties have perfect information about the negative impacts of a LULU. That assumption is usually invalid, given the difficulty of assessing the risks posed by LULUs. Where market participants do not have perfect information, property values may fall either more or less as a result of a LULU than if perfect information was available.").

145. See generally, Robert R.M. Verchick, *Feathers or Gold? A Civil Economics for Environmental Law*, 25 HARV. ENVTL. L. REV. 95 (2001) (discussing the current interaction of economics and environmental law within academia).

C. The Actual Market

An analysis of the current state of the solid waste disposal market is important for understanding what general legal institutions exist to regulate the industry and how additional regulations, such as flow control, would impact the market. In many ways, the theoretical narrative of waste disposal has paralleled the actual historical evolution of the waste disposal industry. Only a few hundred years ago modern concepts of a disposal “industry” were alien, as garbage was simply tossed haphazardly onto streets or places of convenience.¹⁴⁶ Even initial community-based campaigns to “solve” solid waste problems in urban areas were driven by an “out of sight, out of mind” philosophy that resulted in disposal methods that incorporated few precautionary measures.¹⁴⁷

Legislative governance did not significantly shape the waste disposal industry until the American populace recognized the potentially noxious effects of solid waste, especially hazardous waste.¹⁴⁸ During the 1960s and 1970s, the federal government, along with the states, began to take a more proactive approach to environmental protection in general.¹⁴⁹ In particular, in 1976, the federal government enacted the Resource Conservation and Recovery Act,¹⁵⁰ a statute encouraging the states to implement certain minimum standards for waste collection, disposal, and monitoring in return for technical and financial assistance.¹⁵¹

146. LUTON, *supra* note 16, at 88. For a seminal work on the historical account of refuse collection in the United States, see MARTIN V. MELOSI, *GARBAGE IN THE CITIES: REFUSE, REFORM, AND THE ENVIRONMENT* (Rev. ed., Univ. of Pittsburgh Press 2005) (1981).

147. LUTON, *supra* note 16, at 89–90.

148. See David L. Markell, *The Federal Superfund Program: Proposals for Strengthening the Federal/State Relationship*, 18 WM. & MARY J. ENVTL. L. 1, 6–12 (1993) (recounting the story of Love Canal and Congress’ response to hazardous waste disposal thereafter).

149. Several significant environmental statutes were passed during this time, including the Clean Water Act, the National Environmental Protection Act, the Clean Air Act, the Endangered Species Act, and the Solid Waste Disposal Act (as amended by the Resource Recovery and Conservation Act).

150. 42 U.S.C. §§ 6901–6992k (2007–2008).

151. The Resource Conservation and Recovery Act (hereinafter the “Act”), which essentially sets forth the modern framework for solid waste management, was actually an amendment to the 1965 Solid Waste Disposal Act. Under Subtitle D of the Act, which regulates non-hazardous solid waste disposal, states are encouraged to develop comprehensive solid waste management plans for managing non-hazardous industrial solid waste and municipal solid waste, to implement set criteria for municipal solid waste landfills and other solid waste disposal facilities, and to prohibit the open dumping of solid waste. 42 U.S.C. §§ 6941–6949 (2007–2008). Congress has amended the Act three additional times: in

The depth and cost of engineering, administrative, and legal expertise required to meet the tougher regulations, however, caused thousands of landfills to close.¹⁵² The vast majority of landfills that closed were small, publicly-owned landfills whose income generation from disposal servicing did not compensate for the cost of the new regulations.¹⁵³ Furthermore, although landfills have always required economies of scale, only over the last twenty-five years were these great enough to facilitate the restructuring of the waste disposal industry in favor of large, private solid waste management companies.¹⁵⁴ Today, continued closure of older and smaller landfills, coupled with the consolidation of the solid waste management industry, has led to the regionalization of landfills.¹⁵⁵ The regionalization of landfills has contemporaneously driven up the level of solid waste crossing state lines for interstate waste disposal.¹⁵⁶

D. Negative Externalities and the Economic Limits to Regulation

Despite the current trajectory towards regionalization of landfills and away from the traditional small landfills operated by towns, negative externalities still persist. These negative externalities can be grouped into general problems associated with both enforcement and performance. Technically, problems of enforcement are not externalities per se; rather direct and purposeful health and safety hazards are correlated with noncompliance. The difference between enforcement and performance here is that performance is meant to describe natural,

1984 through the Hazardous and Solid Waste Amendments, in 1992 through the Federal Facilities Compliance Act, and in 1996 through the Land Disposal Program Flexibility Act. For an introduction to RCRA and subsequent amendments see COMMUNICATIONS, INFORMATION, AND RESOURCES MANAGEMENT DIVISION, U.S. ENVIRONMENTAL PROTECTION AGENCY, RCRA ORIENTATION MANUAL 2006 § 1–18 (2006).

152. See McCarthy, *supra* note 20, at 12 (“As small landfills continue to close—the number of U.S. landfills declined 63% between 1993 and 2004, from 4,482 to 1,654—this trend toward regionalization, consolidation, and waste shipment across state lines is likely to continue.”).

153. See PORTER, *supra* note 21, at 54.

154. *Id.*

155. See McCarthy, *supra* note 20, at 12.

156. The Congressional Research Service estimated that in 2005 more than 42 million tons of solid waste crossed state lines for disposal, an increase of 8% from 2003. Overall waste imports have also risen significantly over the past 15 years, now representing approximately 25.3% of municipal solid waste disposed of at landfills and waste combustion facilities. See *id.* at 2.

as opposed to purposeful, health and safety hazards. Nomenclature aside, the groupings used are simple to help conceptualize the diverse set of problems that can and do arise.

In terms of enforcement, there is direct and anecdotal evidence that widespread noncompliance with disposal regulations occurs.¹⁵⁷ *United Haulers* reveals that in the years preceding the decision to enact flow control laws, Oneida and Herkimer Counties encountered pervasive compliance problems. Specifically, many local landfills were operating without permits and in violation of state regulations, which spurred their closure.¹⁵⁸ The enforcement problems eventually culminated in a federal enforcement action against Onieda County's largest private landfill operator, which subsequently named hundreds of local businesses as third-party defendants.¹⁵⁹ Additionally, those problems were compounded by the contentious relationship that existed between the counties on one hand and the private waste disposal industry, influenced by organized crime, on the other.¹⁶⁰ Faced with recurring problems of enforcement, the counties wanted to adopt a new regulatory strategy for managing their municipal waste collection and disposal.¹⁶¹

In terms of performance problems, disposal sites probably still cause negative externalities such as poor ambient air quality, leachate contaminations that pose health risks, and decreases in property values. In fact, media stories of such problems still abound. Injured persons seeking some form of compensation have a diverse medley of legal options to deal with these externalities. First, as stated previously, both federal and state laws provide remedial measures,¹⁶² which often include venues for private or

157. Marianne Lavelle, *Environmental Vise: Law, Compliance*, NAT'L L. J., Aug. 30, 1993, at S1 (col. 2) (noting that more than two-thirds of the 200 corporate general counsels responding to a 1993 survey conceded that at some point during the last year their businesses had operated in violation of federal or state environmental laws).

158. *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 127 S. Ct. 1786, 1790–91 (2007).

159. *Id.*; See also Brief of Defendant-Appellate County of Oneida, *United Haulers Ass'n, Inc., v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245 (2d Cir. 2000) (Nos. 00-7593(L), 00-7595(CON), 00-7597(CON)), 2000 WL 33988467.

160. *United Haulers*, 127 S. Ct. at 1791.

161. See *infra* Part III for a broader discussion of the economic cost-benefit analysis, applicable to choices between regulatory alternatives, that exists for coping with such situations.

162. For example, CERCLA applies to *ad hoc* remedial measures.

public enforcement.¹⁶³ Second, apart from statutory actions, citizens or public officials may bring common law actions, such as private and public nuisance.¹⁶⁴ Finally, *ex ante* bargaining can sometimes be foisted whereby prospective disposal operators will pay “host fees” or similar offers of compensation to communities that will allow for the opening of waste disposal facilities.¹⁶⁵ The fees are designed to alleviate, in part, anxiety over potential declines in surrounding property values.¹⁶⁶

To be sure, even sanguine commentators do not assert that complete internalization has occurred through either *ex ante* bargaining or *ex post* remedial mechanisms. Ample data reflects, for instance, that the waste disposal industry, when forming decisions about where to locate new facilities, tends to take the path of least resistance.¹⁶⁷ This often translates into problems associated with environmental justice, such as the uneven bargaining power of poorer regions vis-à-vis wealthier regions with stronger political mobilization, that may result in inadequate compensation by the disposal industry. Moreover, as discussed above, a lack of effective enforcement mechanisms, whether public or private, can also lead to internalization failures.¹⁶⁸

Given the regulatory troubles that still persist in the solid waste disposal industry, should states and municipalities attempt to preempt all enforcement and performance problems by adopting a more totalitarian regulatory regime? For instance, in *United*

163. There are citizen suits and suits that can be brought directly by the federal government under both RCRA and CERCLA. 42 U.S.C. § 6972 (2007–2008); 42 U.S.C. § 9659 (2007–2008). See also 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, 1506–07 (1995) (discussing options for and limits to internalization of waste disposal externalities).

164. See W. PAGE KEETON ET. AL., PROSSER & KEETON ON THE LAW OF TORTS §§ 86–91, at 616–54 (5th ed. 1984) (discussing the law of public and private nuisance).

165. See Engel, *supra* note 163, at 1504–06. See generally Robin R. Jenkins et al., *Host Community Compensation and Municipal Solid Waste Landfills*, 80(4) LAND ECON. 513, 526 (2004) (examining the determinants of host fee compensation disparities negotiated by large solid waste landfills and concluding that a positive correlation exists between higher host fees and the bargaining position of a community, resource availability of a firm, acceptance of sludge and problematic waste, and proximity to a community).

166. Often the fees may be offered to overcome political opposition known as NIMBYism.

167. See Been, *supra* note 144, at 1009–15 (discussing studies that reflect disproportionate sitings of locally undesirable land uses in poor and minority areas, and potential flaws in such studies).

168. For instance, some argue that tort laws impose barriers to private internalization. See Engel, *supra* note 163, at 1506–07.

Haulers, Oneida and Herkimer Counties may have quelled an array of enforcement problems when they enacted a regulatory regime that replaced the private disposal market with a public one. Should the governing bodies choose, they might additionally enact disposal requirements aimed to prevent the manifestation of *all* health or safety hazards through increased expenditures on containment, monitoring, and remedial requirements. However, communities do not seriously consider an approach to solid waste disposal whereby economic costs are secondary to all environmental and safety hazards, for the simple reason that some hazards are worth accepting.

To explain this, suppose that a community imposed neither basic operating standards for environmental protection nor remedial enforcement mechanisms. Suppose further that adopting no regulations or rules of liability would cause maximum noxious health risks to the community. Suppose however that health risks could be mitigated to a large extent through the implementation of basic safeguarding precautions, such as mechanisms to contain, monitor, and remedy serious hazards. The expected value to the community of these basic regulations is reflected by an upward sloping marginal cost curve for avoiding health risks.¹⁶⁹ Therefore, the cost of enacting a stricter regulatory regime rises exponentially after a certain point. In other words, the community acts as if it values health quality, but only up to an optimal point, after which resources would be better utilized elsewhere.

III. MAXIMIZING THE ECONOMIC EFFICIENCY OF THE DECISION IN *UNITED HAULERS*

The purpose of this section of the article is to answer some of the lingering questions left unanswered by the Court in *United Haulers* concerning the implications of the dormant Commerce Clause on flow control jurisprudence. The substance of the holding itself defines the limits of this inquiry, such that it is unnecessary to analyze the direct justifications for (entity differentiation, federalism, traditional functions) or the implications of (*Pike* balancing) a public-private distinction.

First, the distributional effects of flow control are shown through

169. The diminishing returns for additional precautionary regulations are well-documented. See, e.g., PORTER, *supra* note 21, at 59–60.

its impact on demand elasticity and producer rents. Second, concluding that public monopolies in the waste disposal industry do not always economize on transaction costs, some brief theoretical explanations are proffered for the efficiency failures. Lastly, this section examines the benefits of correcting for transaction costs to see under what circumstances flow control might increase efficiency.

A. The Fallacy of the Public-Private Distinction

Contrary to the rationale of *United Haulers*, both public and private market participants have incentives to enact flow control regulations in their favor, irrespective of aggregate local benefits. To help illustrate this point, Appendix I shows the local supply curve, S , which rises due to limited capacity and service capabilities of the public landfill. It also shows the local demand curve of landfill space, D . The price of disposal without flow control would be P_0 and Q_0 . The local landfill is limited, within the parameters of a competitive market, by demand elasticity in extracting consumer rents, as represented by the rent rectangle ABCD. However, by squelching opportunities for market substitutes, local legislation of flow control produces inelastic consumer demand. Under conditions of inelastic demand, whereby no alternatives exist, price can be set at P_3 and Q_3 , resulting in a larger redistribution of consumer surplus, as represented by the rent rectangle EFCG. Given the effects of flow control on rent distribution for favored disposal facilities, whether public or private, such facilities have strong incentives to it have it enacted.

There are two assumptions implicit in this model. First, inelasticity of demand under such circumstances depends on compliance. On the whole, an assumption of compliance is sound. There is no reason to suspect a *significant* portion of waste haulers, the direct consumers, or households and businesses, the indirect consumers, would fail to comply—especially since civil and criminal sanctions for noncompliance are typically part of flow control legislation.

Second, a political coalition must actually promulgate such legislation. If flow control, in the aggregate, increases the redistribution of consumer surplus to the advantage of waste disposal suppliers, then why might a populace permit, or not later repeal, such a law? One effortless rejoinder is Arrow's Impossibility

Theorem—that while individuals intrinsically attempt to maximize, groups may not.¹⁷⁰ A better response is that voter incentives to become well informed about non-private transaction decisions are weak given their relative power to affect such outcomes.¹⁷¹ This helps explain the potency of political rhetoric of election campaigns and interest groups.¹⁷² This is true even more in the field of solid waste management. As sexy a topic as solid waste management may be to some, it is not a private transaction individuals must contemplate because it is generally coordinated between local governments and public or private haulers. Further, the alternative method of financial support for public disposal facilities is increasing locally-imposed taxes, a subject ripe with direct political associations to which local politicians may prefer to be unassociated.¹⁷³

Related to the second assumption of legislative feasibility is the issue of burdened out-of-state disposal facilities and haulers and their apparent failure to influence localities' decisions on flow control.¹⁷⁴ The current private solid waste market is dominated by only a handful of private entities.¹⁷⁵ Mobilized and interested pressure groups that are acutely impacted by legislation are often believed to steer the outcome of such legislation to a strong degree. Yet, neither these entities nor their proxies (such as trade

170. KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963). Arrow's Impossibility Theorem basically holds that institutions can not be designed to generate all diverse preferences of individuals making social choice in a manner that is consistent with a set of reasonable conditions.

171. This concept has been particularly developed and modeled in the area of behavioral economics. See, e.g., Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 391-94 (1983).

172. *Id.*

173. State or local subsidization of a public or private disposal facility is actually the better economic alternative for protecting against market competition, both for exporting and importing localities. Unlike flow control, subsidization would protect a favored disposal facility in a net exporting locality while not subverting consumer (individual and business) gains. See PORTER, *supra* note 21. See also E. Ley et al., *Restricting the Trash Trade*, 90 AM. ECON. REV. 243 (May 2000).

174. Demonstrative of private solid waste disposers' and haulers' opposition to flow control laws are the amici curiae briefs filed in *United Haulers* by both the National Solid Wastes Management Association and American Trucking Associations, Inc. See Brief for American Trucking Association, Inc. and National Solid Waste Management Association as Amici Curiae Supporting Appellants, *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 127 S. Ct. 1786 (2007).

175. Segal, *supra* note 11 (noting that 11 private firms control approximately 43% of the waste disposal market) (citing CHARTWELL INFORMATION PUBLISHERS, INC., *Chartwell Directory and Atlas of Solid Waste Disposal Facilities* 15 (1998)).

associations) seem to have influenced the local politics of flow control.

One response to this paradox can actually be explained by the political process approach justification to the dormant Commerce Clause. The doctrine is often defended in terms of lack of political access for out-of-state interests that are burdened to the detriment of in-state interests. The textbook example of this rationale involves an in-state private industry gaining an advantage over out-of-state competition through state or local legislation.¹⁷⁶ Within the context of flow control regulations favoring public disposal facilities, an in-state *public* industry is gaining an advantage over the out-of-state disposal industry. Under those circumstances, the private disposal entities are not actually bargaining with a disinterested politician but with competition itself, i.e., a disposal industry, albeit in public.¹⁷⁷ Therefore, although the public and private entities may not be “substantially similar entities,”¹⁷⁸ the incentives to engage in rent-seeking behavior by jockeying for favorable regulations does not change.

Finally, we are left with the local governments: why might some promulgate flow control regulations where such regulations do not economize upon transaction costs? The answer, as enunciated throughout the New Institutional Economics literature,¹⁷⁹ is that a “government,” whether federal, state, or local, is not a benevolent monolith seeking to maximize total sum wealth;¹⁸⁰ rather, “government” consists of individual actors each making their own

176. See e.g., *Dean Milk Co. v. Madison*, 340 U.S. 349, 350–51, 354–56 (1951) (invalidating Wisconsin municipality regulation that prohibited the sale of pasteurized milk unless it was processed and bottled at an approved pasteurization plant located within five miles of the city because it was an undue burden on interstate commerce enacted as a protectionist measure against out-of-state competition).

177. See Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987) (discussing deadweight loss caused by both initial bargaining for or against regulation and the additional loss associated with maintaining that status quo).

178. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 127 S. Ct. 1786, 1795 (2007).

179. This movement is a direct offspring of transaction costs economics, and commonly associated with the Chicago School votaries. For a review and assessment of New Institutional Economics see POSNER, *supra* note 139, at 426–43.

180. See generally Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976) (describing how private interest groups have incentives to organize and bargain for or against certain legislative enactments given politicians’ ability to redistribute wealth generally); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON 3 (1971) (a seminal article discussing government rent creation in the context of producer cartels).

bargains with individual wealth maximization in mind.¹⁸¹ Although this concept is typically cast in terms of competing private rent-seekers bargaining with legislatures that seek political capital, and vice-versa, the political genesis of flow control regulations represents another rent-seeking dimension: intra-governmental rent-seeking.

In fact, a diverse set of local government agencies and interest groups have a vested interest in the financial viability of public disposal facilities, such as city and county public works administration, local waste safety departments, recycling and reuse departments,¹⁸² appointed civil servants, waste disposal employees, and their unions, to name a few.¹⁸³ At the local level, these public interests have incentive to mobilize and bargain, either explicitly or tacitly, for the creation or protection of governmental rents, with indispensable political capital as consideration. A successful intra-governmental mobilization, as demonstrated earlier, results in a larger redistribution of consumer surplus to the benefit of both local legislatures and the public disposal industry.

The dissent in *United Haulers* aptly recognized the possibility of such behavior, although it was not described in rent-seeking parlance:

Discrimination in favor of an in-state facility serves local economic interests, inuring to the benefit of local residents who are employed at the facility, local businesses that supply the facility with goods and services, and local workers employed by such businesses. It is therefore surprising to read in the opinion of the Court that state discrimination in favor of state-owned business is not likely motivated by economic protectionism.¹⁸⁴

181. See generally McChesney, *supra* note 177.

182. Recycling and reuse type departments could be funded even if a public disposal facility closed, but alternative sources of funding may strain municipal budgets, adding pressure for increased taxation.

183. See LUTON, *supra* note 16, at 97 (describing the local political institutions that typically have an interest in solid waste management). Although public employees and their respective unions are often strongly oppose privatization, see Moore, *supra* note 11, non-market strategies can be implemented to alleviate their criticisms and other problems associated with privatization such as sunk costs of public equipment. Such strategies include careful public-private negotiations concerning hiring criteria and options to sell. See Eugene J. Wingarter, *Refuse Collection*, in PRIVATIZATION 193, 197-203 (Roger L. Kemp ed., 1991) (describing three cities' decisions to privatize their refuse collection and disposal services).

184. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 127 S. Ct. 1786, 1807-08 (2007) (Alito, J., dissenting) (internal citations and quotations

The incentives described above, which further support the underlying assumptions of the rent-seeking model, help explain why local governments promulgate flow control.

B. Recyclable Recommendations for Courts Adjudicating Dormant Commerce Clause Challenges to Flow Control Regulations

The implications of this article on the lingering dormant Commerce Clause questions left unanswered by the Court in *United Haulers* are two-fold. First, the Court should not establish a sweeping rule of validity for all flow control regulations that require waste to be delivered to public facilities, and treat all in-state and out-of-state private haulers the same.¹⁸⁵ Such a sweeping rule would essentially condone flow control regulation where the only cognizable benefit was revenue generation. Condoning flow control in these situations, whereby transaction costs are not mitigated, is tantamount to condoning pure rent seeking behavior.

Second, and inextricably bound to the first, the Court should not afford factual deference to what local benefits are actually conferred by a given flow control regulation.¹⁸⁶ While principles of federalism and the institutional competence of the judiciary support affording deference to governments' comparisons of out-of-state burdens and in-state benefits when the burdens are unclear, the Court should not provide factual deference to governments' determinations of what local benefits are actually conferred. Providing such deference would effectively establish a sweeping rule of validity for flow control. This result would be inevitable as no state or locality would stipulate revenue generation to be the only benefit conferred by a flow control regulation.¹⁸⁷ And as illustrated earlier, flow control regulations that only

omitted).

185. *See id.* at 1790.

186. This suggestion would not be inconsistent with the holding of *United Haulers*. Although Justice Rehnquist explicitly advocated factual deference, *Philadelphia v. New Jersey*, 437 U.S. 617, 632 (1978), the opinion of *United Haulers* failed to enunciate the precise import of their *Lochner* remarks. *See United Haulers*, 127 S. Ct. at 1798.

187. *See supra* Part I.B for a discussion of potential pleading tactics localities could utilize. *See also* *Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349, 354 (1951) (“[T]hat the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, *save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods.*”) (internal citations omitted) (emphasis added).

generate revenue are inefficient forms of regulation that mainly benefit local vested interests of public disposal facilities at the expense of both local aggregate consumer gains and interstate commerce.

To clarify how a court might analyze a given case, examples may be helpful. If flow control is deemed to be passed primarily to protect the financial viability of a pre-existing landfill, it should be invalidated. Conversely, where flow control is enacted in response to a “waste crisis,” whereby high enforcement and performance problems exist creating substantial externalities, the regulation *may* actually economize on transaction costs. To be sure, in the latter example a local government would likely be better off, in the aggregate, if it employed an alternative financing method by which local consumer gains, via lower tipping fees, are not subverted.¹⁸⁸ However, the dormant Commerce Clause doctrine is not designed as a bulwark to efficiency generally, but rather to interstate protectionism specifically. Therefore, to jettison the sometimes paternalistic tendencies of those not in the position of accountable state and local governments, deference should be afforded under the “waste crisis” circumstances. But when flow control is imposed simply as a protectionist measure, whether for a favored private *or* public facility, the dormant Commerce Clause doctrine should be used to promote efficiency.

Finally, the opinions expounded above should not be summarily dismissed on account of the methodology. Rather than symbolizing an anachronism of substantive economic due process, transaction costs analysis has long been an intrinsic element of judicial thinking, especially in areas of cost-benefit analysis.¹⁸⁹ Nor should one view this methodology as a triumph of efficiency over equity—the two notions are not necessarily distinct. In nuisance law, for example, commentators do not proclaim injustice in reckoning the benefits, or lack thereof, of a defendant’s actions against harms imposed.¹⁹⁰ By the same token, equity is not

188. See *supra* note 171.

189. See Richard Posner, *Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers*, 29(2) J. LEGAL STUD. 1153, 1154 (2000) (“[Cost-benefit analysis] can be used to explain and predict some government decisions, especially decisions that are relatively insulated from the operation of interest group politics, which is true of most courts (though of the U.S. Supreme Court least of all) and of some administrative agencies in some areas.”).

190. See, e.g., *Boomer v. Atlantic Cement Co., Inc.*, 309 N.Y.S.2d 312 (1970).

sacrificed for efficiency when flow control laws that confer no benefits are struck down as unconstitutional under the dormant Commerce Clause. The use of transaction costs theory is an attempt to shed light on the alternative modes of analysis the Court left open in *United Haulers*, and their relative benefits to society. Admittedly this work does not solve the concerns over the contours of what activities are “traditionally and typically” the domain of the state or local governments, nor the issue of when a disposal facility is technically “public”—that mess must be cleaned in a later day or article.

APPENDIX A

