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

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Abstract

This article is the culmination of over a year’s work. In the summer of 2007, while clerking in the Middle District of Georgia, I had the privilege of helping decide an issue of first impression in the 11th Circuit—whether municipal “flow control” laws are valid under the dormant Commerce Clause. Basically, flow control is simply the practice of local governments restricting exportation of solid waste from their jurisdictional boundaries, and is often enacted as a financing measure for local waste disposal facilities. The validity of such laws has been hotly debated within both legal academia and the Supreme Court itself.

Complicating the matter, the Supreme Court had just released their path-breaking holding, Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S.Ct. 1786 (2007), 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 required all waste be delivered to publicly owned and operated facilities, and that treated 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. Indeed, presently no article has been published post-United Haulers that both clearly elucidates the decisions unanswered questions and attempts to set forth a model for how those ambiguities should be resolved. This article, utilizing the Coase Theorem and case precedent, is that first attempt.
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William J. Cantrell

This article, which focuses on municipal flow control regulations, has two general purposes: to demonstrate that the dormant *Commerce Clause* can foster efficiencies and equities otherwise absent without it and to offer recommends for the future applicability of the doctrine to flow control disputes. Utilizing the Coase Theorem it will be shown that municipalities should not prefer the flow control alternative to other financial alternatives. However, jettisoning paternalistic tendencies and recognizing both political realities, and federalist principles more broadly, this article advocates judicial enforcement of the dormant *Commerce Clause* as a “second best” option for business regulation. Therefore, given that the precise framework set forth in *Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S.Ct. 1786 (2007) is still unclear, this article casts doubt on the soundness of a sweeping rule of validity for, or factual deference of, 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.

**Introduction**

**The Dormant Commerce Clause**

As necessary background, a brief description of the dormant *Commerce Clause* and flow control regulations should be provided. The *Commerce Clause* provides that “Congress shall have Power ... to regulate Commerce with foreign Nations, and among the several States, and

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with the Indian Tribes.” 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 that same power. This implicit Constitutional restriction upon the States has become known as the “dormant” or “negative” Commerce Clause doctrine. Thus, at its most basic level, the dormant Commerce Clause prevents states from enacting laws that would impede interstate commerce to the benefit of the enacting state.

A two-tier analysis is currently implemented to determine whether a statutory scheme violates the dormant Commerce Clause. Under the first tier, if the statute is found to discriminate against interstate commerce on its face, or has the effect of discriminating against out-of-state interests to the benefit of in-state economic interests, the statute will generally be struck down as a per se constitutional violation. If the statute passes the per se analysis, it may nevertheless be found unconstitutional under the second tier of analysis, commonly referred to as the Pike balancing test. Here, the question is whether the ordinance imposes a burden on interstate commerce that is “clearly excessive in relation to the putative local benefits.”

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2 U.S. Const., Art I, § 8, cl. 3.
5 Id.; There is a narrow exception to the rigid application of the per se rule to a statute—if it advances a legitimate local interest that can not be fulfilled by other reasonable nondiscriminatory alternatives, Maine v. Taylor, 477 U.S. 131,—but this exception is rarely invoked successfully by states.
7 Id.
Flow Control Regulations: One Man’s Waste is Another’s Treasure

Flow control, in the generic sense of the term, is simply the practice of local governments restricting exportation of solid waste from their jurisdictional boundaries. Such laws are enacted as financing measures for protecting both new and pre-existing waste disposal sites from competitive pressures of the marketplace. Limited by means and extent of taxation, local governmental entities, such as municipalities, counties, and special districts, must form 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. But even when these services are not privatized entirely, local governments

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8 Often the power to implement flow control legislation is granted to municipalities by their respective state. And, structuring flow control legislation is not restricted to municipalities; quite often it may be the county, as opposed to the municipality, or sometimes both jointly, that implements such legislation.

9 The term “waste disposal sites/facility” is generically used and meant to encompass a range of facilities, such as transfer stations, waste-to-energy facilities, incinicators, 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/epaoswer/non-hw/muncpl/landfill/landfills.htm (last visited June 9, 2008). The subject of hazardous waste is omitted from discussion as it is governed by a separate and distinct regulatory regime.

10 No doubt that flow control is adopted, sometimes, with the ultimate objective of protecting public health and safety. See, e.g., 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. 157,166-69 (2007) (arguing for a deferential review under the Pike balancing test, finding the current analytical paradigm lacks sensitivity to the needs of local governments struggling with waste disposal issues). But, so is the opposite—municipalities may implement flow control for purely financial survival. The point is simply that flow control is enacted primarily for financial protection, irrespective of whether that protection is an end in itself or a means to accomplish other, indirect, purposes.

11 Stephen Moore, How Contracting Out City Services Impacts Public Employees, in CONTRACTING OUT GOVERNMENTAL SERVICES 211, 212 (Paul Seidenstat ed., 1999) 211, 211-12. The percent of publicly-owned landfills declined from 85 percent in 1984 to 64
often, at a minimum, may 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. Typical of such contracts are “put or pay” clauses, whereby the local government guarantees a minimum flow of waste, often at set tipping fees, to the newly constructed facility, otherwise the local government must pay the private company an amount equal to the difference between the required amount and actual amount received. Under these and similar structural arrangements, a flow control ordinance provides local governments protection against competing outlets for waste disposal, especially if the set tipping fees are above 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.\textsuperscript{16}

\begin{itemize}
\item \textsuperscript{13} Waste disposal facilities can encompass a range of facilities, such as basic landfills, incinerators, and transfer stations to more advanced processing facilities. For a description of the different types of financial and structural arrangements localities sometimes form with private entities to collect waste and/or dispose of waste see Eric S. Petersen & David N. Abramowitz, Municipal Solid Waste Flow Control in the Post-Carbone World, 22 FORDHAM Urb. L.J. 361, 364 (1995).
\item \textsuperscript{14} A “tipping fee” is the charge levied upon a quantity of waste, usually per ton, received at a waste processing or disposal facility.
\item \textsuperscript{15} Larry S. Luton, The Politics of Garbage: A Community Perspective on Solid Waste Policy Making, 133 (Bert Rockman ed.,Unv. of Pittsburgh Press 1996).
\item \textsuperscript{16} See, e.g., Quality Compliance Serv., Inc., v. Dougherty County, 2006 U.S. Dist. LEXIS 97435, 1-4 (upholding local flow control ordinance that was enacted after the opening of a new private transfer station was projected to hinder the financial viability of the local landfill, which was the funding source for local recycling and reuse programs).
\end{itemize}
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—to ensure adequate revenue generation.

During the last two decades flow control laws have become an increasingly popular financing tool for local governments for a number of reasons. For one, through the Resource Conservation and Recovery Act (“RCRA”) the federal government provided incentives to states to implement solid waste management plans\(^1\) that impose stricter minimum standards for waste disposal and encourages recycling and reuse programs.\(^1\) Faced with the option of renovating at a hefty price or contracting out disposal services to private firms, many municipalities choose the latter. In fact, between the period of the earlier 1970’s until the late 1980’s the number of landfills in the United States dropped from approximately 20,000 to 6,000\(^1\), and to only 1,654 by 2004.\(^2\) Moreover, many of the states that decided to keep their pre-existing landfills open did so partly on the faulty prediction that demand would be met through a rise in aggregate waste

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\(^2\) JAMES E. MCCARTHY, CRS REPORT FOR CONGRESS, INTERSTATE SHIPMENT OF SOLID WASTE: 2007 UPDATE, 12 (2007) (hereinafter CRS REPORT, INTERSTATE SHIPMENT OF SOLID WASTE)
production.\textsuperscript{21} During this same period the private sector began introducing new integrated disposal methods\textsuperscript{22} and expanding existing landfill space which, coupled with the closing of smaller local landfills, has led to the regionalization of landfills.\textsuperscript{23} Therefore, to guarantee sufficient financial revenues, whether necessitated purely by intensified competition or by a need to implement recycling and reuse programs without providing subsidies, flow control laws are implemented.\textsuperscript{24} This phenomenon has given a literal twist to the adage that one man’s waste is another’s treasure.

**First Glance: United Haulers and Potential Extensions**

Until recently the Supreme Court has generally prohibited waste restriction regulations under the dormant *Commerce Clause*.\textsuperscript{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 are within a towns jurisdiction.\textsuperscript{26}

\begin{itemize}
  \item \textsuperscript{21} See Porter, supra note __, 110.
  \item \textsuperscript{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 transport intermediaries through ownership of transfer stations. Id.
  \item \textsuperscript{23} CRS REPORT, INTERSTATE SHIPMENT OF SOLID WASTE 12. This trend towards regionalization is projected to continue, leading to even more interstate shipment of solid waste. Id.
  \item \textsuperscript{26} Carbone, 511 U.S. at 391.
\end{itemize}
Therefore, recalling the *per se* analysis, the laws unconstitutionally discriminate against interstate commerce by prohibiting the free flow of municipal waste, on their face or in effect. Hardly surprising, many states and commentators alike have chastised the doctrine. States and localities view it as a practical limitation on their ability to solve financial and environmental problems in the waste disposal industry\(^\text{27}\), while droves of commentators view it as judicial enshrinement of laissez-fair economics, harkening back to an era of substantive economic due process.\(^\text{28}\) To the sure, the calls of criticism concerning the application of the dormant *Commerce Clause* to flow control have not been homogenous. Some entirely denounce the dormant *Commerce Clause* as a pernicious doctrine, lacking textual, structural, and economic

\[^{27}\text{See, e.g., United Haulers, Amicus Brief, Brief for the States of New York, et. al.}\]

\[^{28}\text{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, 1201 (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.”).}\]
foundation, and entails the Court subverting state policy choices in place of its own. Others do recognize the doctrine’s inherent existence and efficacy, but still chide the *per se* tier arguing its application blindly prefers judicial expediency over any analysis of benefits derived from flow control.

Most recently the doctrine’s antagonists won the day in the landmark case, *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S.Ct. 1786 (2007). In that case, the Court held that county flow control ordinances that required all waste be delivered to facilities owned and operated by a state-created public benefit corporation, and that treated all in-state and out-of-state private haulers the same, do not discriminate facially or in effect for purposes of the dormant Commerce Clause. The facts in *United Haulers* were explicitly distinguished from those found in *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 392 (1994), which, in contrast to the former, involved a private business entity receiving the favored local

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29 See *United Haulers*, 127 S.Ct. 1799-1803 (Thomas, 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 __, at 1279-89 (using the Prisoners Dilemma game to advocate a three-step test approach focusing on actual harm to 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, Concurring).

31 Given many of the doctrine’s strongest antagonists have come from the Supreme Court itself (Justice’s Rehnquest, Blackman, Scalia, Thomas, and now, perhaps, Chief Justice Roberts), the decision was almost predictable. Also see Richard J. Roddewig and Glenn C. Sechen, *Municipal Solid Waste: The Uncertain Future of Flow Control A Municipal Perspective*, 26 Urb. Law. 801, 815 (1994), prolifically suggesting “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.
benefits.\textsuperscript{33} Thus, under this public-private distinction a state or municipality will not be subject to \textit{per se} invalidity if the ordinance 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 the state and local government’s traditional role of managing waste disposal.\textsuperscript{34} Importantly, when balancing local benefits against interstate burdens, the Court also referenced that revenue generation for the purpose of sustaining the economic viability of a publicly-owned disposal facility is a legitimate benefit to be factored.\textsuperscript{35}

In deciding \textit{United Haulers} it seems clear that the Court has signaled a shift in dormant \textit{Commerce Clause} jurisprudence. Whether this shift represented a fundamental crack in the vanguard of \textit{per se} invocation, or whether it is limited to flow control, remains yet to be seen. One prospect is certain though—astute litigators will vehemently use the facts and reasoning of \textit{United Haulers} to fit future cases.\textsuperscript{36} Indeed, some commentators have already pointed to areas such as public water rights\textsuperscript{37}, contractual regulation of energy facilities\textsuperscript{38}, and state exemption of

\begin{itemize}
\item 511 U.S. at 387.
\item \textit{United Haulers}, 127, S.Ct at 1796.
\item \textit{Id.} at 1798.
\item \textit{See, e.g., State of Alabama Dep’t of Revenue v. Hoover, Inc.}, --So. 2d--, 2007 WL 2460086, 1, 4-5 (Ala. Civ. App.) (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 \textit{Commerce Clause} in light of the \textit{United Haulers} decision. This argument was summarily discounted, the appellate court refusing to extend \textit{United Haulers} in the face of direct authority by the states highest court, and adding “\textit{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.”)
\end{itemize}
interest exclusively for in-state municipal bonds\textsuperscript{39} as potential areas for extension. At a minimum, the decision inspires a plethora of unanswered questions concerning the precise contours of the holding itself.\textsuperscript{40} As is often the case with controversial landmark decisions that split the Court,\textsuperscript{41} more questions may have been raised than answers provided—which of course makes room for healthy scholarly debate.

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 dormant \textit{Commerce Clause} was to creative regulations by states and localities attempting to evade the doctrine pre-\textit{United Haulers}. Part II of this article, after explaining the Coase Theorem and the fundamental role transaction costs play in regulatory policy analysis, 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 inhibiting a frictionless market, Part III of the article will compare different existing regulatory alternatives against the ideal, concluding that the dormant \textit{Commerce Clause} can be a “second-best” form of regulation.


\textsuperscript{39} Ethan Yale & Brian Galle, \textit{Muni Bonds and the Commerce Clause after United Haulers}, 115 TAX NOTES 1037 (June 11, 2007).

\textsuperscript{40} \textit{See infra} Part II, \textsection.

\textsuperscript{41} The \textit{United Haulers} majority opinion, written by Chief Justice Roberts, was joined in full by Justice’s Souter Ginsburg, and Breyer. Justice’s Scalia and Thomas filed separate concurrences. Justice Alito filed a dissenting opinion, joined by Justices Stevens and Kennedy. 127 S.Ct. at 1789-90.
Part I

This Part provides a genealogical landscape of Supreme Court precedent on the application of the dormant *Commerce Clause* to governmental waste disposal restrictions. The purpose of this survey is to demonstrate the Court’s rational for typically invalidating such restrictions. The elucidation of the rational is necessary, as it will later 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*, 511 U.S. 383 (1994) and, most recently, *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Management Authority*, 127 S.Ct. 1786 (2007). However, the doctrinal foundation on which those two cases were decided owes to their regulatory analogue—waste import restriction precedent. Consequently, to gain a complete understanding of the Court’s justifications for their rulings on waste disposal cases, a brief synopsis of the four waste import restriction cases is provided.

**Philadelphia and its Prodigies**

The Court first confronted the legality of waste restrictions in the landmark case of *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). In that case New Jersey had enacted a general prohibition against importation of out-of-state waste to its landfills.\(^{42}\) New Jersey argued the

\[^{42}\text{The statute read: “No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner [of the State Department of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State.” N.J.Stat.Ann. § 13:11-10 (West Supp. 1978), in Philadelphia, 437 U.S. at 618-19, n. 1.\]
regulation served the environmental purpose of mitigating health and safety concerns by ensuring adequate landfill space. Although the asserted purpose of environmental protection was not uncontested, the Court found the question to ultimately be immaterial, finding “. . . whatever New Jersey's ultimate purpose, it may not be accomplished 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.” In effect then, the Court set forth a hard and fast rule that States may not erect statutory walls around their borders blocking waste imports based only on their out-of-state origins.

The next waste restriction case to come before the Court was Chemical Waste Management v. Hunt, 504 U.S. 334 (1992). Challenged was an Alabama statute designed to impede the volume of imported hazardous waste by charging an additional fee on hazardous waste generated out-of-state and disposed in-state. Functionally the statute was equivalent to

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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.” Philadelphia, 437 U.S. at 625-26.

45 Philadelphia, 437 U.S. at 626-27.

46 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.” § 22-30B-2(b), in Chemical Waste Management, 504 U.S. at 338-39.
that in *Philadelphia*, save 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.  

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

Decided with *Chemical Waste Management*, the statute at issue in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep’t of Natural Resources*, 504 U.S. 353 (1992), suffered from similar constitutional infirmities as that in *Philadelphia*. Michigan enacted a statute that prohibited private landfill operators from accepting solid waste that originated outside the *county* in which their facilities were located. Thus, Michigan creatively attempted to avoid the *per se* application 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

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*Chemical Waste Management*, 504 U.S. at 342.

*Id.* at 343-44.

*Id.* at 345.

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.” § 299.413a., in *Fort Gratiot*, 504 U.S. at 355.
counties to equally prohibit waste imports from both other in-state counties and states.\(^{51}\) The Court was not persuaded.\(^{52}\)

Recognizing that Michigan was attempting to do by county what it otherwise 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.”\(^{53}\) Accordingly, the Michigan statute was invalidated under strict scrutiny finding it indistinguishable from earlier precedent.\(^{54}\)

Finally, the most recent waste import restriction case to come before the Court was *Oregon Waste Systems v. Dep’t of Envtl. Quality*, 511 U.S. 93 (1994). 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 another state.\(^{55}\) Oregon’s main defense to the statute

\(^{51}\) *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.

\(^{52}\) *Id.* at 363.

\(^{53}\) *Id.* at 361. As a caveat, the dormant *Commerce Clause* would presumable 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. The reason for this is evident in the doctrine’s purpose—to protect *interstate* commerce, not intrastate commerce. *See Oregon Waste Systems v. Dep’t of Envtl 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’Conner. *See Carbone*, 511 U.S. at 407 (O’Conner, Concurrence). For further discussion, see *infra*, p., and n.. (discussing O’Conner’s tier-two balancing test analysis of flow control regulation and its potential “balkanization” affect on the interstate shipment of waste.)

\(^{54}\) *Id.* at 363.

\(^{55}\) *Oregon Waste Systems*, 511 U.S. at 96. The private in-state landfill operators, as opposed to another state, actually challenged the statute because the surcharge on out-of-state
was that it only imposed a cost-based surcharge, designed to compensate the state for disposing of out-of-state waste. 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 they receive any benefit commensurate with the additional surcharge. 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.

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56 In Chemical Waste Management the Court left open the possibility of a valid discriminatory surcharge if justified on a cost-basis. See 504 U.S. at 346, n. 9. Describing the narrow exception available under the compensatory tax doctrine, the Court 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.” Oregon Waste Systems, 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 and 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 HAMLINEL. Rev. 451, 458-62 (1998).

57 Oregon Waste Systems, 511 U.S. at 100.

58 Id. at 105.

59 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).
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. Ironically, however, it would be the consistent dissenting opinions by former Chief Justice Rehnquist, later joined by Justice Blackmun, which would ultimately plant the philosophical seeds underpinning current flow control jurisprudence. Therefore, to gain an adequate appreciation of the constitutional debate stirring among commentators, and within the Court itself, the dissents are worthy of elaboration.

Rehnquist’s 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. First, apparent when one compares the four dissenting opinions is a coherent, albeit rudimentary, application of the tier-two balancing test. Rather than viewing the import restriction laws as a form of local economic protection, they enable the states to cope with environmental and safety concerns innate in evaporating landfill space. Given those legitimate concerns, the argument runs, it is judicially oppressive to force upon states a “Hobbesian” dilemma between maintaining no landfills or, as the sole alternative, accepting interstate waste from any and all. Diametrically opposed to that per se result, Rehnquist would

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60 Justice Blackmun had not joined the Court when it decided the waste restriction cases prior to *Fort Gratiot*. Justice Burger joined Rehnquist’s dissenting opinion in *Philadelphia*, but had left the Court prior to the later cases.

61 *Philadelphia*, 437 U.S. at 632

62 *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
defer to the states judgment concerning the waste restrictions underlying motivation, thus
loading the dice in favor of constitutional legality.\textsuperscript{63}

Second, when determining whether a waste import restriction is predicated upon local
economic protectionism, passage of it as but one part of a more general, comprehensive scheme
should serve as a factor indicative of answering in the negative.\textsuperscript{64} Curiously, in both \textit{Fort Gratiot} and \textit{Oregon Waste Systems}, the cases in which this proposition is asserted, lacking is any
substantive discussion of a justification. Nevertheless, this strain of analysis turns out to be quite
potent as it later reflected in \textit{United Haulers}.

To be sure, the notion does ring innately plausible upon first reflection that a waste
import restriction law is less likely to be enacted for only local economic protectionism if a state
troubled itself to foist it within a comprehensive waste disposal scheme. Indeed, if on the whole
legislation talks like safety, and walks likes safety, then it must be about safety! But is this
necessarily true? Of course, the answer to the leading question is, no. Perhaps, serving as
camouflage, the comprehensive waste disposal “safety” package is but typical, run of the mill
municipal regulations, with the enactment of a waste import restriction serving as the primary

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\textsuperscript{63} One reading Rehnquist’s dissents on the waste import cases 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 do not
likely represent a rejection of free trade ideals, but rather embrace a political philosophy
of Jeffersonian federalism. Variegated throughout the Rehnquist Court decisions on
disputed constitutional norms can be found a common thread strong in state sovereignty
tones. \textit{See, e.g.}, Alden v. Maine, 527 U.S. 706 (1999) (interpreting the 11\textsuperscript{th} Amendment
Sovereign Immunity to extend to citizens suits against their own state); City of Boerne v.
Flores, 521 U.S. 507 (1997) (limiting Congresses enforcement powers under the 14\textsuperscript{th}
Amendment); U.S. v. Lopez, 514 U.S. 549 (1995) (limiting Congresses powers under the
\textit{Commerce Clause}).

\textsuperscript{64} \textit{Fort Gratiot}, 504 U.S. at 369-70.
objective. Or, perhaps more realistically, a state or municipality could, at a minimum, pass a waste restriction law for local economic protectionism but claim it a simple *addition* to an allegedly pre-existing comprehensive scheme.

Third, the political process is claimed to be another factor militating in favor of waste import restriction laws.\textsuperscript{65} In the context of *Fort Gratiot*, Rehnquist suggested the law worked to the disadvantage of the Michigan “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.”\textsuperscript{66} Thus, protectionism concerns should be abated given that the states own citizenry will be hurt by increases in cost of consumption, i.e., increased disposal fees.\textsuperscript{67} The soundness, or lack thereof, of that rational will be explored *infra*, Part III, as it too becomes controversial in the context of flow control regulations in *United Haulers*.

Finally, in *Oregon Waste Systems*, Rehnquist prophesized (inspired?) the coming of a debate that would take center-stage in flow control jurisprudence: whether a public-private distinction should exist among disposal sites for purposes of the dormant *Commerce Clause*.\textsuperscript{68}

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\textsuperscript{65} See, e.g., *Fort Gratiot*, 504 U.S. at 370.

\textsuperscript{66} *Id.* (internal citations omitted).

\textsuperscript{67} *Id.*

\textsuperscript{68} *Oregon Waste Systems*, 511 U.S. at 114-15 (“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.*
He began by noting, “[w]e 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.” 69 Capitalizing upon that ambiguity, Rehnquist offered his own advice, surmising that the state participation doctrine, an exception to the dormant Commerce Clause, vests discretion to state or locally owned disposal facilities in both accepting waste and fees charged. 70

The state participation doctrine, whereby the state acts as a participant in a market as opposed to regulating a market, allows a state or locality to discriminate against interstate commerce like a private entity. 71 Thus, if a state regulation required state-owned landfills to not accept out-of-state waste, all else being equal, the regulation would be in conformity with the state participation doctrine because the facilities are directly participating in the disposal market. 72 Rehnquist’s suggestion therefore seems on mark that the exception would allow a publicly-owned disposal facility to not accept out-of-state solid waste or to charge differential taxes. Why then have states not pulled that doctrinal arrow from their constitutional quiver to resolve their waste disposal dilemmas? Simply put, the Court’s waste import precedent involved

69 Id. at 114 (citing Philadelphia, 437 U.S. at 627, n.6.)

70 Oregon Waste Systems, 511 U.S. at 114.


72 See Swin Resources Sys. v. Lycoming, 883 F.2d 254, 250-51 (3rd Cir. 1989); accord LeFrancois v. State of Rhode Island, 669 F.Supp. 1204, 1211 (D.R.I. 1987) (stating that although Rhode Island’s statute deprived out-of-state disposers from 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.”
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. Consequently, while states are constitutionally vested with a degree of discretion for regulation of waste imports, that regulation is seriously limited.

Applying the state participation doctrine to flow control, the regulatory analogue of waste import restrictions, conceptually parallel results are seen. For example, if a state or locality owned both the disposal facility and waste hauling entity, it could freely choose, as a market participant, to deliver all waste to the public facility. That constitutional right makes sense, as private haulers regularly structure equivalent intra-firm arrangements. However, a state or locality could not institute a blanket regulation requiring all waste haulers, public and private alike, to deliver waste to particular disposal facility because it would then be considered a market regulator. 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, as 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.

73 See supra, Part I, _._.

74 Some argue the market participate 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 V. St. of Rhode Island, 669 F. Supp. 1204 (A.R.I. 1987).

75 CRS REPORT, INTERSTATE SHIPMENT OF SOLID WASTE, supra note __, at 12.

76 See SSC Corp. v. Town of Smithtown, 66 F.3d 502, 512-13 (2nd Cir. 1995); USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272, 1982-83 (2nd Cir. 1995); Atlantic Coast Demolition and Recycling, Inc. v. Bd. Of Chosen Freeholders, 48 F.3d 701, 717 (3rd 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).
Carbone and United Haulers: Flow Control Jurisprudence

C & A Carbone, Inc. v. Clarkstown

In 1989 the town of Clarkston, New York, arranged to close its landfill and build a new solid waste transfer station that would process waste for disposal. 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. To ensure the local private contractor recouped its investment a “pay or put” clause was negotiated in which the town guaranteed a minimum waste flow of 120,000 tons per year, for which the contractor could charge set tipping fees of $81 per ton. However, the arrangement would not be feasible in an open and competitive market: both a guaranteed minimum waste flow and a price set higher than market price were needed, but setting the latter would prevent the former. The town’s solution was to enact a flow control ordinance. C & A Carbone, a similar processing facility in the town that under the new ordinance was required to deliver its processed waste to the above facility, challenged the ordinance claiming it violated the dormant Commerce Clause.

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77 Error! Main Document Only. 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. Carbone, 511 U.S. at 387. For a through exegesis of Carbone, see Mank, supra note __, at 168-78.

78 Carbone, 511 U.S. at 387.

79 Id.

80 Id.

81 Id.

82 Id. at 387-88.
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.” The ordinance was easily found to affect 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. In addition, the ordinance deprived potential out-of-state processing competition from access to the local market. Accordingly, the ordainy was found per se invalid, discriminating in effect by, “[squelching] competition in the waste-processing service altogether, leaving no room for investment from outside.” Nor did the Court find it material that both in-state and out-of-state processors were covered equally by the ordinance. 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.

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83 Carbone, 511 U.S at 394.
84 Id. at 389.
85 Id.
86 Id. at 392.
87 Id. at 391-92.
88 Carbone, 511 at 393-94. In Concurrence, O’Conner, proffered another alternative by jiving the town could drop the tipping fee for processing down to a competitive price. Id. at 405-06 (O’Conner, concurring).
United Haulers, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.

Decided in 2007, United Haulers, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.,\(^89\) unquestionably provides a new dynamic for litigating the dormant Commerce Clause.\(^90\) 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.”\(^91\) The Authority, unlike the quasi-public facility in Carbone, was owned from the initial time of incorporation directly by the state.\(^92\) The Authority was created because of a perceived solid waste “crisis,” with problems ranging from state regulatory violations by private landfill operators to price fixing, pervasive overcharging, and the influence of organized crime.\(^93\)

The mandate of the Authority was to “collect, process, and dispose of solid waste generated in the Counties.”\(^94\) To augment the standard functions performed by waste disposal facilities, the Authority also provided a gamut of additional services such as sophisticated recycling, composting, household hazardous waste disposal, and other services.\(^95\) The tipping fees charged were, therefore, significantly higher than those charged for waste disposal on the

\(^{89}\) 127 S.Ct. 1786.

\(^{90}\) See supra, __, for novel applications of United Haulers that have already been suggested by commentators.

\(^{91}\) The public benefit corporation, known as the Oneida-Herkimer Solid Waste Management Authority (“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.

\(^{92}\) Id.

\(^{93}\) Id.

\(^{94}\) Id. (internal citations omitted).

\(^{95}\) Id.
open market. As a consequence, the flow control ordinance was enacted to prevent waste haulers from delivering collected waste to facilities with lower tipping fees. Otherwise, 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. In sum, the facts closely mirror those in Carbone, except that the waste disposal facility was unquestionably public.

The Court prefaced the opinion by noting that the “only salient difference” between Carbone and United Haulers was the public-private distinction between what entity owned and operated the waste processing facility. By judicial fiat the Court then announced that this distinction was “constitutionally significant.” The opinion offered three “compelling reasons that justify” treating laws that clearly benefit a publicly-owned and operated waste processing

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96 United Haulers, 127 S.Ct at 1791.

97 Id.

98 Id.

99 Quoting the lower court, the 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 261 F.3d 245, 259 (2nd Cir. 2001)).

100 United Haulers, 127 S.Ct. at 1790.

101 To be fair, the characterization of the holding as a “feit” may be a bit aggrandizing given the dormant Commerce Clause itself was of judicial origins, rather than grounded explicitly in positive law. The point, however, is simply that, save Rehnquist’s allusions in Oregon Waste Systems, and explicit references in the Carbone dissent, this distinction had not previously been recognized over the course of the doctrine’s long existence.

102 United Haulers, 127 S.Ct at 1790.
facility over private ones differently than laws favoring in-state private processing facilities over out-of-state facilities.\textsuperscript{103}

First, public and private businesses should not be categorized together because, “[c]onceptually . . . any notion of discrimination assumes a comparison of substantially similar entities.”\textsuperscript{104} State and local government entities are not substantially similar to their private counterparts because, unlike private entities, government is vested with the responsibility of protecting the health, safety, and welfare if its citizens.\textsuperscript{105} 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.”\textsuperscript{106}

Second, the contrary approach would lead to undue judicial encroachment into state and local policy decisions reserved for the legislative domain.\textsuperscript{107} Reminiscent of earlier Rehnquist like undertones, the Court added that the judiciary is condoned 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.”\textsuperscript{108}

Third, judicial restraint is of particular importance in this case since “[w]aste disposal is both typically and traditionally a local government function.”\textsuperscript{109} The importance of this function

\begin{itemize}
\item[\textsuperscript{103}] Id. at 1795-97.
\item[\textsuperscript{104}] Id. at 1795 (internal citations omitted).
\item[\textsuperscript{105}] Id.
\item[\textsuperscript{106}] Id. at 1795-96.
\item[\textsuperscript{107}] United Haulers, 127 S.Ct at 1796.
\item[\textsuperscript{108}] Id.
\item[\textsuperscript{109}] Id.
\end{itemize}
is underscored by language in RCRA stating that “collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies.”

Finally, attempting to reconcile the holding on grounds other than a public-private distinction, the Court claimed “the most palpable harm by the ordinance—more expensive trash removal—is likely to fall upon the very people who voted for it.” Under this familiar political process principle, some ancillary burdens to out-of-state interest are deemed tolerated when the populace of the regulating state are themselves acutely burdened.

However, the Court’s reliance on the political process principle is misplaced for two reasons. First, its application in this context is inconsistent with the Court’s own precedent generally and is at odds with Carbone directly. The Court goes far in demonstrating this point itself when it initially declared the public-private distinction to be the only “salient difference” between United Haulers and Carbone. Given that the two cases are factually congruent, save technical ownership over the waste processing facilities, the citizens of Clarkston would have

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110 Id. (internal citation omitted). Whether out of sincere belief or out of respectful comradeship, the Court did not opine RCRA as Congressional authorization of flow control, or overly emphasize the statute, as former Justice O’Conner had previously discussed its impact at length in her Carbone concurrence. See Carbone, 511 U.S. at 407-10 (Concluding that the statutory language of RCRA, “neither individually nor cumulatively rise to the level of the ‘explicit’ authorization required by our dormant Commerce Clause decisions.”) Id. at 409. The opinions of most commentators are consonant with O’Conners. See, e.g., Mesnikoff, supra note __, 1234.

111 United Haulers, 127 S.Ct. at 1797.

112 See e.g., Fort Gratiot, 504 U.S. 361-63; Dean Milk Co., v. City of Madison, Wis. 340 U.S. 349, 354, n. 4 (invalidating 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).

113 United Haulers, 127 S.Ct at 1790.
been similarly burdened by their ordinance in terms of increased price for trash removal. 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.”

Second, and as will be discussed more fully in Part III, the political process approach is unmoored from socioeconomic realisms 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.

Having concluded the flow control law did not discriminate per se, the Court then considered whether it nevertheless was invalid under the Pike balancing test. In terms of local benefits conferred, the Court decided that “while revenue general is not a local interest that can justify discrimination against interstate commerce . . . it is a cognizable benefit for purposes of the Pike test.”

While in the same breath however, the Court made clear that the ordinances were more than simple financing tools. Rather, the flow control law made possible an “integrated package of waste-disposal services” that conferred “significant” health and environmental benefits by improved incentives to, and enforcement of, recycling.

In terms of burdens imposed on out-of-state business, the Court noted that the Second Circuit referred to, but stopped short of endorsing, a “rather abstract harm” that may exist from

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114 Carbone, 511 U.S. at 391.
115 See infra, ___.
116 United Haulers, 127 S.Ct. at 1797.
117 Id. at 1798 (internal citations and quotations omitted).
118 Id.
119 Id.
the ordinance effectively removing waste generated in the two counties from the national marketplace for waste processing services. However, in a dissenting opinion by Justice O’Conner in *Carbone*, she argued 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.”

The Court conveniently side-stepped this debate by simply declaring that “any arguable burden” does not clearly exceed the public benefits conferred.

To ensure the significance of this case was not overlooked, the Court concluded with an austere forewarning, wrapped in the dreaded judicial “Lockner” expletive, that will surely be quoted ad nauseum in future briefs. The Court stated that when considering challenges to laws that favor certain public entities it will give deference as “[the challenges] are invitations to rigorously scrutinize economic legislation passed under the auspices of the police power.”

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

121 *Carbone*, 511 U.S. at 406 (internal citations omitted). *But cf.* Mcgreal, *supra* note 22, 1279-81 (arguing game theory disproves the neoclassical economic assumption that interference with interstate competition will necessarily harm interstate commerce). *See also* 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). The problem with O’Conner’s view may not be with her economic postulations, but with the untoward practical results of such an approach. Under her approach any and 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 ordinances benefits and burdens—burdens not born by the ordinance itself but, rather, from the possibility that similar ordinances in other jurisdictions would excessively burden interstate commerce in toto.

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

123 *Id.* at 1798
And, although the Court “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.”124

**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 divided into those applicable to the public-private distinction generally and questions on flow control laws specifically. First, as a general question, is a typical and traditional government function a requirement or only a factor to be considered under this new distinction? And, at what threshold does a government function become both typical and historical? Of course both of the previous questions are founded on the assumption that the holding is actually amenable to extension beyond the subject of flow control.

Second, in the context of 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, thus it was considered “public.”125 In *Carbone* the town of Clarkston did not own or operate the waste processing facility, and although a contract existed to transfer ownership after five years, it was nevertheless deemed “private.”126 In between those two factual patterns, however, an array of possibilities exists for structuring ownership.127 For example, what if a state or municipality directly owned, but did not operate, a waste processing

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

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

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

127 *See* Petersen & Abramowitz, *supra* note __.
facility? And if that were sufficient, what if the state or municipality leased the waste processing facility, while retaining only a reversionary interest? Clearly the direction of these hypothetical questions is 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, passed during a solid waste “crisis,” made possible an “integrated package of waste-disposal services” that conferred “significant” health and environmental benefits by improved incentives to, and enforcement of, recycling. The question the Court must have recognized, but purposely left open, is whether revenue generation alone is a sufficient benefit conferred? For example, must a flow control law be passed because of a solid waste “crisis”? Given the majorities concluding benediction on Locknerizing, this is unlikely. But what outcome when a county or municipality enacts flow control simply to protect the financial viability of a disposal facility? Furthermore, does the type of disposal facility, whether a landfill, incinerator, or processing facility, matter?

These vital questions are not mere theoretical exercises in higher erudition. States and local governments are actively seeking means to finance their ailing disposal facilities in light of the trend towards regionalization of the disposal industry, which has brought competitive pressures from increasing trade in interstate commerce. As designed, the decision will provide breathing room to state and municipal governments from the previously tight strictures of the dormant Commerce Clause’s application to waste restriction regulations, but concomitantly risks littering the doctrine’s jurisprudential path with a near Kafkaesque sense of direction for lower

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

129 *See CRS REPORT, INTERSTATE SHIPMENT OF SOLID WASTE*, *supra* note __, at 12.
courts. The purpose of the next two parts of this article is to take an initial step towards cleaning up that mess.

**Part II**

The purpose of this part is twofold: First, an introduction to the Coase Theorem is provided to demonstrate the fundamental role transaction costs should play in regulatory policy analysis. Those already familiar with the transaction costs paradigm may wish to either skim the following section or proceed to the subsequent section. Second, a theoretical “ideal” waste disposal market is described, in which transaction costs are not accounted. In such a theoretical frictionless market governmental regulations, which include legal institutions themselves, would be unwarranted. The purpose of this economic thought experiment is not to serve as a starting point towards some inevitable liassez-faire teleology. Rather it elucidates just how diverse the transaction costs could be in an unregulated municipal waste disposal market. When the transaction costs are high, so as to prohibit an efficient outcome, the door is left open to comparing alternative regulatory methods of economizing on those prohibitive forces. Ultimately this will allow for an assessment of how *United Haulers* may affect the dormant *Commerce Clause*, and in turn, the efficiency of the municipal solid waste disposal market.

**The Coase Theorem**\(^{130}\)

The Coase Theorem essentially posits that if there are no transactions costs\(^ {131}\) the law does not matter.\(^ {132}\) To illustrate this principle of invariance take the perennial example of a

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The doctor and confectioner, both who operate adjacently in the same building. The doctor provides services worth 60, but must have quite. The confectioner provides services worth 40, but the baking machinery is loud. Now further suppose that the confectioner can sound proof the walls for 20. If the confectioner is liable, it will sound proof the walls for a cost of 20 while still gaining 20 in net. As shown, this liability regime leads to an economically efficient result: the doctor produces services worth 60 and the confectioner is still profitable at 20, with a sum total of 80.

The novel insight of the Coase Theorem is that in the absence of any liability the two parties will nevertheless bargain to the same efficient outcome. The source of this insight is gained from framing the problem of harm as a problem that is reciprocal in nature. In other words, although the doctor is harmed by the confectioners work, the inverse is also true—the confectioner is harmed by the doctor requiring silence. For example, on first impression one might conclude that, absent liability, the confectioner will not sound proof his walls. But that is incorrect. The confectioner will sound proof his walls because the doctor will bargain for such a result. Although the precise bargain struck is unknown, the doctor should be willing to pay between 20 and 60, as the confectioner will not accept less than 20 and the doctor is unprofitable.


Economic “efficiency” describes a state where all mutually beneficial trades are made, i.e., no party can be made better off with out 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.
above 60. Assuming the bargain is made at 20, the confectioner totals 40 and the doctor totals 40, with a total sum of 80. Thus, the liability regime is immaterial.

Building on the example, now suppose for a cost of 18 the doctor can relocate.\textsuperscript{134} If the confectioner is liable, again, the initial impression is that he will soundproof the businesses walls to avoid liability and the doctor will not move given the liability regime. But again the initial impression is incorrect. The doctor will relocate because the confectioner will pay the doctor an amount greater than, or equal to 18 (cost to relocate), but less than, or equal to 20 (cost to sound proof walls). Assuming the bargain is made at 18, the confectioner totals 22 and the doctor totals 42, with a total sum of 82. Absent liability the same total economic output is achieved; the doctor will mitigate by relocating, thus totaling 42, while the confectioner will not mitigate, thus totaling 40. Again the sum total is 82.

But here comes the wrinkle in the Coase Theorem: transaction costs may prohibit an otherwise efficient result. An implicit corollary follows that a liability regime, or lack thereof, can be determinative of economic efficiency. Suppose in the illustration above the cost for transacting\textsuperscript{135} is 25. Assuming the confectioner is liable, recall that he would pay the doctor between a range of 18 and 20 to relocate. With transaction cost, however, this bargain will not be struck, as 25 (transaction cost) 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 cost arise, as the doctor—the low cost mitigator—will simply relocate, producing a higher sum total

\textsuperscript{134} 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, ect. Coase, \textit{supra} note __, 9, n. 9.

\textsuperscript{135} In the example transaction costs may include such costs as negotiations and enforcement.
of 82. Consequently, the law can maximize total surplus by shifting the liability burden\textsuperscript{136} to the low cost mitigator.

The lessons and applications of the Coase Theorem are not limited to merely nuisance law. To the contrary, the Coase Theorem reveals fundamental threads of economic truisms that weave together a patchwork of economic applications.\textsuperscript{137} Whenever there are no transaction costs the market should naturally function efficiently without governmental regulations.\textsuperscript{138} But whenever there is cost involved with a transaction, which is typical\textsuperscript{139}, the law may be impeding or facilitating economic efficiency.\textsuperscript{140} Whether the law is impeding or facilitating economic efficiency depends first on the transaction costs involved, and if they are high enough, on what 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 preferences between comparative institutional choices.

\textsuperscript{136} This is simply to say that when the law imposed no liability to the confectioner it had a “right” to create externalities, which in turn was a “burden” to the doctor.


\textsuperscript{139} R.H. COASE, THE Firm, THE Market, AND the Law 95, 114

\textsuperscript{140} As noted by Richard Posner, in ECONOMIC ANALYSIS OF LAW 10, 271 (2d ed. 1977), 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.
The “Ideal” Market

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. Doubtlessly negative externalities spring to mind at the mere thought of waste collection and disposal, such as noise pollution from dump trucks, disposal site odor, ambit air quality, various leachate contamination with attendant health risks, and decrease in surrounding property values, to name just a few.

To be clear, negative externalities are not in and of themselves prohibitive 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 are of policy concern. Drawing on Coase’s example, if negative externalities to a business result from a loud confectioner that alone does not mean society should impose liability onto the confection. An efficient bargain would still be obtained privately, unless of course transaction costs, such as costs of negotiations and enforcement, would prevent that bargain. Thus, regulatory intervention can be fruitful when prohibitive forces impede actors in the private market from orchestrating an efficient resolution.

A cursory reflection of the potential transactions costs that could arise in an entirely unregulated solid waste disposal market 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. Therefore, if the solid waste disposal firm

\[\text{See supra, \_\_}, \text{for a brief discussion of local solid waste management structural arrangements.}\]
were unregulated, 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 of the landfill. Moreover, even initial cost in 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, if not nearly impossible, to obtain.\textsuperscript{142}

A commonsensical approach then to an ideal solid waste disposal market demonstrates the obvious—that 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 loggerheaded, but rather the former could be improved by the imposition of the latter. Now whether particular past or present laws, whether promulgated at the federal, state, or local levels, optimally economize on these transaction costs is a prodigious inquiry,\textsuperscript{143} and although important, is beyond the scope of this article.

\textbf{The Actual 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

\textsuperscript{142} See Vicki Been, \textit{What’s Fairness Got to do With It? Environmental Justice and the Sitting 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”).

streets or places of convenience.\textsuperscript{144} 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.\textsuperscript{145}

Not until awareness of the potentially noxious effects of solid waste, especially hazardous waste, were recognized did legislative governance significantly shape the waste disposal industry.\textsuperscript{146} During the 1960’s and 1970’s the federal government, along with states, began to take a more pro-active approach to environmental protection in general.\textsuperscript{147} In particular, in 1976 the federal government enacted the Resource Conservation and Recovery Act\textsuperscript{148}, a statute implementing a cooperative federalism paradigm whereby the states are encouraged to implement certain minimum standards for waste collection, disposal, and monitoring in return for technical and financial assistance, but are further allowed to impose more stringent standards if they so choose.\textsuperscript{149}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{144} LUTON, supra note __, 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).
\item \textsuperscript{145} LUTON, supra note __, 89-90.
\item \textsuperscript{146} See David L. Markell, 18 WM. & MARY J. ENVTL. L. 1, 6-12 (1993) (recounting the story of Love Canal and Congress’s response to hazardous waste disposal thereafter).
\item \textsuperscript{147} Several significant environmental statutes were passed during this time, including the Clean Water Act, National Environmental Protection Act, Clean Air Act, Endangered Species Act, and Solid Waste Disposal Act (as amended by the Resource Recovery and Conservation Act).
\item \textsuperscript{148} 42 U.S.C. §§ 6901-6992k (2007-2008).
\item \textsuperscript{149} The Resource Conservation and Recovery Act (herein after, 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 nonhazardous industrial solid waste and municipal solid waste, to implement set criteria for municipal solid waste
\end{enumerate}
\end{footnotesize}
The depth and cost of engineering, administrative, and legal expertise that were required to meet the tougher regulations caused thousands of landfills to close.\textsuperscript{150} 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.\textsuperscript{151} 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.\textsuperscript{152} 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.\textsuperscript{153} The regionalization of landfills has contemporaneously driven up the level of solid waste crossing state lines for interstate waste disposal.\textsuperscript{154}

**Negative Externalities and the Economic Limits to Moral Outrage**

Despite the current trajectory towards regionalization of landfills, and away from the traditional small landfills operated by towns, negative externalities still persist. These negative

\textsuperscript{150} See CRS REPORT, INTERSTATE SHIPMENT OF SOLID WASTE, supra note __, 12.

\textsuperscript{151} See PORTER, supra note __, 54.

\textsuperscript{152} Id.

\textsuperscript{153} See CRS REPORT, INTERSTATE SHIPMENT OF SOLID WASTE, supra note __, 12.

\textsuperscript{154} One study 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 11-12.
externalities can be grouped into general problems associated with both enforcement and performance. Technically, problems of enforcement are not externalities *per se*; rather noncompliance often is correlative of direct, and purposeful, health and safety hazards. The difference between enforcement and performance here is that performance is meant to describe natural, as opposed to purposeful, health and safety hazards. Nomenclature aside, the groupings are simple to help conceptualize the diverse set of problems that can and do arise.

In terms of enforcement there is direct\(^{155}\) and antidotal\(^{156}\) evidence that widespread noncompliance with disposal regulations occurs. Indeed, *United Haulers* is a case in point. The facts of that case reveal that in the years preceding the decision to enact flow control laws Onieda and Herkimer Counties encountered pervasive compliance problems. Specifically, many landfills were operating without permits and in violation of state regulations, spurring the closure of many local landfills.\(^{157}\) The enforcement problems eventually culminated with a federal enforcement action against Onieda County’s largest private landfill operator, which subsequently named hundreds of local businesses as third-party defendants.\(^{158}\) Additionally, those problems were only 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.\(^{159}\)

\(^{155}\) *See EPA, REPORT ON SOLID MUNICIPAL WASTE DISPOSAL COMPLIANCE STANDARDS.*

\(^{156}\) Marianne Lavelle, Environemtnal Vise: Law, Compliance, Nat’l L. J., S1 (Aug 30, 1993) (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 violated of federal or state environmental laws).

\(^{157}\) *United Haulers*, 127 S.Ct. at 1790-91.

\(^{158}\) *Id.*; See also Appellate Brief for Defendant-Appellate County of Onieda (2nd Cir.), 2000 WL 33988467.

\(^{159}\) *United Haulers*, 127 S.Ct at 91.
Faced with reoccurring problems of enforcement it is understandable that the Counties wanted to adopt a new regulatory strategy for managing their municipal waste collection and disposal.\textsuperscript{160}

In terms of performance problems, media of disposal sites causing negative externalities such as poor ambit air quality, leachate contaminations that pose health risks, and decrease in property values, still abound. However, a diverse medley of legal options is available for injured persons seeking some form of compensation. First, as stated previously, both federal and state statutory laws exist that provide remedial measures\textsuperscript{161}, which often include venues for private or public enforcement.\textsuperscript{162} Second, apart from statutory actions, citizens or public officials may bring common law actions, such as public and public nuisance.\textsuperscript{163} Finally, \textit{ex ante} bargaining can sometimes be foisted whereby prospective disposal operators will pay “host fees,” or similar offers of compensation, to communities who will allow for the opening of waste disposal facilities.\textsuperscript{164} The fees are designed to alleviate, in part, anxiety over potential declines in surrounding property values.\textsuperscript{165}

\textsuperscript{160} See \textit{infra}, Part III for a broader discussion of the economic cost-benefit analysis applicable to choices of regulatory alternatives that exists for coping with such situations.

\textsuperscript{161} For example, CERCLA applies to \textit{ad hoc} remedial measures.

\textsuperscript{162} 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, 42 U.S.C. § 9659; See also Kirsten Engel, \textit{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).


\textsuperscript{164} See \textit{Engle, supra} note __, 1504-06. See generally Robin R. Jenkins et al., \textit{Host Community Compensation and Municipal Solid Waste Landfills}, 80 (4) LAND ECON. 513, 526 (2004) (examining the determinates of host fee compensation disparities negotiated by large solid waste landfills, concluding that a positive correlation exists between higher
To be sure, even sanguine commentators likely do not pontificate 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, tend to take the path of least resistance.\textsuperscript{166} This often translates into problems associated with environmental justice, one being the uneven bargaining power of poorer regions vis-à-vis wealthier regions with stronger political mobilization, possibility resulting 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.\textsuperscript{167}

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 Haulers*, Onieda and Herkimer Counties may have quelled an array of enforcement problems by enacting a state regulatory regime that replaced the private disposal market with a public one. Should they 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 a complete moral

\textsuperscript{165} Often the fees may be offered to overcome political opposition known as NIMBYism.

\textsuperscript{166} See Been, *supra* note __, 1009-1015 (discussing studies that reflect disproportionate sittings of locally undesirable land uses in poor and minority areas, and potential flaws in such studies).

\textsuperscript{167} For instance, some argue the tort laws impose barriers to private internalization. See Engle, *supra* note __, 1506-07.
outrage approach to solid waste disposal for the simple reason that some hazards are worth accepting.

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. But, health risks could be mitigated to a large extent though 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 reflective by an upward sloping marginal cost curve for avoiding health risks.\textsuperscript{168} 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 have been better utilized elsewhere.

\textbf{Part III}

The purpose of this part is to answer some of the lingering questions left unanswered by the Court in \textit{United Haulers} concerning the implications of the Dormant \textit{Commerce Clause} to flow control jurisprudence. The substance of the holding itself define the limits of this inquiry such that unnecessary is an analysis into the direct justifications for (entity differentiation, federalism, traditional functions) or implications of (Pike balancing) a public-private distinction. Put another way, the analysis proceeds on an assumption of \textit{stare decisis}.

Serving as a heuristic tool, first the distributional effects of flow control are shown through its impact on demand elasticity and producer rents. Second, concluding that the distributional effects of flow control promotes extraction of larger producer surplus gains than

\textsuperscript{168} The diminishing returns for additional precautionary regulations are well-documented. See, e.g., Porter, \textit{supra} note ___, 59-60.
otherwise possible, transaction costs benefits are then examined to see under what circumstances public monopoly might increase efficiency. Finally, further concluding that public monopolies in the waste disposal industry do not always economize on transaction costs, some brief theoretical explanations are proffered for efficiency failure.

**Would You Like Option “A” or Option “A”?**

In Appendix I is shown the local supply curve, \( S \), which rises due to limited capacity and service capabilities of the public landfill, and 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, local legislation of flow control forces, by squelching opportunities for market substitutes, inelastic consumer demand. Under conditions of inelastic demand, whereby no alternatives exist, price can be set at \( P_3 \) and \( Q_3 \), resulting in larger redistribution of consumer surplus, as represented by the rent rectangle EFCG. Therefore, given the effects of flow control on rent distribution for favored disposal facilities, whether public or private, such facilities have strong incentive to have it enacted.

There are two assumptions implicit in the model. First, inelasticity of demand under such circumstances obviously depends on compliance. On the whole, an assumption of compliance is sound since there is no reason to suspect a significant portion of waste haulers, the direct consumer, or households and businesses, the indirect consumers, would fail to comply—especially since civil and/or 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.\footnote{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.} A more transparent and precise response is that voter incentives to become well-informed about non-private transaction decisions are weak given their relative power to affect such outcomes.\footnote{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. of Econ. 371, 391-94 (1983).} This helps explain the potency of political rhetoric of election campaigns and interests groups.\footnote{Id.} Similarly, a sexy a topic as solid waste management may be to some, it is not a private transaction individuals must contemplate since waste collection is generally coordinated between local governments and public or private haulers. On the other hand, the subject of increasing locally imposed taxes\footnote{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 (individuals and businesses) gains. See Porter, supra note __. See also, Ley, et. al., Restricting the Trash Trade, AM. ECON. REV. 7 (May 2000).}, which is another alternative for financial support of public disposal facilities, is ripe with direct political associations to which local politicians may prefer to be unassociated.

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. The current private solid waste market is dominated by only a handful of private entities. 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 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 examples of this rational involve an in-state private industry gaining an advantage over out-of-state competition through state or local legislation. Here, an in-state public industry is gaining an advantage over the out-of-state disposal industry. In other words, the private disposal entities are not actually bargaining with a disinterested politician but with competition itself. Therefore, although the public and private entities may not be

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173 Demonstrative of opposition from private disposers and haulers of solid waste 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.


175 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 with in five miles of the city, finding it an undue burden on interstate commerce enacted as a protectionist measure against out-of-state competition).

176 See *Fred S. McChesney, Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. (1987) (discussing dead weight loss caused by both initial bargaining for or against regulation and the additional loss associated with maintaining that status quo).
“substantially similar entities,” the incentives to engage in rent-seeking behavior by jockeying for favorable regulations have not changed, but rather only the players have changed. And, when one jockey’s against only himself, he is likely to win.

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, is that a “government,” whether federal, state, or local, is not a benevolent monolith seeking to maximize total sum wealth. Rather “government” consists of individual actors each making their own bargains with individual wealth maximization in mind. Although this concept is typically cast in terms of competing private rent-seekers bargaining with legislatures that seek political capital, and vise versa, the political genesis of flow control regulations represent another rent-seeking dimension: that of intra-governmental rent-seeking.

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

United Haulers, 127 S.Ct at 1795.

This movement is a direct off-spring 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 __, 426-43.

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) (seminal article on government rent creation in the context of producer cartels).

See generally McChesney, supra note __.
administration, local waste safety departments, recycling and reuse departments,\textsuperscript{181} appointed civil servants, waste disposal employees and their unions, and so on.\textsuperscript{182} At the local level these public interests have incentive to mobilize and bargain, whether 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 \textit{United Haulers} aptly recognized the possibility of such behavior, although it was not described in rent-seeking parlance:

\begin{quote}
Discrimination in favor of an in-state facility serves local economic interests, insuring 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 the opinion of he
\end{quote}

\textsuperscript{181} 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. The problems associated with this alternative were discussed \textit{supra}, __.

\textsuperscript{182} \textit{See} LUTON, \textit{supra} note __, 97 (describing the local political institutions that typically have an interest in solid waste management). Although public employees and their respective unions are often a strong opposition group to privatization, see Moore, \textit{supra} note __, non-market strategies can be implemented to alleviate their criticisms, and other problems associated with privatization such as sunk costs of public equipment, by careful public-private negotiations concerning hiring criteria for the former and options to sell for the latter. \textit{See} Eugene J Wingerter, \textit{Refuse Collection, in PRIVATIZATION} 193, 197-203 (Roger L. Kemp ed., 1991) (describing three cities' decision to privatize their refuse collection and disposal services).
Court that state discrimination in favor of state-owned business is not likely motivated by economic protectionism.\(^{183}\)

**Recyclable Recommendations negotiations**

The implications of this article on the lingering questions left unanswered by the Court in *United Haulers* concerning the implications of the Dormant *Commerce Clause* 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.\(^ {184}\) Condoning flow control when revenue general *alone* is the benefit conferred is tantamount to condoning pure-rent seeking behavior.

Second, and inexplicitly bound to the first implication, is that while principals of federalism, and institutional competence of the judiciary, support affording deference to comparing out-of-state burdens to in-state benefits where the burdens are unclear, the Court should not afford factual deference to what local benefits are actually conferred.\(^ {185}\) Providing factual deference would lead to the untoward result of effectively establishing a sweeping rule of validity, as no state or locality would stipulate revenue generation to be the only benefit conferred.\(^ {186}\)

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\(^{183}\) *United Haulers*, 127 S.Ct. 1786, 1807-08 (Alito, dissenting).

\(^{184}\) See *id.*, at 1790.

\(^{185}\) This suggestion would not be inconsistent with the holding of *United Haulers*. Although Rehnquist explicitly advocated factual deference, *Philadelphia*, 437 U.S. at 632, the opinion of *United Haulers* failed to enunciate the precise import of their Lockner remarks. See *United Haulers*, 127 S.Ct. at 1798.

\(^{186}\) See, *supra* ____, for a discussion of potential pleading tactics localities could utilize. See also, *Dean Milk*, 340 U.S. at 354 (“[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
Thus, as a clear example, if flow control was deemed to be passed to primarily 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 exists 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, to employ an alternative financing method by which local consumer gains, via lower tipping fees, are not subverted. However, the design of the dormant Commerce Clause doctrine is not as a bulwark to efficiency generally, but rather to interstate protectionism specifically. Therefore, jettisoning the sometimes paternalistic tendencies of those not in the position of state and local governments who are accountable, deference should be afforded when balancing. But when flow control is imposed simply as a protectionist measure, whether for a favored private or public facility, the doctrine should be used a “second best” regulation.

Finally, the opinions expounded above should not be summarily dismissed on account of the methodology. Contrary to symbolizing an anachronism of substantive economic due process, transaction costs analysis as long been an intrinsic element of judicial thinking, especially in areas of cost-benefit analysis. Nor should one view this methodology as a triumph of efficiency over equity—the two notions are not necessarily distinct. In nuisance law, for

Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods.”) (internal citations omitted)(emphasis added).

See supra, note 171.

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.”).
example, commentators do not proclaim injustice in reckoning the benefits, or lack thereof, of a defendant’s actions against harms imposed.\textsuperscript{189} In the same token, equity is not sacrificed for efficiency when flow control laws that confer no benefits but only burden interstate commerce are struck down as unconstitutional under the dormant \textit{Commerce Clause}.

In conclusion, this article sheds much light on the alternative modes of analysis the Court left open in \textit{United Haulers} and their relative benefits to society. It admittedly 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.

\textsuperscript{189} See, \textit{e.g.}, the seminal case \textit{Boomer v Atlantic Cement Co., Inc.}, 309 N.Y.S.2d 312 (1970).
Appendix I

Price

D (No Flow Control)

D2 (Flow Control)

Quantity