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Trash in the Courtroom: The Problem of Solid Waste Control Ordinances after *Huish Detergents, Inc. v. Warren County*

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TRASH IN THE COURTROOM: THE PROBLEM OF SOLID WASTE CONTROL ORDINANCES AFTER *HUISH DETERGENTS, INC. V. WARREN COUNTY*

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Americans live in a disposable society. However, the comforts and conveniences that Americans enjoy create by-products that cause significant problems. As solid waste output continues to grow in the United States and across the world, federal, state and local governments are struggling to find efficient and economically feasible methods of disposing their solid waste, while also taking due consideration of environmental effects and regulations.[1] Courts across the United States often find trash on their doorsteps as conflicts over local "flow control" ordinances spill into the courtroom. Thus, courts are left with the problem of resolving these conflicts and providing a clear framework that allows local governments to adopt viable solid waste disposal programs. On May 31, 2000, the United States Court of Appeals for the Sixth Circuit in *Huish Detergents, Inc. v. Warren County*[2] attempted to clarify the status of municipal solid waste programs when it struck down a local ordinance as an impermissible discrimination against interstate commerce. In invalidating the municipal ordinance, the court applied the well-known precedent laid out in *C & A Carbone v. Town of Clarkstown.*[3]

This case comment centers on the decision laid down in *Huish*. Part I explains the state of the law preceding the Court's decision. Next, Part II discusses the background facts, procedural history, as well as the holding of *Huish* and compares this decision to the prior state of the law regarding municipal solid waste control ordinances. Finally, Part III analyzes the position of municipalities in the post-*Huish* context, discussing various alternatives and possibilities for solving the complex dilemma of solid waste disposal. While the *Huish* court provided some insight into the various legal issues regarding solid waste ordinances, it otherwise left municipalities with a difficult path ahead of them to balance their waste disposal needs within the ambiguous rubric of the dormant

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[1] *See generally* Maryellen Suhrhoff, Comment, *Solid Waste Control and the Commerce Clause: Circumventing Carbone*, 7 ALB L.J. SCI. & TECH. 186 (1996).

[2] Huish Detergents, Inc. v. Warren County, 214 F.3d 707 (6th Cir. 2000).

[3] C & A Carbone v. Town of Clarkstown, 511 U.S. 114 (1994).

Commerce Clause, as well as against economic and environmental concerns.

I. *CARBONE* AND THE POST-*CARBONE* ERA

A. Background

Until recently, solid waste management remained within the realm of traditional local government functions.[4] As the Court of Appeals for the Second Circuit states in *USA Recycling v. Town of Babylon*,[5] "for ninety years, it has been settled law that garbage collection and disposal is a core function of local government in the United States."[6] As disposal space for solid waste continued to decrease, the Federal government began to become more involved in this once traditional area of local authority.[7] In 1984, Congress amended the Resource Conservation and Recovery Act ("RCRA")[8] to require states to adopt waste management plans in an effort to curb the solid waste disposal crisis that developed during the mid-1980's.[9] Such requirements proved difficult for smaller municipalities who sought to promulgate such plans in light of increasingly stringent environmental regulations that required more expensive pollution controls.[10] Thus, many state and local governments began looking either toward hiring private vendors to dispose of their solid waste, or taking the load upon themselves by providing municipal disposal services.[11] In order to insure the stability of such facilities, local governments began passing "flow control" ordinances that authorized the municipal government to require all residents and businesses to deliver their solid waste to the local government itself or to a single designated facility.[12] The requirements contained within such "flow control" ordinances quickly became the subject of a flood of

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[4]Suhrhoff, *supra* note 1, at 187.

[5]USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272 (2nd Cir. 1995).

[6]*Id.* at 1275.

[7]Suhrhoff, *supra* note 1, at 188.

[8]RCRA § 6941 states:

The objectives of this chapter are to assist in developing and encouraging methods for the disposal of solid waste which are environmentally sound and which maximize the utilization of valuable resources including energy and materials which are recoverable from solid waste and to encourage resource conservation. Such objectives are to be accomplished through Federal technical and financial assistance to States or regional authorities for comprehensive planning pursuant to Federal Guidelines designed to foster cooperation among Federal, State, and local governments and private industry. 42 U.S.C. § 6941 (1994).

[9]Suhrhoff, *supra* note 1, at 187-188.

[10]*Id.*

[11]*Id.*

[12]*Id.*

litigation that swept into federal courts, culminating in the decision of the United States Supreme Court in *Carbone*.[13]

B. *C & A Carbone* and its progeny

In *Carbone*, the Supreme Court struck down a local "flow control" ordinance adopted by the town of Clarkstown, New York, that sought to insure a minimum flow of waste to a single processing facility built as part of an agreement between the town and a local contractor who agreed to construct and operate the facility for five years.[14] Carbone Incorporated, a local waste hauler, sought to enjoin the "flow control" ordinance as an impermissible restriction on interstate commerce in violation of the Commerce Clause.[15] The Court agreed with Carbone and held that the ordinance violated the strictures of the dormant Commerce Clause by preventing competitors, including those from out of state, from entering the local waste processing market.[16] According to the majority, the disposal services, not the waste itself, constituted the article of commerce.[17] Therefore, a state or municipality could not "hoard" such a service market against interstate competition.[18] The Court further noted that there existed other less discriminatory alternatives to address legitimate issues such as health and environmental safety, including the implementation of uniform safety regulations.[19] As the Court explained, "State and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities."[20]

The Supreme Court's ruling in *Carbone* opened a Pandora's box of issues that led to challenges of municipal solid waste ordinances and other waste management systems across the United States and left municipalities in a rather ambiguous position.[21] As one author explains "[b]ecause the decision in *Carbone* was cast in unusually broad terms, efforts by many communities to devise safe and practical waste management systems and enormous public investments in waste processing facilities are now highly vulnerable to Commerce Clause challenges."[22] Because of this vulnerable

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[13]*See generally* C & A Carbone v. Town of Clarkstown 511 U.S. 383 (1994).
[14]*Id.* at 387.
[15]*Id.* at 388.
[16]*Id.* at 389.
[17]*Id.* at 391
[18]*See generally* C & A Carbone v. Town of Clarkstown 511 U.S. 383 (1994).
[19]*Id.* at 393.
[20]*Id.* at 394.
[21]*See* Colin A. Fierman, Comment, *The Second Circuit Upholds Waste Management Systems in the Wake of Carbone v. Clarkstown: The Decisions in USA Recycling, Inc. v. Town of Babylon and SSC Corp. v. Smithtown*, 23 FORDHAM URB. L.J. 767 (1996).
[22]*Id.* at 767-768.

position under the dormant Commerce Clause, local "flow control" ordinances came under challenge and often fell as being impermissibly discriminatory against interstate commerce.[23] As a result, municipalities scrambled to reorganize their solid waste management plans to conform to the broad rule laid out in *Carbone*.[24] For example, the town of Babylon, New York, which employed an ordinance similar to the one used in *Carbone* prior to 1994, reorganized its waste management system after the Court's ruling.[25] In an effort to avoid a Commerce Clause challenge, Babylon created various garbage districts and implemented a contracting scheme with local waste haulers.[26] Such modifications; however, failed to halt the increasing amount of litigation piling in front of federal courts involving challenges to waste management plans, as the next two cases demonstrate.

In two simultaneous decisions,[27] the United States Court of Appeals for the Second Circuit sought to distinguish the limits of the *Carbone* decision regarding local "flow control" ordinances. In *USA Recycling*, the court held that a flow control ordinance enacted by the town of Babylon requiring every garbage hauler to dispose of all municipal waste at the town incinerator passed constitutional muster.[28] In reaching its conclusion, the court distinguished the holding in *Carbone* by stating that Babylon did not create a monopoly that excluded out-of-state competitors for the benefit of in-state processors, rather, the court explained that the town completely took over the market by providing exclusive services at the municipal incinerator.[29] By engulfing the waste disposal market, the court explained, Babylon was not acting as a business through selling services to a captive consumer base, but rather as a municipal government providing services for its residents.[30] From its position as a government provider, the court went further to explain that Babylon's decision to hire independent contractors to perform exclusive waste disposal services did not violate the dormant Commerce Clause.[31] The court cited that Babylon, since it took over the entire waste disposal market, acted as a market participant and

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[23] *See* Waste Mgmt., Inc. v. Metro. Gov't of Nashville, 130 F.3d 731 (6th Cir. 1997); Atl. Coast Demolition and Recycling, Inc. v. Bd. of Chosen Freeholders of Atl. County, 48 F.3d 701 (3rd Cir. 1995) (remanding the decision for review under the heightened scrutiny standard laid down in *Carbone*); Nat'l Solid Waste Mgmt. Ass'n. v. Williams, 877 F. Supp 1367 (D. Minn. 1995).

[24] *See generally* Fierman, *supra* note 21, at 767.

[25] USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272, 1278 (2nd Cir. 1995).

[26] *Id.*

[27] *See id.*; *See also* SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2nd Cir. 1995).

[28] *USA Recycling*, 66 F.3d at 1294.

[29] *Id.* at 1283.

[30] *Id.*

[31] *Id.* at 1289.

could hire whoever it wanted to provide hauling services for the town.[32] Thus, the town's actions fell under the market participation exception to the negative implications of the Commerce Clause.[33]

In *SSC Corp. v. Town of Smithtown*, the Second Circuit affirmed the district court's decision to invalidate a municipal flow control ordinance passed by the town of Smithtown requiring disposal of all of the town's residential and commercial waste at a designated incinerator as a violation of the strictures of the Commerce Clause.[34] The court distinguished its holding from that reached in *USA Recycling* by citing that the Smithtown ordinance imposed both civil and criminal penalties for those who violated its provisions, something a market participant could not do.[35] However, the court upheld an "improvement" contract entered into between the town and several local contractors, giving them exclusive rights to collection and disposal of garbage generated in the town by stating that these actions fell under the market participation doctrine.[36] The court reasoned that Smithtown, by accepting bids for services, hired employees to dispose of waste rather than provide the services itself.[37] As a market participant, the town acted like a normal business who could decide with whom it wanted to deal regarding waste disposal services.[38] Thus, in two simultaneous decisions, the Second Circuit attempted to distinguish and provide definition to the broad ruling laid down in *Carbone*.

These cases suggest that prior to *Huish*, municipalities possessed several possible methods to circumvent the *Carbone* decision. "Certainly, the Second Circuit's reasoning in the two cases provides significant leeway for communities to implement waste management systems."[39] After *USA Recycling* and *SSC*, municipalities apparently stood on safe ground if they either: (a) owned their own disposal facilities; (b) established municipal garbage districts or (c) acted as market participants through accepting bids for

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[32]*Id.*

[33]*Id.* Professor Erwin Chemerinsky describes the market participation doctrine by explaining that " . . . a state may favor its own citizens in dealing with government owned business and in receiving benefits from government programs. In other words, if the state is literally a participant in the market, such as with a state-owned business, and not a regulator, the dormant commerce clause does not apply." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES §5.3.7.2 (1997); *See also* Hughes v. Alexandria Scrap Corp. 426 U.S. 794 (1976) (upholding a Maryland law that placed fewer restrictions on state residents than on non-residents who wanted to purchase abandoned cars bought by the state government for sale at auction).

[34]SSC Corp. v. Town of Smithtown, 66 F.3d 502, 518 (2nd Cir. 1995).

[35]*Id.* at 512.

[36]*Id.* at 517.

[37]*Id.*

[38]*Id.*

[39]Fieman, *supra* note 21, at 778.

franchise contracts for solid waste disposal services.[40] However, municipalities continued to struggle to implement policies consistent with the legal framework established by *Carbone* and its progeny. As one author notes " . . .municipalities have little certainty as to what actions they may take in order to secure stability in planning for long-term disposal needs."[41] It is from this background that *Huish* emerges in an attempt to further define this broad legal position.

II. *HUISH DETERGENTS, INC. V. WARREN COUNTY*

A. Background

In *Huish*, the Sixth Circuit found yet another opportunity to decide the constitutionality of a local municipal solid waste ordinance. Huish Detergents, Incorporated, an owner and operator of a laundry detergent manufacturing facility in Bowling Green, Kentucky,[42] brought suit in Federal District Court against Warren County to enjoin the implementation of a county ordinance that incorporated a franchise agreement between the Bowling Green Municipal Government and Monarch Environmental, Incorporated.[43] Prior to the agreement, Warren County solicited bids from various contractors seeking to provide collection and processing services for the county's waste.[44] In 1995, the County accepted a bid from Monarch and formally entered into a franchise agreement giving the corporation exclusive rights to collect and process all municipal solid waste generated in Bowling Green for a period of five years.[45] The agreement also required Monarch to operate the city's transfer station and dispose of solid waste only at a Kentucky landfill.[46] Also included within the agreement was a provision requiring that all residents, as well as commercial and industrial entities within the city, employ Monarch to provide their disposal and processing services.[47] Monarch then billed each resident directly for their services.[48] On the same day that the County entered into its franchise agreement with Monarch, it passed an ordinance incorporating the

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[40] *Id.*

[41] Suhrhoff, *supra* note 1, at 209.

[42] Huish Detergents, Inc. v. Warren County, 214 F.3d 707, 709 (6th Cir. 2000).

[43] *Id.* at 708.

[44] *Id.*

[45] *Id.* The agreement also allowed Monarch to renew its franchise for three terms of five years each, which automatically renewed for a five-year term absent prior notice by one of the parties.

[46] *Id.*

[47] Huish Detergents, Inc. v. Warren County, 214 F.3d 707, 709 (6th Cir. 2000).

[48] *Id.*

provisions of the agreement; thus, legally requiring all residents and businesses to dispose of their solid waste through Monarch.[49]

B. Procedural History

The United States District Court for the Western District of Kentucky granted defendant Warren County's 12(b)(6) motion to dismiss, holding that the County ordinance and franchise agreement passed the strictures of the dormant Commerce Clause.[50] In reaching its conclusion, the District Court used a similar bifurcated approach as in *USA Recycling* and *SSC Corp.*, stating that Warren County engaged in two distinct activities: (a) a "take over" of the local waste collection, processing and disposal markets and (b) the granting of a franchise agreement to provide such services to the community.[51] As to the first action, the court concluded that the County was not acting as a market participant; thus, subjecting the ordinance to Commerce Clause scrutiny.[52] However, the court held that the County's "take over" of the waste disposal and processing market did not violate the Commerce Clause because it did not discriminate against interstate commerce.[53] The court also concluded that the burdens created by such an action were not excessive in relation to the County's benefits, such as the assurance of safe and efficient collection and disposal of waste generated in the city.[54]

The court also held that "the County acted as a market participant in awarding an exclusive franchise to Monarch."[55] The court reasoned that since the County took control of the waste disposal market, it acted as a market participant in "purchasing" exclusive waste removal services from Monarch just as any normal business could do.[56] Thus, although the facts between the cases differed slightly, the District Court in *Huish* followed the bifurcated approach laid down in *USA Recycling* in holding that the ordinance/contracting scheme did not violate the dormant Commerce Clause.[57]

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[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] Huish Detergents, Inc. v. Warren County, 214 F.3d 707, 709 (6th Cir. 2000).
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id*
[57] Huish Detergents, Inc. v. Warren County, 214 F.3d 707, 709 (6th Cir. 2000).

C. The Basis for the Sixth Circuit's Decision in *Huish*

On appeal, the Court of Appeals for the Sixth Circuit reversed the decision of the District Court, holding that the ordinance violated the dormant Commerce Clause.[58] The court rejected the bifurcated approach taken by the District Court, instead describing three main issues for analysis: (a) the County's designation of a single in-state processing station for municipal waste; (b) the decision by the County to prohibit the disposal of city waste outside of the state and (c) the granting of an exclusive franchise to Monarch for waste collection and processing services.[59]

The court first disarmed the market participation argument presented by the County, stating that it did not act as a market participant in requiring Monarch to process all municipal waste at a single Bowling Green site.[60] The fact that the County included the terms of the agreement in its ordinance held little relevance for the court, which stated "[t]he market participation exception does not come into play simply because a municipality labels its action as an agreement."[61] The court further reasoned that the County was not acting in a proprietary capacity by forcing all residents and businesses to buy waste disposal services from a single provider because the County did not "purchase" the services using public funds, but rather forced those under their jurisdiction to pay for the services themselves.[62] Thus, by using its regulatory powers to force all city residents and businesses to purchase waste collection services from Monarch, the County " . . .far exceeded that which a private entity could accomplish on a free market."[63]

Without the protection of the market participation doctrine, the court then analyzed the ordinance under the strictures of the Commerce Clause as set out in *Carbone*. The court determined that although the ordinance/franchise scheme differed from the facts in *Carbone*, the County's decision to require Monarch to provide processing services at the city's transfer station constituted the functional equivalent of the situation present in *Carbone*.[64] Using the strict standard adopted in *Carbone*, the court held that the actions taken by the County constituted a *per se* violation of the dormant Commerce Clause because they discriminated against out of state waste disposal service providers to the benefit of the competing in-

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[58] *Id.* at 716.
[59] *Id.* at 715.
[60] *Id.*
[61] *Id.*
[62] Huish Detergents, Inc. v. Warren County, 214 F.3d 707, 715 (6th Cir. 2000).
[63] *Id.* at 715-716.
[64] *Id.* at 716.

state industry.[65] The court also ruled that the County's interests in assuring safe and efficient collection and disposal of solid waste did not satisfy the stringent test of *Carbone* because other less-discriminatory alternatives existed to accomplish the County's goals of safe and efficient disposal of solid waste.[66] However, the court did not render a decision as to whether the County's designation of Monarch as the exclusive collector of waste violated the dormant Commerce Clause absent its market participant defense.[67]

The court also concluded that the County's prohibition of out-of-state disposal failed to survive its Commerce Clause challenge.[68] In support of this conclusion, the court explained that the County did not act as a market participant in prohibiting out-of-state waste disposal and even if such actions constituted market participation, the doctrine would not insulate the County because its regulation of the disposal market effected the downstream collection and processing markets as well.[69] Thus, in rendering its decision, the court reaffirmed the broad statement laid out in *Carbone* that a municipality could not use its regulatory power to force its residents to send its waste to a single facility. Municipalities, therefore, must utilize other alternatives in order to achieve their legitimate goals.

III. ANALYSIS: WHERE DO MUNICIPALITIES STAND IN THE POST-*HUISH* CONTEXT REGARDING THE IMPLEMENTATION OF WASTE MANAGEMENT ORDINANCES AND POLICIES?

While *Huish* provided some clarity to the law regarding municipal solid waste ordinances, many municipalities continue to find themselves on unstable ground regarding which avenues to follow with their solid waste management programs. *Huish* did not set clear boundaries within which municipalities must act, although it implied that many options still exist for local waste management programs.

Although the majority in *Carbone* did not mention the market participation doctrine as a possibility, Justice Souter in his dissenting opinion argued that the transfer station in controversy was "essentially an agent" of the town.[70] Despite its rejection of the market participation argument made by Warren County, the court in *Huish* left the doctrine as a viable possibility for municipalities under

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[65] *Id.*

[66] *Id.*

[67] Huish Detergents, Inc. v. Warren County, 214 F.3d 707, 715 (6th Cir. 2000).

[68] *Id.* at 716.

[69] *Id.*; *See also,* South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984) (plurality opinion).

[70] C & A Carbone v. Town of Clarkstown, 511 U.S. 383 at 416 (1994) (Souter, J. dissenting).

certain circumstances.[71] The court noted that Warren County might have avoided the strictures of the Commerce Clause by using public funds to pay for their disposal service, stating " . . . the County could have achieved the same result, without implicating the Commerce Clause, by hiring Monarch as its exclusive waste hauler using public funds to pay for the service."[72] However, Warren County left its ordinance open to an attack under the dormant Commerce Clause by forcing residents to "do the purchasing for it."[73]

Critics question whether a municipality may act as market participant once it acts in a regulatory capacity.[74] These concerns are of some relevance. Although a municipality participates in the market by using public tax dollars to "purchase" collection and processing services, private companies do not possess the authority to promulgate ordinances that ensure a steady stream of solid waste to their facilities. Further, the examples of market participation provided by the Supreme Court do not involve situations such as solid waste "flow control" ordinances.[75] Ordinances such as those in *Huish* and *Carbone* are distinguished from these Supreme Court cases because "the goal of the market participants in the Supreme Court cases was not economic protectionism as is the case overtly or covertly with solid waste cases."[76] In his concurring opinion in *Huish*, Circuit Judge Clay argued that the decision made by Warren County to designate Monarch as the exclusive hauler and collector of waste violated the Commerce Clause because it " . . .instituted a comprehensive monopolistic scheme by which it used its regulatory power to favor a single provider of waste removal, disposal and processing services, and by so doing eliminated other potential local and interstate waste services providers from the relevant market."[77] Thus, allowing a municipality to use its regulatory power to force its residents to use the waste disposal services it "purchases," while claiming to act as a market participant via a scheme of contracts with local providers, appears inconsistent with the underlying principles of the market participation doctrine as laid down by the Supreme Court.

Huish also did not discard the idea of municipal hauling of solid waste. By collecting and disposing of the waste itself, the

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[71] *Huish*, 214 F.3d at 717.

[72] *Id.*

[73] *Id.*

[74] *See* Suhrhoff, *supra* note 1, at 212.

[75] *Id.* at 211-212; *See also* Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976); Reeves, Inc. v. Stake, 447 U.S. 429 (1980) (requiring that a state-owned cement plant sell its product at lower prices to residents); White v. Mass. Council of Constr. Employers, Inc., 460 U.S. 204 (1983) (requiring that all construction projects within the city receiving city funds maintain a work force of at least fifty percent city residents).

[76] *See* Suhrhoff, *supra* note 1, at 211-212.

[77] Huish Detergents, Inc. v. Warren County, 214 F.3d 707, 717 (6th Cir. 2000) (Clay, J. concurring).

municipality may avoid dormant Commerce Clause ramifications through even-handed discrimination against both in-state and out of state interests.[78] The extensive costs of such services; however, creates substantial burdens on municipalities, many of whom prefer to enter into contracts with private operators for their waste disposal needs.[79] These costs are magnified when considering the limited financial resources of smaller municipalities, such as Bowling Green. Considering these situations, the viability of municipal hauling often depends on the resources of the municipality, meaning that it often fails to provide a reasonable alternative for smaller communities.

Another alternative to direct "flow control" ordinances is a so-called "economic flow control" system that seeks to entice waste disposal and collection providers to deliver their waste to a municipal disposal facility.[80] Municipalities could stabilize such facilities through the issuance of bonds, as well as the implementation of new taxes and user fees, which are fees charged to all county customers to operate the municipal facility.[81] By supporting the municipal facility through public funding, the local government allows such facilities to charge competitive rates, which encourages out of state waste disposal service providers to dispose of their waste at the municipal facility; thus, putting such facility on a level playing field with out of state facilities while leaving its survival up to the free market system.[82] While such "economic flow control" presents feasible alternatives to larger municipalities, the same problems appear when considering smaller towns and cities that do not have the same depth of economic resources to take risks in a municipally owned facility.

Finally, opportunities exist in the legislative arena to provide guidance to municipalities who seek to implement constitutional solid waste disposal programs.[83] Because the application of the dormant Commerce Clause upon the states remains dormant only as long as Congress remains silent in the area, states may pressure their representatives to support legislation authorizing state and municipal governments to implement flow control regulations.[84] Justice O'Connor, concurring in *Carbone*, noted that Congress might authorize "flow control" regulations that would burden interstate

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[78] *See* Geoffrey L. Oberhaus, Note, *The Dormant Commerce Clause Dumps New Jersey's Solid Waste "Flow Control" Regulations: Now What? Possible Constitutional Alternatives to the Current "Flow Control" System*, 29 RUTGERS L.J. 439, 451 (1998).

[79] *Id.* at 453.

[80] *Id* at 459.

[81] *Id.* at 459-460.

[82] *Id.* at 463.

[83] *See* Oberhaus, *supra* note 78, at 472.

[84] *Id.* at 472. *See also*, Suhrhoff, *supra* note 1, at 211 (advocating that Congress at least provide authorization for pre-*Carbone* facilities, given their substantial commitment of finances already made by the time of the Supreme Court's decision).

commerce.[85] She states, "It is within Congress' power to authorize local imposition of flow control. Should Congress revisit this area, and enact legislation providing a clear indication that it intends States and localities to implement flow control, we will, of course, defer to that legislative judgment."[86] Although the Sixth Circuit did not address this possibility in *Huish*, it remains an important alternative for advancement of municipal solid waste disposal programs.

In 1994, Congress made its most serious attempt at passing legislation that authorized flow control on a broad basis when a bill sponsored by New Jersey Representative Frank Pollone, Jr. passed the House of Representatives.[87] However, this bill failed to survive a challenge in the Senate.[88] In 1995, the Senate agreed upon a compromise bill allowing communities that were using or had already made substantial financial commitments to solid waste disposal facilities prior to the *Carbone* decision to maintain flow control regulations; however, this measure met a similar fate in the House of Representatives.[89] Subsequent attempts to pass similar legislation failed as small businesses and other interest groups mounted increasing pressure in Congress against such measures.[90] Given the current amount of public pressure against "flow control" ordinances, congressional authorization poses a possible, yet unlikely solution to the waste disposal woes of municipalities.

IV. CONCLUSION

With a complex body of precedent in front of it, the Sixth Circuit in *Huish Detergents* provided some clarity for municipalities who seek to implement constitutional methods of providing solid waste disposal programs that must balance public policy, as well as economic and environmental concerns in the post-*Carbone* context. However, *Huish* failed to set concrete boundaries within which municipalities may work comfortably, meaning that they continue to face an uncertain path ahead of them. *Huish* left open the possibility that states and municipalities may continue to use the market participation doctrine to their advantage under certain circumstances. This raises the question whether local governments may simultaneously regulate and behave as a participant in the market

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[85] C & A Carbone v. Town of Clarkstown, 511 U.S. 383, 401 (1994) (O'Connor, J. concurring).

[86] *Id.* at 410.

[87] Oberhaus, *supra* note 78, at 472.

[88] *Id.*

[89] *Id*; *See also* James C. Vago, Comment, *The Uncertain Future of Flow Control Ordinances: The Last Trash to Clarkstown?*, 22 N. KY. L. REV. 93, 110 (1995).

[90] Oberhaus, *supra* note 78, at 473.

simultaneously. Such an issue poses a controversial question to the court system that requires a determinative answer.

Other alternatives also exist to "flow control" ordinances, such as "economic flow control" and congressional legislation. These measures; however, pose significant feasibility problems for smaller municipalities who lack the necessary economic resources to risk investment in municipal facilities, and the outlook for Congressional authorization of "flow control" measures appears bleak at the moment. Thus, with the solid waste output of American communities continually increasing, the court system will continue to find trash in their courtrooms until they take action to provide a more definite framework for such solid waste disposal plans.