What May States Do About Out-of-State Waste in Light of Recent Supreme Court Decisions Applying the Dormant Commerce Clause? Kentucky As Case Study in the Waste Wars

Stanley E. Cox
New England School of Law

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the State and Local Government Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol83/iss3/2

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
What May States Do About Out-of-State Waste in Light of Recent Supreme Court Decisions Applying the Dormant Commerce Clause? Kentucky As Case Study in the Waste Wars

BY STANLEY E. COX*

* Assistant Professor of Law, New England School of Law. A.B. 1974, Harvard College; M.A.T. 1975, Duke University; H.Dip. 1978, Trinity College, University of Dublin; J.D. 1987, University of Kentucky. During his work for the Kentucky Office of Attorney General in 1990-92 the author advised on the constitutionality of legislation proposed for the 1991 Special Session of the Kentucky Legislature; co-authored amicus briefs in Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 112 S. Ct. 2019 (1992), and Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992); authored an amicus brief in National Solid Waste Management Ass'n v. Voinovich, 763 F. Supp. 244 (S.D. Ohio 1991), rev'd and remanded 959 F.2d 590 (6th Cir. 1992); co-authored the briefs in Carpenter v. Commonwealth, 831 S.W.2d 188 (Ky. Ct. App. 1992); and issued numerous informal opinion letters on waste issues. The views in this Article are the author's, but they are, of course, partly colored by these earlier experiences and by his previous work on behalf of citizen-group plaintiffs opposed to expansion of landfills designed to receive primarily out-of-state trash. Since joining academia, the author provided limited pro-bono assistance to attorneys for Clarkstown in C&A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677 (1994), and for the state of Oregon and state amici in Oregon Waste Systems, Inc. v. Oregon Department of Environmental Quality, 114 S. Ct. 1345 (1994), litigation. The author thanks all, both friend and foe, who have "enlightened" him during previous battles and counseling sessions. This Article tries to tell the law the way the Supreme Court has seemed to make it, without regard to who would win or lose thereby.
## TABLE OF CONTENTS

**INTRODUCTION: STATES INCREASINGLY FIND IT DIFFICULT TO SOLVE THEIR OWN, BUT ONLY THEIR OWN, WASTE PROBLEMS** ........................................... 553

**I. STATES DO NOT WANT TO FULLY SOLVE THEIR OWN WASTE PROBLEMS AND CERTAINLY DO NOT WANT OTHERS' BURDENS** ........................................... 556

A. Waste Costs Are Externalized and Ultimately Borne by Those Nearest the Disposal Site ............ 556

B. The NIMBY Syndrome Implies Relative Political Powerlessness and Shifted Burdens ..................... 558

C. The Rise of the Interstate Waste Market Both Exemplifies and Exacerbates Cost Externalization .... 559

D. Application to Kentucky Situation ....................... 562

**II. THE SUPREME COURT'S DORMANT COMMERCE CLAUSE RULINGS PLACE SIGNIFICANT RESTRICTIONS ON A STATE'S ABILITY TO MANAGE ITS OWN, BUT ONLY ITS OWN, WASTE** ........................................... 564

A. Philadelphia Foreclosed Bans Involving Private Facilities, Construing Such Bans As Economic Protectionism ........................................... 565

B. Fort Gratiot Emphasized that Philadelphia's Economic Protectionism Rationale Applies to Local Actions Which Are Part of a Comprehensive Waste Management Plan ..................... 571


D. Oregon DEQ Foreclosed Using Compensatory Fees As an Easy Solution to Externalized Out-of-State Waste Harms ........................................... 579

1. Background Regarding Compensatory Fees ............ 579

2. The Type of Fee Involved in Oregon DEQ ............ 582

3. The Oregon DEQ Opinion — Presumptions Against Compensatory Fees and Insistence on Substantial Equivalence Doom Oregon's Statute ..................... 583

4. Subsidies and Fees that Might Survive Oregon DEQ ........................................... 586

E. C&A Carbone Foreclosed Mandatory Flow Control, but It Did Not Prevent Publicly Assisted Flow Control ........................................... 590
III. APPLICATION OF THE COURT’S DORMANT COMMERCE
CLAUSE RULINGS TO KENTUCKY’S WASTE MANAGEMENT
REGIME ................................................................. 602
A. Statutes Motivated by Unconstitutional Intent
Still Can Constitutionally Control Waste Planning ..... 604
B. Significant Local Control Is Possible ............... 605
  1. The Starting Point of Shared Authority .......... 606
  2. Unexercised Preemption .............................. 609
  3. “Consistent with” Regulations ....................... 610
C. Several Parts of Kentucky’s Waste Management
Scheme Violate the Dormant Commerce Clause ...... 614
  1. Differential Fees Charged ............................ 614
  2. Mandatory Flow Control ............................... 616
  3. Consent-to-Service Only for Out-of-Staters ...... 618
  4. Capture of Private Facilities for In-Area or
     In-State Waste ........................................... 619
D. Several Possibilities for Constitutional Regulation
Should Be Explored ................................................. 622
  1. Monopolistic Market Participation ................. 622
  2. Evenhanded Regulation ................................ 624
     a. Treating Waste Differently Based on Type
        or Content ............................................. 625
     b. Rigorous Regulation, with Differential
        Impact .................................................. 626
CONCLUSION: STATES SHOULD REGULATE EVEN-
HANDLEDLY AND/OR AT REAL COST IN ORDER TO
SURVIVE DORMANT COMMERCE CLAUSE ATTACKS ...... 628

INTRODUCTION: STATES INCREASINGLY FIND
IT DIFFICULT TO SOLVE THEIR OWN, BUT
ONLY THEIR OWN, WASTE PROBLEMS

No state wants to become a dumping ground for everyone else’s trash, yet all states are obligated to manage, at least to some extent, their own citizens’ trash. The United States Supreme Court, however, beginning in
1978 with City of Philadelphia v. New Jersey and continuing in 1992 and 1994 with four strong extensions of the Philadelphia ruling, has indicated that attempts to prevent privately owned disposal facilities from serving out-of-state waste interests on the same terms as in-state interests will almost always run afoul of the dormant Commerce Clause.

The Court in Philadelphia relied upon flawed reasoning. A state’s waste management efforts should not be invalidated under the dormant Commerce Clause if those efforts are directed at the state’s cost to ensure proper disposal of its own citizens’ waste. The practical assumption of this Article, however, is that the Court will not soon overrule four strong waste precedents decided in the last three terms. States, for the foresee-

1 437 U.S. 617, 626-27 (1978) (“Philadelphia”) (holding that a New Jersey law prohibiting importation of waste generated outside of New Jersey was discriminatory in effect and on its face); see infra notes 36-76 and accompanying text (discussing facts and reasoning in Philadelphia).


3 Although the Constitution speaks only of congressional power to affirmatively regulate commerce, the Court has long recognized an implied restriction on states’ power to act. See, e.g., Oregon DEQ, 114 S. Ct. at 1349. States are not absolutely prohibited from acting just because Congress has chosen to refrain from using its power to act. Instead, the Court has developed balancing tests and presumptions to determine when state action might be prohibited under this implied restriction. Such judicial analysis is often referred to as dormant Commerce Clause scrutiny.

4 Stanley E. Cox, Burying Misconceptions About Trash and Commerce: Why It Is Time to Dump Philadelphia v. New Jersey, 20 CAP. U. L. REV. 813 (1991) (arguing that Philadelphia should be overruled because it incorrectly considered trash to be a consumer commodity instead of a regulated stream and because the Commerce Clause should not compel one state to shoulder the burden of another state’s waste).

5 See id.

6 In a forthcoming article, the author plans to use this decade’s waste and Commerce Clause cases as a springboard to fully criticize the Court’s general dormant Commerce Clause jurisprudence. In the author’s opinion, the Court has articulated and applied
able future, will be stuck with significant dormant Commerce Clause impediments to acting as they wish—especially in regard to out-of-state generated trash.

Taking this reality into account, this Article uses the Kentucky waste situation as a specific example of state efforts to regulate trash. Kentucky, like many states, responded to perceived waste problems by revising some of its waste statutes and enacting additional measures to help the state manage its own, but only its own, waste. The products of the 1991 Special Session of the Kentucky legislature are now necessarily outdated because of the current flow of waste and Commerce Clause cases, and all Kentucky statutes of even older vintage are similarly untested by the Court's most recent rulings. This Article attempts to determine how much of the Kentucky waste program is still valid in light of what the United States Supreme Court has decided since early 1991.

Kentucky's situation is an example of how significant political pressures can cause states to walk close to and sometimes over the constitutional line when attempting to deal with the problems caused by out-of-state waste. One "solution" to the strictures imposed by the dormant Commerce Clause would be for the Court to loosen that constitutional noose. The Court, however, as its most recent decisions strongly indicate, steadfastly has resisted all efforts to carve out any "waste" exceptions to dormant Commerce Clause scrutiny. Under current Court tests, only those state regulatory efforts which impose evenhanded burdens on the local citizenry rather than serve as a pretext for discrimination against out-of-state waste stand a reasonable chance of surviving constitutional attack. Generally, these tests mean that true, rather than pretextual, market participation and evenhanded rigorous regulation of all waste in a government's boundaries should survive dormant Commerce Clause scrutiny. Other measures, despite their political appeal, are likely to be found unconstitutional under the Court's current precedents.

The rest of this Article develops these conclusions in greater detail. Part I explains why states, including Kentucky, resist the burdens imposed by their own waste, but even more especially, by out-of-state

inappropriate dormant Commerce Clause tests. State regulations should be evaluated on the basis of whether they further legitimate state action at the regulating state's cost without impinging on truly national interests. The current focus on the extent to which private business interests are burdened undervalues the state's need to regulate. Any form of such substantive economic due process should have been disposed of properly in the mid-twentieth century and should not be recycled through the dormant Commerce Clause.

7 See infra notes 31-35, 223-80 and accompanying text.
8 See supra notes 4, 6.
waste.\textsuperscript{9} Part II analyzes the Court's waste decisions, emphasizing that the Court generally will declare unconstitutional the sort of "shortcut" regulatory measures which states politically would prefer to adopt in order to address the burdens imposed by out-of-state waste.\textsuperscript{10} Part III examines the Kentucky waste situation in light of this constitutional landscape — first addressing local control issues and then evaluating whether specific local and statewide measures would violate the dormant Commerce Clause.\textsuperscript{11} The Article concludes that states should regulate evenhandedly and/or at real cost in order to survive attacks brought under currently controlling dormant Commerce Clause precedents.\textsuperscript{12}

I. STATES DO NOT WANT TO FULLY SOLVE THEIR OWN WASTE PROBLEMS AND CERTAINLY DO NOT WANT OTHERS' BURDENS

A. Waste Costs Are Externalized and Ultimately Borne by Those Nearest the Disposal Site

In a perfectly equitable world, it might seem reasonable that states would wish to impose on waste generators the full burdens of their waste generation.\textsuperscript{13} We do not live in a theoretical world; we live in a world


\textsuperscript{10} See infra notes 36-222 and accompanying text.

\textsuperscript{11} See infra notes 223-300 and accompanying text.

\textsuperscript{12} See infra pp. 628-29.

\textsuperscript{13} Cf. Fort Gratiot, 112 S. Ct. at 2029 (Rehnquist, C.J., dissenting) ("In sum, the law simply incorporates the common sense notion that those responsible for a problem should be responsible for its solution to the degree they are responsible for the problem but not further."). The thrust of the Chief Justice's point — that the Commerce Clause should not be read to impose on other states the burdens of waste disposal which the generating states themselves have been unwilling to bear — is correct. However, this Article emphasizes that no state or locality has yet fully assumed responsibility for the problems it has created. The Court implicitly uses this fact of externalization in its dormant Commerce Clause jurisprudence to turn Rehnquist's logic around. Implicit in the majority's economic protectionist arguments in several high profile cases, see infra notes 43-162 and accompanying text, is the notion that a state may regulate against the externalized costs of out-of-state or out-of-area trash only to the extent that the state itself has assumed these costs or assessed them against particular citizens. In contrast to
where every citizen generates significant amounts of waste, where efforts to discourage manufacturers from creating products which end up as waste are embraced halfheartedly if at all, and where many of the costs of waste generation are not borne directly by those who put their trash into receptacles. It is quite predictable that if the full burdens of waste generation are not imposed on those who generate waste, then generators will pass these burdens on to others who will seek to pass them on to yet others. At some point down the waste chain, the recipients of these waste spillover costs can be expected to resist the imposition. Theoretically, the excess and externalized costs could be picked up or fully subsidized by government. The underlying economic and factual reality, however, is that states, just as they hesitate at the front end to impose the full costs of disposal on those who generate waste, also seldom, if ever, wish to fully absorb the costs of even their own citizens' waste generation at the back end.

The predictable result of this dual private enterprise and government avoidance of the full costs of waste generation is that significant spillover costs of waste generation are imposed where waste is finally deposited. The reality of toxic pollution catastrophes at waste disposal sites is what led to the creation of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), also known as "Superfund." Although the reality of potential CERCLA clean-up liability has required increased internalization of the costs associated with producing wastes, the full costs of waste generation and disposal are still far from

Rehnquist’s statement, the majority might say: Our dormant Commerce Clause jurisprudence reflects the notion that a state wishing to impose costs on others who have contributed to a problem may impose those costs only to the degree that the state fully has addressed its own part of the same problem.

16 See, e.g., Kalojian, supra note 14.
19 The courts have interpreted § 107 of CERCLA as imposing minimal causation requirements on government seeking to recover for costs of remediation associated with a CERCLA site and as permitting joint and several liability recovery against any party
fully internalized. Waste disposal is a business where even those firms and businesses most worried about future liability must still compete against others willing to shortcut environmental protection in favor of short-term profits. Waste sites may have become profitable enterprises, but they are still, as Chief Justice Rehnquist has correctly noted, legitimately undesirable neighbors.20

B. The NIMBY Syndrome Implies Relative Political Powerlessness and Shifted Burdens

Since the costs of waste disposal are not sufficiently internalized, the political battle focuses on who will have to bear the insufficiently compensated costs at the end of the waste disposal chain. In this regard everyone is a NIMBY,21 for nobody welcomes the imposition of waste burdens which are inadequately compensated. It is no accident that waste

who contributed wastes to the site which might have in turn contributed to the clean-up problem. See Zygmunt Plater et al., Environmental Law and Policy: Nature, Law, and Society 260-300 (1992) (discussing approaches taken by courts in the environmental law area). The desired result of this fear of CERCLA liability is increased care in the handling and disposal of wastes.

20 It is no secret why capacity is not expanding sufficiently to meet demand — the substantial risks attendant to waste sites make them extraordinarily unattractive neighbors. The result, of course, is that while many are willing to generate waste — indeed, it is a practical impossibility to solve the waste problem by banning waste production — few are willing to help dispose of it. Those locales that do provide disposal capacity to serve foreign waste effectively are affording reduced environmental and safety risks to the States that will not take charge of their own waste. Fort Gratiot, 112 S. Ct. at 2028 (Rehnquist, C.J., dissenting) (citation omitted).

21 The acronym stands for "Not In My BackYard" and usually carries with it an undeservedly pejorative connotation. See, e.g., Orlando E. Delogu, "NIMBY" Is a National Environmental Problem, 35 S.D. L. Rev. 198, 198 (1990) (explaining that NIMBY is a syndrome characterized by efforts to exclude unwanted programs and facilities from a group's locale). It is easy for those NIMBYs who have successfully avoided having to face all the costs associated with their own waste disposal to sneer at those NIMBYs who refuse to accept the costs thus passed on. After all, if the waste has to go somewhere, those who resist its final deposition are being unreasonable, are they not? So does the pot call the kettle black. Compare the opinion of the Chief Justice:

The result is that the Court today gets it exactly backward when it suggests that Alabama is attempting to "isolate itself from a problem common to the several States." To the contrary, it is the 34 States that have no hazardous waste facility whatsoever, not to mention the remaining 15 States with facilities all smaller than Emelle, that have isolated themselves. ChemWaste, 112 S. Ct. at 2018 (Rehnquist, C.J., dissenting) (citation omitted).
disposal facilities traditionally have been sited in rural, economically depressed, or otherwise relatively politically powerless areas.\textsuperscript{22} Since the waste has to go somewhere, the politically or economically more powerful dictate the end location. The town dump, like any undesirable facility, traditionally is located on the other side of the tracks. Nor do the city fathers desire to give the residents near the proposed town dump veto power over its siting, because the waste (despite its costs not being sufficiently internalized) has to go somewhere.

C. The Rise of the Interstate Waste Market Both Exemplifies and Exacerbates Cost Externalization

While CERCLA and the Resource Conservation and Recovery Act ("RCRA")\textsuperscript{23} do not require waste generation to completely pay for its own disposal, they have significantly increased the costs of disposal.\textsuperscript{24} For several reasons, these increased costs have led to disposal facilities which are larger and usually more regional or national in scope. First, the significantly increased engineering costs associated with the landfilling of even common household garbage\textsuperscript{25} mean that small facilities are no


\textsuperscript{25} Household garbage is part of what RCRA calls municipal solid waste ("MSW"). It would be a mistake to assume that MSW is non-hazardous. Although exempt from the more rigorous RCRA Subtitle C regulations which govern hazardous waste, MSW's exemption is by definition rather than because of the constituents of the waste. In fact, Environmental Protection Agency ("EPA") evidence and the RCRA requirements for disposal indicate that the hazards associated with MSW disposal are similar to those involved in hazardous waste disposal. See, e.g., 40 C.F.R. §§ 257, 258 (1994).
longer viable. The county dump is thus increasingly a thing of the past, as economies of scale require or encourage regional facilities. As a corollary to this need for economies of scale, governmental units with smaller population bases may find it not only impossible to operate a facility on their own (i.e., using only their citizens’ waste to sustain operation of the facility), but also difficult to cooperate with other governmental units to pool their trash. Finally, the potential CERCLA liability for operating a disposal facility, while not fully capturing spillover costs, is nevertheless something many governments desire to avoid rather than embrace. Whereas the county dumps of the past may have suspected they were potential Superfund sites, current city, township, and county waste managers are definitely aware of the dangers attendant to being a waste disposal facility.\footnote{See, e.g., B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1205 (2d Cir. 1992) (holding that CERCLA does not contain exceptions to liability for municipalities).}

As explained above, political powers responsible for disposing of community-generated waste disproportionately impose the burdens of waste on those at or near the waste facility. The town dump is imposed on those who have no significant clout in the town. But at least when the town dump disposes of only town-generated garbage, the burdens of the dump are imposed within the governmental unit which created those burdens. Viewed at the governmental boundary level, the waste costs are not externalized; the burdens will be felt by the community, albeit disproportionately within that community. When communities stop operating disposal facilities, however, and export their waste to other communities, the burdens of waste disposal begin to lose this one-to-one correspondence between waste and the governmental unit traditionally responsible for waste management. An interstate waste market necessarily presupposes no correspondence of benefits and burdens between the government of the people who generated the waste and the government of the people who will feel its externalized burdens.

This lack of correspondence between governmental waste generators and disposal facilities has several important implications. First, from the generator’s point of view, the incentive to distribute waste disposal burdens across the waste-generating governmental population has decreased even more.\footnote{A local government which operated a dump for town waste might at least have argued, albeit not too persuasively, that disproportionate property taxes helped offset some of the burdens of waste disposal.} All of the externalized costs of waste disposal are now headed out of the political unit. The only constraints on waste export thus become economic rather than a combination of economic and
political limitations. \(^{28}\) But under RCRA and CERCLA, since the costs of waste disposal have dramatically increased, the economics now favor exportation more often than when disposal was primarily a local operation and the main costs were thought to be more in the nature of nuisance than potential Superfund liability. Thus, generating communities have positive incentive to ship waste out in order to avoid political and environmental liability, and they find that it is often not too expensive to do so.

At the other end of the waste stream, eliminating correspondence between government populations which generate waste and those who bear externalized disposal burdens causes increased governmental resistance to proposed facility siting within the government boundaries. Under a town dump regime, part of the rationale for siting the dump within the town is that the town’s waste has to go somewhere. No similar governmental necessity argues on behalf of facilities designed to take other governments’ waste. The arguments in favor of siting a disposal facility which takes primarily out-of-area waste become solely economic, while the arguments against local siting are both economic and political. Since those dumped upon are local voters, while those proposing to ship waste in are not, \(^{29}\) local government probably favors its constituents when it opposes a disposal facility.

The pressure on government to oppose siting intensifies for additional reasons. Increased economies of scale and waste exportation mean literally that more burden bears down on whatever community hosts a disposal site. Those most directly affected understandably scream more loudly when the proposed site is a mega-landfill rather than just a town dump. \(^{30}\) Additionally, resistance is broadened, since marginal supporters

---

\(^{28}\) While relatively without clout, those dumped on by their own community can still vote, and if the dumping becomes too excessive, those who allow the dumping run the risk that their political careers will be of short tenure.

\(^{29}\) The disposal facility will, of course, have local advocates who would benefit from local siting in the form of profits or increased jobs. But the point of the argument throughout this part of the text is that the externalized costs of disposal are always greater than whatever the waste industry operation charges for its services. In such circumstances, where spillover costs have not been internalized, those who bear the spillover costs have the potential to politically outweigh those who will receive the benefit of waste industry dollars.

\(^{30}\) Because it was the small town dumps of yesterday which have become the Superfund sites of today, it could be argued that the state-of-the-art mega landfills of today do not present the same degree of danger as past facilities and therefore should not be vehemently opposed. However, the perceived, non-internalized costs of current disposal, not the unrecognized costs of prior disposal, motivate resistance. If yesteryear's
of a siting involving locally generated waste (because "their" waste needs to go somewhere) can easily become marginal or even vociferous opponents of a site which adds burdens to the community as a whole.

To summarize, RCRA/CERCLA waste management increases disposal costs and creates pressure for increased economies of scale. Small-scale government operations become impractical, while the economics of long-distance export are not necessarily prohibitive. As waste is exported and increasingly processed for disposal by private enterprise rather than governments, burdens become more focused on communities whose populace did not generate and do not want the waste involved. The predictable resulting political pressure to oppose waste facility sitings and/or waste import is what has generated and will continue to generate regulation which industry challenges under the dormant Commerce Clause.

D. Application to Kentucky Situation

The above points seem borne out in the Kentucky experience. Kentucky statutes generally give Kentucky counties the primary responsibility for planning for waste management and grant them some, but not complete, control over the siting and operation of disposal facilities within their borders. The reluctance to grant localities absolute control could be viewed in part as an intragovernmental fight between the state as a whole, whose waste must go somewhere, and the particular (usually rural and less politically powerful) counties which will most likely bear externalized disposal costs. Alternatively, it could be viewed partly as paternalistic skepticism on the part of the state environmental regulatory agency that counties will properly exercise power, given prior lax attitudes towards waste management. Finally, the dump did not appear so bad at the time it was being operated, severity of resistance was only based on those incorrectly perceived harms. The fact that a modern facility is state-of-the-art does not defeat the truth that it still does not fully protect against potential harm. These perceived, albeit decreased risks, may be more strongly opposed than were the unperceived, but more harmful, risks of the past.

31 See infra notes 223-80 and accompanying text (examining the contours of Kentucky waste legislation in more detail).

32 One of the major accomplishments of the solid waste legislation passed during the 1991 Special Session was the requirement that all Kentucky counties adopt some form of waste management program providing all residents the opportunity to dispose of their trash through organized collection systems. See KY. REV. STAT. ANN. § 224.43-315 (Baldwin 1992). While the equivalent of household universal collection is still not mandatory in Kentucky, the new legislation moved Kentucky much closer to a situation
reluctance to institute absolute local power could also be viewed in part as the result of lobbying by private interests (including in-state waste developers and out-of-state disposal interests), who argued that granting too much power to the localities would frustrate waste development opportunities.

At the local level, and in line with the arguments above regarding externalized costs, Kentucky environmentalists have perceived the battle about facility siting as primarily one resulting in the politically less powerful being dumped upon. Accordingly, the focus of groups such as Kentuckians for the Commonwealth ("KFTC"), the Local Governance Council, and the Kentucky Resources Council ("KRC") has been the empowerment of those local citizens most directly affected by disposal activities. In line with other of the points made previously, however, the increased pressure for waste export has been across state lines and also a result of economies of scale encouraging larger regional facilities. Several large-scale disposal facilities have been proposed and/or built in Kentucky and have predictably met with opposition.

where roadside, streamside, or other open dumping, while always having been illegal, would increasingly lose its economic incentive, since local revenues often would be required to ensure some form of collection service.

Additionally, as the author, having served as a prosecution screener for potential environmental crimes in Kentucky, can attest, many of the most poorly run landfill operations in the state, and thus those potentially most deserving of criminal indictment or serious civil enforcement action, were county-operated rather than privately owned. This history of prior lax waste management at least argues for not giving localities exclusive control over waste management.

This statement is especially true of the KFTC and the Local Governance Council, which emphasize citizen lobbying over lawyer-dominated actions. The KRC, while also providing organizational assistance to grassroots groups, is more likely to play on the state and local level a role approximating that which the National Resources Defense Council or Environmental Defense Fund plays at the national level, by considering proposals for legal involvement on the merits and involving itself in those proposals which seem to have the most potential for statewide environmental impact. Other Kentucky environmental groups such as the Sierra Club, Kentucky Conservation Committee, and Community Farm Alliance have played significant legislative and lobbying roles regarding waste issues. Particular disposal projects or problems also generate ad hoc local citizen groups opposed to those projects or concerned about addressing problems.

At the same time Kentucky was hoping to implement legislation to exclude out-of-state waste, it adopted regulations which nevertheless emphasized the need for larger regional facilities within the state because of economies of scale. See, e.g., 401 Ky. ADMIN. REGS. 47:080 (1991).

Some of the more notable controversies involved the Green Valley, Atwoods, and Laidlaw/Valley View facilities, plus proposed landfills in the counties of Hickman, Magoffin, and Pulaski.
nents of Kentucky facilities created primarily for disposal of out-of-state long-haul trash have been not just the traditionally less politically powerful, but also the governmental establishment itself, or at least more broadly representative grassroots movements. This generalized political pressure to prevent Kentucky from becoming a dumping ground for others’ waste was partly responsible for the 1991 Special Session. Kentucky’s efforts to gain control over waste streams diverted to it, like the efforts of other states and localities, raise significant dormant Commerce Clause issues. The remainder of this Article explores those Commerce Clause issues at both the national and the Kentucky level in greater detail.

II. THE SUPREME COURT’S DORMANT COMMERCE CLAUSE RULINGS PLACE SIGNIFICANT RESTRICTIONS ON A STATE’S ABILITY TO MANAGE ITS OWN, BUT ONLY ITS OWN, WASTE

The United States Supreme Court clearly has foreclosed several significant state options for waste control via its Philadelphia, Fort Gratiot, ChemWaste, Oregon DEQ, and C&A Carbone rulings. Each of these cases is analyzed in turn, but a brief overview is helpful. The Philadelphia Court established that waste must be treated as potentially protected commerce. Philadelphia further established that attempts to control waste based on its origin will almost always fail because they will be subjected to heightened scrutiny. Still, Philadelphia left many waste regulatory options open or at least undecided. Court dicta in the Fort Gratiot and ChemWaste cases about the narrowness of those rulings emphasized that other options for state regulation remained available and indicated that the Court did not mean to prohibit states from all regulation affecting out-of-state waste. The proper way to read the Philadelphia, Fort Gratiot, and ChemWaste holdings is as a rejection of fairly transparent state efforts to exclude out-of-state waste when state

---

41 Philadelphia, 437 U.S. at 621.
42 Id. at 628-29.
43 See, e.g., Fort Gratiot, 112 S. Ct. at 2023; ChemWaste, 112 S. Ct. at 2015-16 & n.9.
efforts did not impose serious waste management burdens on the state’s own citizens.

The Oregon DEQ and C&A Carbone decisions from the Court’s most recent term expanded on Philadelphia’s premises. Oregon DEQ, strictly interpreting the compensatory tax line of cases, ruled that states may not equalize burdens imposed by out-of-state waste through fees equal to the amount of general revenue money the state has allocated to in-state waste burdens.\footnote{Oregon DEQ, 114 S. Ct. at 1355.} The Court in C&A Carbone ruled sweepingly that states may not tell their citizens where they must dispose of their trash.\footnote{C&A Carbone, 114 S. Ct. at 1680.} By ruling in both recent cases that a state may not impose incidental burdens on interstate commerce even when seriously burdening its own citizenry with waste management of locally generated waste, the current Court has indicated that state regulation of garbage will receive searching scrutiny. Though serious state regulation of interstate waste is not foreclosed by Court precedents, states must craft their regulations carefully to survive future dormant Commerce Clause attacks. The methods of regulation which seem most logical to the state because they cheaply and efficiently take care of the state’s own waste problems while minimizing or excluding out-of-state burdens are precisely the methods which the Court is likely to find in violation of the dormant Commerce Clause.

A. Philadelphia Foreclosed Bans Involving Private Facilities, Construing Such Bans As Economic Protectionism

In Philadelphia, the Court invalidated the most direct state effort to ensure that it manages its own, but only its own, waste — a state ban on receiving waste generated from outside the state.\footnote{437 U.S. 617.} The Court rejected New Jersey’s arguments that waste, having negative value, did not deserve Commerce Clause protection.\footnote{Id. at 618-19.} The Court also held that the ban’s effect was impermissible economic protectionism.\footnote{Id. at 621.} For purposes of evaluating future state regulation, the Court emphasized that heightened scrutiny would be imposed on any state enactment that treats waste differently based on origin.\footnote{Id. at 622.} The Court left open, however, the possibilities of

\footnote{Id. at 624.}
market exemption and evenhanded regulation; it also did not foreclose the fact that a state's discriminatory regulation might even survive heightened scrutiny if more compelling justification than that offered by New Jersey could be provided.

The *Philadelphia* Court first rejected New Jersey's argument that dormant Commerce Clause scrutiny was not triggered by New Jersey's trash regulations since the thing regulated, garbage, was not an article of valuable commerce. In deciding that business related to garbage is protected commerce, the *Philadelphia* Court rejected the notion that traffic in negatively valued items such as trash is not commerce. By implication, the *Philadelphia* Court emphasized the totality of the business relations rather than the particular items banned. The fact that private business transactions definitely were occurring in regard to trash, in the Court's view, triggered dormant Commerce Clause scrutiny. The Court thus read the dormant Commerce Clause expansively, giving it the same scope of potential prohibition as if Congress attempted to regulate under its explicit grant of Commerce Clause authority. Accordingly, the Court explicitly rejected New Jersey's arguments that a more restrictive scope to the Commerce Clause was required when the issue was the validity of a state's actions.

The Court similarly rejected New Jersey's arguments that the negative value of trash made its prohibition like quarantine measures, which survive dormant Commerce Clause scrutiny. In order to be like a quarantine measure, in the Court's view, New Jersey law would have to insist that all trash, regardless of origin, be immediately destroyed near

---

50 *Id.* at 621.

51 Trash has negative value in that nobody wants it; people only want to get rid of it. As Chief Justice Rehnquist correctly argued, it is nonsensical to argue that any of the parties in any of the waste cases are buying and selling trash; they are buying and selling services or space for the disposal of trash. See *Fort Gratiot*, 112 S. Ct. at 2028 & n.1 (Rehnquist, C.J., dissenting).

52 This lack of concern about the exact article of commerce being regulated was continued in the *Fort Gratiot* case. In that case, the Court emphasized that however trash transactions were viewed, it was clear the transactions represented potentially protected commercial activity. *Id.* at 2023.

53 "Just as Congress has power to regulate the interstate movement of these wastes, States are not free from constitutional scrutiny when they restrict that movement." *Philadelphia*, 437 U.S. at 622-23.

54 See *id.* at 621-22 (rejecting two-tiered definition of commerce).

55 Under the quarantine cases, as the Court acknowledged, it is permissible to discriminate against quarantined items by refusing to accept them into the state. *Id.* at 628-29.
its site of origin. The Court thus implicitly gave no weight to externality arguments, which are central to understanding the political realities involved in current waste management. By rejecting New Jersey’s quarantine argument, the Court implicitly rejected arguments that the danger of trash is always felt most at its point of deposit rather than at points higher up the waste chain, yet the only way to effectively quarantine trash is to insist that it be deposited in disposal facilities.

By implicitly refusing to consider externalities to be of any consequence, the Court more easily viewed New Jersey’s actions as pure economic protectionism. New Jersey had something — landfill capacity — which was desired by waste generators in other states. By preventing other states’ citizens from using this New Jersey resource, New Jersey was selfishly hoarding for its own citizens’ use something which should be available to all on the open market. Thus, the Court analogized landfills to natural resources for which a right of preferred access could not be afforded the state’s own citizens. The Court opined that New Jersey’s ban would result in New Jersey residents having to bear a relatively lighter burden for disposal services than out-of-state citizens. Whether this decreased burden was reflected in a more attractive New Jersey environment or in fewer actual dollars spent in landfilling was irrelevant to the Court. What mattered was that the benefits New Jersey hoped to achieve would be obtained by imposing burdens (in the form of lack of access) only on outsiders. The Court found this situation to be impermissible.

Accordingly, the Philadelphia Court emphasized that for any state regulation aimed at out-of-state trash to withstand dormant Commerce

---

56 See id. at 629.
57 Id. at 627.
58 See id. at 626.
59 Id. at 628-29 (stating that New Jersey was attempting to shift the full burden of diminishing the flow of garbage to the remaining landfill space onto those out-of-state). The Court’s analysis seems misguided. See supra note 6. The real burden, given the externalized costs associated with disposal facilities such as landfills, is having to site them anywhere. And disposal facilities are not unique resources of which one state has greater natural abundance than another. E.g., Cox, supra note 4, at 818-23; cf. Fort Gratiot, 112 S. Ct. at 2030 (Rehnquist, C.J., dissenting) (stating that “siting a modern landfill can now proceed largely independent of the landfill location’s particular geological characteristics”). The Philadelphia Court’s economic and protectionist emphasis has, however, been explicitly followed in more recent Court “trash” precedents, e.g., C&A Carbone, 114 S. Ct. at 1680, and for purposes of this Article is therefore considered binding on any state’s attempt to regulate trash.

60 Philadelphia, 437 U.S. at 628-30.
Clause scrutiny, some reason apart from origin must justify treating the out-of-state waste differently. Moreover, the Court emphasized that because the burdens of the regulation were felt solely by out-of-state generators, the state's burden of showing legitimate purpose would be significantly higher than if the regulation had operated evenhandedly and thus had only indirectly produced higher burdens on out-of-state interests.

The Court clarified and enshrined a two-tiered level of Commerce Clause scrutiny in the waste context. If a regulation operates evenhandedly, then the Pike test, a potentially deferential Commerce Clause balancing test, is employed. However, "where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." In equating New Jersey's discrimination against out-of-state waste with economic protectionism, the Philadelphia Court ensured that future state waste management schemes which differentiate between waste solely on origin would almost surely be doomed. Unfortunately, Michigan, Alabama, and other states, including Kentucky, either did not believe or did not perceive this message.

The Philadelphia rationale of equating different treatment with impermissible discrimination effectively prevents states from reserving

---

61 Id. at 626-27.
62 Id.
63 'The Court set forth the following language as embodying "the general contours" of this "much more flexible approach":
Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 624 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)). Under this Pike balancing test, the state regulation is presumed to be valid. Pike, 397 U.S. at 142 (stating that the state regulation "will be upheld unless the burden imposed . . . is clearly excessive in relation to the putative local benefits") (emphasis added).
64 Philadelphia, 437 U.S. at 624.
65 See infra notes 77-100 and accompanying text.
66 See infra notes 102-20 and accompanying text.
67 See, e.g., infra notes 251-80 and accompanying text (discussing state schemes which are unconstitutional under the Philadelphia rationale because they discriminate based on origin).
privately owned disposal capacity primarily for their own waste management needs. Accordingly, it is vital to understand what options Philadelphia left open to states which wish to bear the burden of managing their own, but only their own, garbage. First, the Court explicitly left open what has come to be known as the "market participant" exemption from dormant Commerce Clause scrutiny. Under this doctrine, when a state acts as a market participant by owning and operating its own facilities, it may favor its own residents over outsiders. A state-owned landfill accordingly has the potential to serve only in-state waste. The more interesting potential use of the market participant exemption would be for a state to prohibit private competition and still claim that it had a right to serve only its own citizens.

Second, the Court left open discrimination based on the type of waste rather than origin. For example, a state ban of all disposable diapers or plastic milk jugs from landfills located in that state theoretically would not violate the dormant Commerce Clause. Since the regulation would apply to waste generated both inside and outside the state, this evenhandedness implicates the Pike balancing test and its more deferential approach to state regulation. Even under the Pike test, however, if burdens imposed by evenhanded regulation become clearly excessive in comparison to local benefits, and/or if the local benefits could be achieved by clearly less discriminatory alternatives, then the local regulation may still be struck down under the dormant Commerce Clause. Thus, to predict the constitutionality of particular types of evenhanded regulation, one must assess the putative benefits, the likely effects on the out-of-state waste industry, and the possibility of achieving similar benefits by alternative means. State efforts which achieve significant local benefit at significant local cost should withstand Commerce Clause scrutiny even if they also frustrate out-of-state desires for access to cheap disposal sites.

---

62 "We express no opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state-owned resources . . . or New Jersey's power to spend state funds solely on behalf of state residents and businesses. . . ." Philadelphia, 437 U.S. at 627 n.6 (citations omitted).

69 See infra notes 280-86 and accompanying text (exploring the constitutional possibilities for such exclusive state ownership of disposal facilities).


71 See supra note 63.

72 See infra notes 282-300 and accompanying text.
A third issue left undecided by the Philadelphia Court is what a state may require of its own citizens regarding the waste they generate. States and localities may consider it within their police power to tell their citizens what they may and may not do with their trash, including requiring them to deliver it to government-authorized agents or franchises or certain disposal facilities. In two 1905 cases, the Court held that such monopolistic state power was authorized under traditional police power logic and did not violate citizens' due process rights. However, in the recent C&A Carbone litigation, the Court held that such "flow control" violates the dormant Commerce Clause.

Finally, the Philadelphia ruling left unanswered the propriety of compensatory fees. A compensatory fee is one the state charges outsiders to compensate the state for funding services it provides the outsiders. When states institute compensatory fees on out-of-state or out-of-area waste, the issues of how discrimination is to be determined, how much "fit" must exist between fees and services provided, what the relationship must be between fees charged on in-state waste and on out-of-state waste, and for what things the state is allowed to be compensated come to the fore. The Oregon DEQ case answered negatively some of the questions about how states might attempt to charge compensatory fees but did not totally foreclose such fees.

In conclusion, the Philadelphia Court made clear that if states discriminate against waste headed to private facilities based on origin, such efforts will be deemed economic protectionism. The Court left open possibilities for rigorous but evenhanded regulation and market participant exemption, as well as compensatory fees which do no more than make out-of-state interests pay their fair share of internalized costs. Many state waste planners in the short run, however, found these Philadelphia waste messages hard to stomach and attempted to craft regulatory programs which would encourage the judiciary to cut back on the Philadelphia ruling. These efforts met with ultimate defeat in the Fort Gratiot and ChemWaste cases.

74 Gardner, 199 U.S. at 332-33 (holding that individual property rights are subordinate to the general good); California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 324 (1905) (deeming all rights subject to conditions instituted by the governing authority in order to ensure the community's well-being).
75 C&A Carbone, 114 S. Ct. at 1680; see infra notes 164-222 and accompanying text (analyzing this case and exploring the power states still have to direct their citizens' trash after C&A Carbone).
76 See infra notes 121-63 and accompanying text.
B. Fort Gratiot Emphasized that Philadelphia’s Economic Protectionism Rationale Applies to Local Actions Which Are Part of a Comprehensive Waste Management Plan

In two 1992 cases, *Fort Gratiot* and *ChemWaste*, the Court confirmed the messages and rationale of *Philadelphia*. The fact that both cases were decided the same day and refer to each other for parts of their analysis\(^7\) indicates the two cases should be linked for many dormant Commerce Clause purposes.\(^8\) In both cases, states attempted to recast *Philadelphia* as not in tune with modern knowledge regarding the hazards of waste disposal and serious state efforts being made to plan for and dispose of waste. In both cases, the Court decisively rejected these arguments as being already included within the *Philadelphia* rationale and decision. Both cases strongly reaffirmed the *Philadelphia* message that differential treatment based on origin will trigger scrutiny fatal to the state, but both cases left open the possibilities for regulation discussed previously.\(^9\)

In *Fort Gratiot*, the challenged state regulation allowed counties to prohibit local disposal facilities from processing any out-of-area waste. The statute granting counties such power was part of a comprehensive Michigan waste program designed to ensure that Michigan counties properly disposed of waste generated within their borders.\(^10\) Significantly, other portions of the waste legislation gave counties (the governmental units responsible for managing waste under the statutes) the power to override any contrary local planning and zoning laws if necessary to site a disposal facility to meet their own needs.\(^11\) In other words, a county could authorize new privately owned landfill space against local opposition but attach to the new space the condition that the disposed waste only come from within the county. Thus, the veto power over out-of-area waste should be seen as encouraging counties to responsibly

---

\(^7\) See, e.g., *ChemWaste*, 112 S. Ct. at 2012-18.


\(^9\) See supra notes 46-76.

\(^10\) See *Fort Gratiot*, 112 S. Ct. at 2029 (Rehnquist, C.J., dissenting) (giving examples of the comprehensiveness of the legislation that made the total package “quite unlike the simple outright ban that we confronted in *Philadelphia*”).

dispose of their own waste by giving them incentive and power to allow otherwise undesirable land use on condition that the externalized cost not be greater than that created by their own citizens' waste-producing activities.\textsuperscript{82} A private landfill operator in St. Clair County, whose request to receive out-of-area waste was rebuffed, challenged the constitutionality of St. Clair's out-of-area ban.\textsuperscript{83}

The \textit{Fort Gratiot} Court considered the ban indistinguishable from the economic protectionism declared unconstitutional in \textit{Philadelphia}. The Court reaffirmed its \textit{Philadelphia} view that isolating private landfills from the larger trash market constitutes impermissible economic protectionism,\textsuperscript{84} ignoring, as Chief Justice Rehnquist pointed out, both the real costs imposed on the citizenry by siting a landfill facility in the area and the increased literal costs that would be charged by a facility that would operate at less than optimal economies of scale.\textsuperscript{85} But to the majority, the determinative point was that the Michigan statute, like the enactment struck down in \textit{Philadelphia}, treated out-of-area waste differently than local waste.\textsuperscript{86} If the determinative inquiry was not whether the facts of the legislation constituted economic protectionism but rather whether the facts would be presumed to constitute such economic protectionism (because the discrimination was facial), Michigan would lose this case.\textsuperscript{87}

\textsuperscript{82} Cf. \textit{Fort Gratiot}, 112 S. Ct. at 2029 (Rehnquist, C.J., dissenting) (discussing how the Michigan statute encouraged local responsibility for waste). The importance of having the government bear the increased externalized costs when a landfill is sited is often ignored by waste industry advocates. Those advocates often feel that the sole issue involved in local waste management planning should be whether there will be adequate disposal capacity for local area wastes (i.e., so long as the government's waste is taken care of, what concern is it to the government if other wastes are also managed). In the \textit{Fort Gratiot} litigation, for example, the landfill operator, as part of its request for permission to take out-of-area waste, also "promised to reserve sufficient capacity to dispose of all solid waste generated in the county in the next 20 years." \textit{Id.} at 2022.

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} "[T]he statute affords local waste producers complete protection from competition from out-of-state waste producers who seek to use local waste disposal areas." \textit{Id.} at 2024.

\textsuperscript{85} See \textit{id.} at 2029 (Rehnquist, C.J., dissenting).

\textsuperscript{86} As the Court explained: "In view of the fact that Michigan has not identified any reason, apart from its origin, why solid waste coming from outside the county should be treated differently from solid waste within the county, the foregoing reasoning [from \textit{Philadelphia}] would appear to control the disposition of this case." \textit{Id.} at 2024 (alteration in original).

\textsuperscript{87} See supra note 6. Applying a heightened scrutiny test, the \textit{Fort Gratiot} Court easily determined that Michigan had not met the high burden of showing that legitimate state objectives could not be accomplished by less discriminatory means. If the legitimate goal was to prevent in-state harms from too much landfilling, the state could slow the
Much of the *Fort Gratiot* case accordingly dealt with Michigan's contrived attempts to argue that a statute which allows discrimination on its face actually does not discriminate. Michigan offered two arguments that its statute operated evenhandedly, both of which the Court satisfactorily refuted. First, Michigan contended that because some counties did allow for disposal of out-of-state waste, on balance there was no state discrimination against out-of-state waste. The Court correctly countered that the *amount* of discrimination is irrelevant to the issue of whether there is discrimination. If any county could choose to reject all out-of-state waste, then the statute was discriminatory regardless of how many counties actually implemented this power.

Second, the Court similarly rejected Michigan's argument that real burdens felt by other Michiganders constituted proof that the statute operated in a non-discriminatory fashion. Michigan emphasized that the statute "discriminated" evenhandedly against both in-state and out-of-state interests, while being a statewide enacted measure. Those burdened by the statute had a democratic voice in its passage and could be presumed to represent interests similar to the out-of-state interests burdened by the enactment. The Court has sometimes emphasized that such virtual representation can be key to determining whether a statute is motivated by impermissible economic protectionism or permissible local purpose.

The lower courts in the *Fort Gratiot* litigation had accepted these contrived arguments, presumably as an indirect way of cutting back on the *Philadelphia* rationale. *Fort Gratiot*, 112 S. Ct. at 2021. Cf. *id.* at 2022-23 (describing the lower courts' judgments solely in terms of their treatment of the evenhandedness test).

The lesson of the Court's analysis under the heightened scrutiny test is clear — the state regulator should try to avoid having to justify his or her actions under that test at all costs.

---

88 The lower courts in the *Fort Gratiot* litigation had accepted these contrived arguments, presumably as an indirect way of cutting back on the *Philadelphia* rationale. *Fort Gratiot*, 112 S. Ct. at 2021. Cf. *id.* at 2022-23 (describing the lower courts' judgments solely in terms of their treatment of the evenhandedness test).

89 *Id.* at 2024-25. Michigan's arguments on amount of discrimination make sense only if the Court employs a balancing test. Since the Court's initial inquiry, however, is whether there is facial discrimination, arguments about relative amounts of discrimination (i.e., burdens on commerce) are irrelevant.

90 *Id.* at 2024.

91 *Id.*

The problems with this argument, however, are two-fold. First, as the Court correctly noted, discrimination at a local level can easily amount to discrimination by the state as a whole, albeit masked through smaller subunits. If the real effect of the local ban is to protect in-state economic interests at the expense of out-of-state competitors, each county is not really discriminating against other counties, but all counties are discriminating against other states by establishing local fiefdoms. The second problem thus becomes the difficulty in establishing standards by which the judiciary can determine whether such impermissible discrimination is occurring.

The Fort Gratiot Court evidently saw no need for such a factual inquiry, failing even to respond to Chief Justice Rehnquist's related points regarding in-state harms and arguing that there was no need to remand for additional factual findings. Apparently the Fort Gratiot Court felt no need to determine the amount of in-state versus out-of-state burden so long as the statute blatantly allowed for some out-of-state burden. Virtual representation seemingly only buttresses a state's claims under the Pike evenhanded test but cannot help make the case as to which test — heightened scrutiny or evenhanded — should apply. By treating waste differently because of origin, Michigan foreclosed any opportunity to claim the advantages of virtual representation.

(stating that "a state's own political processes will serve as a check against unduly burdensome regulations"); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 472-73 n.17 (1981) (stating that "the existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse"); South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 184-85 n.2 (1938) (stating that "legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state").

Fort Gratiot, 112 S. Ct. at 2024-25 (citing Brimmer v. Rebman, 138 U.S. 78, 82-83 (1891) (holding a statute can violate the Commerce Clause even when it burdens in-state as well as out-of-state producers), and Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951) (holding it unpersuasive to a determination of constitutionality that a statute affected in-state milk producers as well as out-of-state producers)).


Fort Gratiot, 112 S. Ct. at 2027 & n.8.

This is a potentially significant modification or clarification regarding the virtual representation doctrine. In the more recent cases of West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205, 2209 (1994), and C&O Carbone, 114 S. Ct. 1677, 1682 (1994), the Court continues to discuss and reject virtual representation arguments when determining which test to apply.
Fort Gratiot accepted and followed Philadelphia's economic protectionism analysis — that preserving in-state landfills for in-state use is economic protectionism regardless of externalized costs. The case more importantly demonstrated, by its treatment of Michigan's legitimate purpose arguments, that the level of scrutiny applied determines whether state arguments for regulation will be given serious consideration or short shrift. Fort Gratiot reemphasized the Philadelphia message that when the state discriminates based on origin, heightened Commerce Clause scrutiny will doom the regulation. Fort Gratiot accordingly rejected arguments that discrimination by a local unit is different from discrimination by the state as a whole or that the comprehensiveness of state waste regulations, including their burdens imposed on insiders, can overcome discrimination against outsiders.

The Court in Fort Gratiot, however, also left open the same options as did the Court in Philadelphia. The Court characterized the Fort Gratiot case as raising a "rather narrow issue." The Fort Gratiot case, like Philadelphia, only involved an outright ban imposed on private landfills accepting municipal solid waste. The sole difference between the cases, in the Court's mind, was the size of the governmental unit doing the banning. The Fort Gratiot case also explicitly emphasized that issues of hazardous waste and market exemption were not before it; presumably all methods of regulation discussed in connection with the Philadelphia case also were not foreclosed by Fort Gratiot. The main message of the Fort Gratiot case, like the ChemWaste case next to be discussed, was reaffirmation of Philadelphia, not foreclosure of qualitatively different methods of regulation.

97 Fort Gratiot, 112 S. Ct. at 2023. The "narrow issue" on which the Court focused was whether discrimination at a county level against outside waste (including both in-state and out-of-state waste) constitutes the same kind of presumptively invalid discrimination which was held unconstitutional in Philadelphia. In other words, the Court's focus was upon whether the Michigan statute fairly could be categorized as evenhanded. Id. at 2024.

98 Id. at 2024-26.

99 Id. at 2023.

100 The Fort Gratiot Court noted later in its opinion that a state was not foreclosed from arguing that even discriminatory regulation could be upheld under the dormant Commerce Clause when the reason for the discrimination was the difference in danger presented by the outside waste. Fort Gratiot, 112 S. Ct. at 2027 (stating that the "conclusion would be different if the imported waste raised health or other concerns not presented by Michigan waste"). But see infra note 130 (discussing the limited possibilities for using this potential avenue of regulation).

101 See infra notes 102-20 and accompanying text.
C. ChemWaste Emphasized that Philadelphia Meant What It Said About Quarantines

The ChemWaste case involved one prong of Alabama's attack against out-of-state hazardous waste.\(^\text{102}\) Chemical Waste Management’s privately owned and operated Emelle, Alabama, facility is by far the largest commercial hazardous waste landfill in the United States.\(^\text{103}\) Although the RCRA encourages states to site facilities within their borders as a way of guaranteeing twenty-year capacity for hazardous waste disposal,\(^\text{104}\) local opposition to the siting of hazardous waste disposal facilities is particularly strong, and most states have no sizeable commercial hazardous waste disposal facilities.\(^\text{105}\) As a result, great demand exists for the Emelle facility to receive out-of-state waste in substantial volume, and, in line with this Article’s earlier arguments regarding externality,\(^\text{106}\) correspondingly strong resistance exists to taking on this burden created by outsiders. The Emelle fact situation quite literally represents one state being dumped on by others.

In response, Alabama enacted several regulatory measures,\(^\text{107}\) only one of which was before the Court in ChemWaste. The measure at issue in

\(^{102}\) 112 S. Ct. 2009. For discussion of the several pronged attack, see infra note 107.

\(^{103}\) ChemWaste, 112 S. Ct. at 2011; see also National Solid Waste Management Ass’n v. Alabama Dep’t of Envtl. Management, 729 F. Supp. 792, 797 (N.D. Ala.), rev’d, 910 F.2d 713 (11th Cir. 1990).


\(^{106}\) See supra notes 13-20 and accompanying text.

\(^{107}\) Alabama first tried, via the “Holley Bill,” 1975 Ala. Acts 89-788, to reciprocally ban hazardous waste from states which either had not entered into agreements with Alabama or had refused to site disposal facilities in their own borders. See National Solid Waste Management Ass’n, 729 F. Supp. at 798-800 (providing pertinent parts of the Holley Bill).
ChemWaste was a fee of seventy-two dollars per ton imposed only on hazardous waste generated outside Alabama. The ChemWaste Court declared the fee unconstitutional, rejecting Alabama's argument that no less discriminatory alternatives could prevent legitimate health harms and rejecting Alabama's more basic argument that it had a right to exclude health harms caused only by others' wastes.

Since the fee in ChemWaste was imposed only on out-of-state waste, the facial discrimination and heightened scrutiny aspects of Philadelphia were triggered. Although Fort Gratiot had emphasized that it did not address hazardous waste issues, the presence of toxic waste in ChemWaste made no difference to the Court's analysis. In other words, although some courts occasionally still mistakenly equate non-hazardous with non-harmful, the ChemWaste Court correctly implied that both forms of waste have negative value and thus are harmful. In the same way that the Fort Gratiot Court made clear that Philadelphia meant what it said about states not being able to reserve in-state private landfill space for its own citizens' use even when that might be the most prudent way to encourage waste planning and facility siting, the ruling in ChemWaste reaffirmed that the Court meant what it said in Philadelphia about permitting harmful items to flow in interstate commerce, even when they are obviously and particularly harmful.

Accordingly, all arguments about the particular hazards of "hazardous" waste were dealt with in ChemWaste as they were in Philadelphia, by
construing the quarantine exception narrowly to require destruction near the point of generation and/or total prohibition of trade in the item.\textsuperscript{13} Unless hazardous waste from outside the state was more harmful than that generated inside the state, it could not be treated differently.\textsuperscript{14} Since Alabama's own hazardous waste was allowed to go to Emelle without the fee, out-of-state waste must also be permitted to do so.\textsuperscript{15}

The \textit{ChemWaste} Court thus confirmed \textit{Philadelphia}'s message that the only permissible way to deal with externalities is to limit them across the board. It is impermissible to limit externalities on the basis of who created them. In other words, when Alabama argued that the real problems of the Emelle facility were caused by the volume of hazardous waste disposed of at the facility, the Court said the functional equivalent of: If your real concern is danger to your residents, then limit volume.\textsuperscript{16} When Alabama said that it nevertheless wanted to responsibly manage the hazardous waste generated by its own citizens and that this could best be done by charging fees which allowed in-state disposal of in-state waste but discouraged in-state disposal of out-of-state waste, the Court said the functional equivalent of: If you really want to take on the burdens of your waste producers, then do so, but do not burden private operators with burdens that you have failed fully to take on.\textsuperscript{17}

Thus, possibilities for waste regulation most clearly left open by the \textit{ChemWaste} Court are evenhanded but burdensome regulation and market participant exemption. The Court specifically mentioned four examples of evenhanded regulation available to Alabama which presumably would not violate the dormant Commerce Clause: a per-ton fee on all waste, a per-mile tax on all vehicles carrying hazardous waste through Alabama, a cap on tonnage landfilled at the Emelle site, and increased monitoring and regulation of the transportation and disposal of hazardous waste within Alabama's borders.\textsuperscript{18} In his dissent, Chief Justice Rehnquist

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{13} \textit{ChemWaste}, 112 S. Ct. at 2016 n.11.
\item \textsuperscript{14} \textit{Id.} at 2015.
\item \textsuperscript{15} \textit{Id.} at 2016.
\item \textsuperscript{16} \textit{Id.} at 2015; \textit{see also Philadelphia}, 437 U.S. at 626 (stating that New Jersey may pursue the legitimate goal of reducing landfill harms "by slowing the flow of all waste into the State's remaining landfills, even though interstate commerce may incidentally be affected").
\item \textsuperscript{17} \textit{See ChemWaste}, 112 S. Ct. at 2015 n.8 (discussing the state's arguments and the Court's rejection of those arguments); \textit{see also supra} note 13.
\item \textsuperscript{18} \textit{ChemWaste}, 112 S. Ct. at 2015-16. Because these examples seemed to be listed illustratively rather than exhaustively, the Court thus apparently left open the entire field of evenhanded regulation and by implication showed that it had not yet been faced in the waste context with a case where evenhanded regulation was being challenged.
\end{itemize}
\end{footnotesize}
specifically mentioned market participant type activities, such as subsidies to Alabama waste producers or state ownership of disposal facilities, as also not being foreclosed by the ChemWaste ruling. This statement was uncontradicted by the majority. Additionally, ChemWaste involved a differential fee situation, and the Court did not directly address any compensatory fee issues. In sum, the possibilities left open by Philadelphia remained open after ChemWaste.

D. Oregon DEQ Foreclosed Using Compensatory Fees As an Easy Solution to Externalized Out-of-State Waste Harms

As noted, the ChemWaste case, which involved a differential fee charged to out-of-state waste, did not directly address what type of compensatory waste fees might pass constitutional muster. The Oregon DEQ case provided some negative answers. In ruling that compensatory fees cannot constitutionally offset general revenue expenditures, the Oregon DEQ Court indicated that few compensatory waste fees which a state might politically desire to pass will survive dormant Commerce Clause attack.

1. Background Regarding Compensatory Fees

A compensatory fee, or user fee, compensates the government for expenses the government incurs relating to the non-citizen’s activities. If

---

119 See supra note 120.

120 Oregon DEQ, 114 S. Ct. at 1351-53. Together with the C&A Carbone, 114 S. Ct. 1677 (discussed infra notes 164-222 and accompanying text) and West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205 (1994) (discussed to a very limited extent infra notes 155-63 and accompanying text), the Oregon DEQ case may indicate a significant shift in the way the Court will decide future dormant Commerce Clause cases. A detailed analysis and critique of the implications of this shift for the Court’s dormant Commerce Clause jurisprudence outside the waste context is beyond the scope of this Article. See supra note 6.

121 The Court apparently lumps together compensatory fees and tax apportionment situations, judging both by the test set out in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274-(1977). Although the issues are related, the purposes served by a compensatory
the state has charged its own citizens to provide a service or government benefit, the outsider who uses the service may sometimes be charged a fee, and such an arrangement will not necessarily violate the dormant Commerce Clause. The justification for such a fee withstanding Commerce Clause scrutiny is that “interstate commerce may constitutionally be made to pay its own way.”

Significantly, heightened scrutiny should not be triggered just because the fee is charged only to outsiders. Accordingly, compensatory fees potentially provide states which

fee versus a straight revenue measure are different. The compensatory fee reimburses the state for something the state has provided and for which its citizens have already paid; outsiders should therefore not be able to use what the state has provided without paying their fair share. A general revenue tax assessed outsiders, on the other hand, asserts that the outsider is really not such an outsider as she claims and that her connection to the state, i.e., her business activity in the state, makes her an insider for purposes of the tax charged; thus, it is fair to have her proportionally share the general revenue obligations imposed on other citizens. The compensatory fee theoretically could require a more direct nexus between the activity and the fee charged than the apportioned tax. The Court has not seen fit, however, to distinguish between the two situations for assessing constitutionality under the dormant Commerce Clause.

The Oregon DEQ opinion, on the other hand, drew theoretical distinctions between compensatory fees and user fees. The Oregon DEQ Court defined the latter fees as “charges imposed by the State for the use of state-owned or state-provided transportation or other facilities and services.” Oregon DEQ, 114 S. Ct. at 1352 n.6 (quoting Commonwealth Edison Co. v. Montana, 453 U.S. 609, 621 (1981)) (internal quotation marks omitted) (emphasis added). The type of compensatory fee at issue in the Oregon DEQ litigation, contrary to the Court’s analysis, would fit the Court’s definition of a user fee. The fee being charged out-of-state waste under the Oregon statute was designed to compensate the state of Oregon for the use of its services (in the form of department of environmental quality personnel) and for degradation of its resources (in the form of externalities which the state would have to pay out of its own pocket). Id. at 1357 (Rehnquist, C.J., dissenting). The fee was being charged primarily not to equalize private citizen tax burdens, but to recover costs. Because the Oregon DEQ Court labelled the fee before it a compensatory fee rather than a user fee, id. at 1351, apparently limiting the label “user fee” to the more narrow situation of literal government ownership, this Article also uses the term “compensatory fee” to refer to situations where a state tries to recover expenses for itself, as well as to situations where the state attempts to equalize tax burdens placed on its private citizens.


125 Id. (stating that “a state tax is not per se invalid because it burdens interstate commerce since interstate commerce may constitutionally be made to pay its way”). Since the purpose of such a fee is always to make the outsider bear a portion of the cost already paid by insiders, if heightened scrutiny were applied against such fees, they would almost never be collected. Although one could argue theoretically that the state has no less discriminatory alternative to the compensatory fee for accomplishing the sharing of burden and revenue, such an argument stretches heightened scrutiny out of shape, since in fact the Court's nexus tests and presumptions in previous compensatory fee cases are
want to manage their own trash a method of controlling the burdens of out-of-state trash.

In reality, however, the allure of compensatory fees is not so bright as might first appear. This is so not only because such fees cannot be used as a pretext for excluding out-of-state waste, but more importantly because even compensatory fees aimed only at recapturing the costs imposed by out-of-state waste, under the Court's Philadelphia rationale, cannot charge for all the waste burdens imposed by the out-of-state waste. Additionally, as emphasized by the Oregon DEQ ruling, the Court's current compensatory fee test requires a close match between the event which triggers a fee against out-of-state interests and the in-state costs being compensated. It was on this requirement of "substantial equivalence" that the Oregon fee primarily foundered.

The reason for this result is that the most important problems associated with landfills are the externalities they impose. Under the Court's Philadelphia logic, these externalities cannot be charged against out-of-state generators who use private landfills unless the siting government which allowed the landfill to come into being has already imposed or is currently imposing the same externalized costs upon its own citizens. See supra notes 46-75 and accompanying text. For example, if a compensatory fee attempted to charge out-of-state waste for the future clean-up costs associated with landfills, but the state had not yet charged this cost against in-state waste generators or the current state budget, the tax would be invalid under Philadelphia's implied "omit-externalities" logic. Although the externalities of the landfill, in the form of future response costs, would be very real and probably would require future state expenditure of real dollars, the state, not yet being out any actual funds, would not be permitted to charge others for what it had not yet charged its own or itself.

The requirements for compensatory fees are set forth in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). A fee withstands dormant Commerce Clause scrutiny when it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." Id. at 279. Since the disposal of garbage within the state would always satisfy the substantial nexus requirement, the focus in garbage compensatory fee cases is upon the other elements of the test. "Discrimination" in tax cases does not mean that the fee is charged only to the out-of-staters, but rather that the out-of-state interests are being singled out disproportionately to pay expenses not borne by in-staters.

Some older dormant Commerce Clause decisions indicated that the presumption was in favor of the reasonableness of compensatory fees and the burden was upon those challenging the fee to establish its disproportionality to services provided. See Clark v. Paul Gray, Inc., 306 U.S. 583, 599 (1939) ("The burden rested upon them to show that
2. The Type of Fee Involved in Oregon DEQ

The fee Oregon charged out-of-state waste in the Oregon DEQ litigation was presumed to exactly equal costs Oregon paid from its state treasury relating to the same amount of in-state waste. Oregon did not argue that the need for a fee on out-of-state waste was because of some unprovable peculiarity of the out-of-state waste, but it more

...
out-of-state waste had not yet paid the same dollar amounts as were being paid in relation to in-state waste. The question Oregon DEQ posited was whether a fee that recovered no more than the same costs actually being collected and expended in relation to in-state waste would nevertheless violate the dormant Commerce Clause. The Oregon DEQ Court declared such an equalizing fee unconstitutional.

3. The Oregon DEQ Opinion — Presumptions Against Compensatory Fees and Insistence on Substantial Equivalence Doom Oregon’s Statute

The Oregon DEQ Court evaluated compensatory fees with a presumption against their validity. This departure from prior Commerce Clause case law bodes ill for the future of compensatory fees generally and waste fees particularly. The Oregon Supreme Court, for example, had read prior case law to indicate that a more lenient test should be applied to compensatory fees than that employed under heightened scrutiny. Instead, the majority opinion of the U.S. Supreme Court placed compensatory fees squarely under the virtual per se rule of invalidity.

discriminatory method of excluding or charging against only that waste which really contains the hazardous constituents. Nevertheless, the Court in Oregon DEQ, as in previous waste cases, continued to offer this false bait to regulators. Id. at 1351 & n.5.

Id. at 1348.

Id. at 1355.

Id. at 1352 ("Though our cases sometimes discuss the concept of the compensatory tax as if it were a doctrine unto itself, it is merely a specific way of justifying a facially discriminatory tax as achieving a legitimate local purpose that cannot be achieved through nondiscriminatory means.").

See also supra notes 122, 123, 125, 128 and accompanying text.

See Oregon DEQ, 114 S. Ct. at 1349.

The Court stated:

Even if the surcharge merely recoups the costs of disposing of out-of-state waste in Oregon, the fact remains that the differential charge favors shippers of Oregon waste over their counterparts handling waste generated in other States. In making that geographic distinction, the surcharge patently discriminates against interstate commerce. Because the Oregon surcharge is discriminatory, the virtually per se rule of invalidity provides the proper legal standard here, not the Pike balancing test. Id. at 1350.

As previous discussions of the Philadelphia and Fort Gratiot cases indicate, the level of scrutiny applied to a waste regulation is near determinative of its validity. Justice
By placing Oregon's compensatory fee under the strict scrutiny test, Justice Thomas virtually ensured that it would be found unconstitutional. Thus, Oregon DEQ becomes another example of how the Court's choice of a Commerce Clause test determines the results in waste cases. By emphasizing that Oregon charged in-state and out-of-state waste different amounts at the same site, then defining such difference as per se discrimination, and then requiring that such per se discrimination be justified under strictest scrutiny, the Oregon DEQ Court made its self-fulfilling prophecy of presumption against validity come to pass. When heightened scrutiny is employed, existence of a less discriminatory alternative will almost always prove the unconstitutionality of the regulation. In the case of Oregon's fee, 'taxing in-state and out-of-state waste the same amount at the landfill gate could always be viewed as a less discriminatory alternative. Justice Thomas emphasized the same point through the term "substantial equivalence."

By strictly construing "substantial equivalence" to mean almost exactly the same event, Justice Thomas doomed Oregon's statutory scheme. Oregon argued that the state satisfied the dormant Commerce Clause when it fully collected waste fees related to in-state waste, via a combination of general revenues and taxes and that it did not have the similar ability to tax out-of-state generators or spread costs across the entire out-of-state population. The Oregon DEQ Court rejected these arguments, focusing solely on the difference in the fee charged to the waste rather than upon whether Oregon had power to tax all waste streams in a similar fashion. From Oregon's perspective, it was a legitimate policy to spread waste disposal costs throughout the state in various ways for in-state waste. However, it was impossible for

Thomas emphasized this truth: "As a result, the surcharge must be invalidated unless respondents can 'show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives' . . . . The State's burden of justification is so heavy that 'facial discrimination by itself may be a fatal defect.'" Id. at 1351 (emphasis added) (citations omitted).

137 Id. at 1351.
138 Id. at 1352.
139 Id. at 1353.
140 Id.
141 Id. Each state legitimately may wish to subsidize some generators relative to others by not charging them their truly proportional costs of waste generation, even if those costs accurately could be determined. Nothing should be constitutionally infirm with a state choosing, for example, not to charge its poor for the costs of waste disposal, or choosing to give its in-state utilities a reduced rate for all aspects of business operations, including waste disposal, by reducing their tax rate. Since all states subsidize their waste
Oregon to collect and spread costs similarly for out-of-state waste. Oregon only had the power to tax out-of-state waste when that waste was headed towards Oregon landfills.

The Court found Oregon's cost-spreading goals insufficient to overcome the presumption of invalidity. The Court articulated its objection by using the deceptively objective-sounding language of a failure to tax a substantially similar event, as if Oregon could accomplish its cost-spreading/full recovery goals by substituting a different tax for the fee it had chosen. But in reality, Oregon's cost-spreading goals were inherently incompatible with the kind of substantially similar taxing event the Court required. Only a discrete tax on particular in-state waste would have satisfied the Court, e.g., a per-ton fee on both in-state and out-of-state waste. A per-ton tax on in-state waste, however, would be exactly the opposite of cost-spreading.

As in the Fort Gratiot and ChemWaste cases, the arguments of the state and the concerns of the Court were at cross purposes. From the Court's perspective, so long as Oregon's scheme always produced differential direct taxation on similar items, a legitimate purpose could never exist. From Oregon's perspective, so long as Oregon had producers to varying degrees, a fee charged against waste, whether in-state or out-of-state, never exactly matches harms with generators. In other words, regardless of what fee is actually charged to waste, there will always be those who get a relatively free ride for the real costs associated with their waste being disposed in Oregon landfills.

The key constitutional question should have been whether taxing in different manners — by general revenues versus waste fees — appears to invite favoritism to in-state enterprises over out-of-state enterprises engaged in the same type of business. The Oregon DEQ Court never satisfactorily identified what in-state interests were advantaged by Oregon's fee or what out-of-state interests were disadvantaged. The Court presumed either that those who hauled waste requiring no differential tipping fee were primarily Oregon businesses, or that most waste which was not charged the fee got more of a free ride than out-of-state waste. Since under heightened scrutiny the burden became Oregon's to refute these assumptions, the possibility of such favoritism was enough to defeat the legislation, despite the lack of real evidence on either side to indicate any in-state haulers or generators actually being given favorable treatment.

142 Id. at 1353-54.
143 Id. at 1353.
144 The Court identified the one-to-one correspondence of item to tax involved in use tax situations as the "prototypical example of substantially equivalent taxable events" and indicated its "reluctance to recognize new categories of compensatory taxes." Id.
145 The Court comes close to frankly acknowledging this effect of its ruling, stating that "because respondents have offered no legitimate reason to subject waste generated in other States to a discriminatory surcharge ... the surcharge is facially invalid .... Accordingly, the judgment of the Oregon Supreme Court is reversed." Id. at 1355 (emphasis added).
already collected fully for in-state waste, any out-of-state waste not being assessed a fully compensatory fee was getting a free ride into Oregon landfills.\textsuperscript{146} When Oregon emphasized that it had already fully collected and paid costs regarding in-state waste, the Court used this information to reinforce its argument that in-state waste, unlike out-of-state waste, was being subsidized.\textsuperscript{147} When Oregon emphasized that out-of-state waste had not yet paid for its full share of harms and therefore should be deterred, the Court used this information to buttress its argument that Oregon was impermissibly hoarding landfill space for insiders.\textsuperscript{148} Focused solely upon the effect of Oregon's fee upon waste at the gate, the Court told Oregon that it could not have it both ways — either Oregon could continue to spread costs away from the gate for in-state waste (meaning it would also effectively have to absorb such costs for out-of-state waste),\textsuperscript{149} or it could charge both types of waste full fees at the gate (meaning under Oregon's current taxing scheme that Oregonians would have to pay twice for the same services for in-state disposal of in-state generated waste).\textsuperscript{150} Oregon's goal of cost spreading was incompatible with the Court's interpretation of the Commerce Clause.\textsuperscript{151}

4. Subsidies and Fees that Might Survive Oregon DEQ

\textit{Oregon DEQ} spoke to the issue of compensatory waste fees in the same way that \textit{Philadelphia} spoke more generally to the issue of waste and the dormant Commerce Clause. In both cases, states invited the Court to take a more lenient Commerce Clause view in waste management situations, arguing that in such situations the state is under an obligation to care for trash generated within its borders and is therefore motivated primarily by environmental rather than economic protectionistic concerns. In both cases, the Court instead restrictively and mechanically interpreted prior Commerce Clause case law to prohibit state action that would negatively affect private waste operators. Just as \textit{Philadelphia} foreclosed favoring in-state created externalities when disposing of waste, \textit{Oregon}

\textsuperscript{146} \textit{Id.} at 1359 (Rehnquist, C.J., dissenting) (noting that Oregon “is only asking that those neighbors pay their fair share of the use of Oregon landfill sites”).

\textsuperscript{147} \textit{Id.} at 1353-54.

\textsuperscript{148} \textit{Id.} at 1354.

\textsuperscript{149} The Oregon legislature anticipated the contingency that its out-of-state differential would be found unconstitutional and directed that in such circumstance the out-of-state fee be reduced to that charged in-state. \textit{See id.} at 1348 & n.2.

\textsuperscript{150} \textit{Id.} at 1352.

\textsuperscript{151} \textit{Id.} at 1351.
DEQ restrictively read prior compensatory fee case law to completely foreclose alternative funding sources for burdens imposed by different waste sources. After Oregon DEQ, a state which wants to recover any of the costs imposed by waste buried at landfills in the state must do so by charging the same amount against all waste of the same type brought to the state’s landfills.

Oregon DEQ, however, does not foreclose other methods by which a state may cut waste costs for its own citizens relative to out-of-staters. Discriminatory fees charged by a market participant and subsidies aimed to benefit only in-state interests are two variations on compensatory fees that presumably are not foreclosed by the Oregon DEQ ruling. It should be noted that the Oregon DEQ Court’s specific emphasis on the fact that it was not dealing with fees charged by a state-owned facility or fees charged due to use of state resources by implication left open market exemption possibilities for approval.

Subsidies in connection with fees charged to out-of-state waste, however, are a more complicated matter. Presumably, subsidies enacted as part of a waste program which also includes compensatory fees are not foreclosed by Oregon DEQ. A state which collected fifty dollars per

---

152 The Court viewed any loosening of the substantially similar event requirement as a Pandora’s box, declining “to open such an expansive loophole in our carefully confined compensatory tax jurisprudence,” and it viewed any invitation to weigh comparative burdens of taxes that were not near carbon copies of each other as a “plunge into the morass” foreclosed by a previous decision. Id. at 1353 & n.8 (quoting American Trucking Ass’ns, Inc. v. Scheiner, 483 U.S. 266, 289 (1987) (internal quotation marks omitted)). As Justice Thomas conceded, this antipathy to compensatory fees is a “recent reluctance to recognize new categories of compensatory taxes.” Id. at 1353 (emphasis added). However, the Court used the Oregon DEQ facts to reaffirm that the direction of decisions begun in Arnco, Inc. v. Hardesty, 467 U.S. 638 (1984), and continued by cases such as Scheiner was so far developed as to be considered well-settled, irreversible, and inflexible. A more detailed consideration of the implications of the Oregon DEQ ruling on dormant Commerce Clause or compensatory fee jurisprudence is beyond the scope of this Article but will hopefully be addressed in a planned future work. See supra note 6.

153 See also infra notes 281-88 and accompanying text (exploring possibilities for market participant exemption).

154 Oregon DEQ, 114 S. Ct. at 1352 n.6.

155 Attorneys crafting any subsidy measures should, however, be aware of the following potentially troublesome language in West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205, 2214 n.15 (1994): “We have never squarely confronted the constitutionality of subsidies, and we need not do so now.” The West Lynn Creamery Court admitted that the Court generally has considered subsidies not to violate the Commerce Clause but apparently did not wish to give an absolute green light to subsidies. See id.

In West Lynn Creamery, the Court declared unconstitutional a state milk pricing order which collected fees from all milk sold or processed in Massachusetts but then used
ton for all waste disposed in the state could, at the same time, use funds from its general revenues to help some or all in-state waste generators to pay their waste disposal costs. This scenario would effectively give in-staters a competitive advantage over out-of-staters who were not similarly subsidized. For example, if a state provides “free” garbage pickup service for its citizens,\(^5\) the total cost of disposal is obviously lower for waste picked up “on the state” than if the entities that generated the waste had to pay for its collection as well. Indirect unlinked “subsidies” of this sort presumably would not violate the dormant Commerce Clause. Every state can provide such subsidies in whatever effective amount it wishes to enable garbage generated in that state to compete with garbage from other states.

Given the Court’s recent reasoning in *West Lynn Creamery*,\(^1\) it would likely be unconstitutional for a state to directly link the amount of any given in-state subsidy to amounts charged all waste as tipping fees.\(^2\) For example, if the state charged fifty dollars per ton for all waste disposed at in-state landfills but then rebated ten dollars to haulers for every ton of in-state waste they deposited at in-state landfills, this situation would be viewed by the Court as no different from impermissibly charging a lower forty dollar per-ton fee at the front end based on waste origin.\(^3\) A ten dollar per-ton subsidy given to in-state

---

\(^5\) Of course such pickup is not truly free, since it is funded through state revenues to which the generators have at least partly contributed. There is, however, no guarantee that the actual value of the pickup for any individual generator (if assessed on the open market) approximates that generator’s contribution to the source of funding for the pickup. Also, RCRA does not obligate the state to provide pickup for all generators’ trash, so whatever the state provides, relative to other states, assists or disadvantages generators in that state relative to the overall waste disposal services market.

\(^1\) See supra note 155 for a brief description of the *West Lynn Creamery* facts and holding.

\(^2\) *West Lynn Creamery*, 114 S. Ct. at 2212.

\(^3\) The author emphasizes that, just as he does not think that the Court should have declared the differential fee in *Oregon DEQ* unconstitutional, he also believes its Commerce Clause jurisprudence is misguided to declare any linked subsidy per se unconstitutional — at least so long as the fee charged against out-of-state waste does no
generators of waste, on the other hand, to assist in their disposal costs, might withstand dormant Commerce Clause attack. The haulers who picked up such subsidized trash would not be expected to reduce their fee to handle the subsidized trash, and the haulers still would be paying the full fee the state charged at the landfill gate for both subsidized and unsubsidized trash.

West Lynn Creamery probably also forecloses the imposition of a revenue-raising fee on all waste to benefit only in-state interests affected by the fee. To stick with the last example, if the state charges fifty dollars per ton to all waste regardless of origin but then subsidizes in-state generators ten dollars per ton out of this fifty-dollar fee, the Court would likely view this scheme as impermissibly taking from outsiders to benefit insiders of the same type. The assumption would be that a substantial portion of the fifty dollars charged to haulers is passed on from haulers to generators in the form of higher hauling fees; generators would therefore be paying a substantial portion of the fifty-dollar tipping fee. If portions of this fee were earmarked to go back to in-state generators, out-of-state generators in effect would be paying in-state generators a substantial part of the subsidy even when both of them disposed at the same site and produced identical harms. Such discrimination against out-of-state commerce to fund in-state benefits would violate the dormant Commerce Clause.¹⁶⁰

To avoid this “linkage” problem, a state wishing to use a compensatory waste fee should make sure that either: 1) any state subsidies are not funded by fees directly linked to the industry the state wishes to benefit;¹⁶¹ or 2) fees collected from out-of-state interests similar to those the state wishes to benefit should go only to expenses the state has actually incurred in regard to the out-of-state waste.¹⁶² If these cautionary steps are not taken, the state runs the strong risk that its linked subsidy will be declared unconstitutional.

₁⁶⁰ Again, the author does not necessarily agree with this logic as a matter of proper dormant Commerce Clause jurisprudence but instead believes only that the Court, given its strong and unequivocal recent precedents in C&A Carbone, Oregon DEQ, and West Lynn Creamery, would utilize such an approach.

₁⁶¹ For example, the state could fund a waste generator subsidy through general revenues rather than via a dedicated waste fee fund that collects indirectly from out-of-state waste generators.

₁⁶² For example, the state should leave no money from the fee collected against both in-state and out-of-state waste to be used for anything else, such as subsidies.
Overall, since even carefully crafted compensatory fees allow only some waste burdens imposed by out-of-state waste to be recovered, such fees may not allow enough recapture of the real burdens imposed by out-of-state trash to provide meaningful relief to states burdened by others’ trash. To recover even these limited harms, compensatory fees must be meticulously designed. The Oregon DEQ case rejected the invitation to loosen prior compensatory fee case law requirements and thus prevented states from easily recovering for out-of-state waste harms. A potentially even more devastating blow to current state waste management practice, however, came in the Court’s second 1994 decision, C&A Carbone.

E. C&A Carbone Foreclosed Mandatory Flow Control, but It Did Not Prevent Publicly Assisted Flow Control

In C&A Carbone, the Court threw a significant wrench in state and local waste planning efforts by broadly declaring flow control unconstitutional. In reaching further than it needed to make this sweeping ruling, the Court left no doubt of its general antipathy to state efforts which shortcut the cost of more evenhanded waste regulation. Since many states have depended on some form of flow control as an important part of their waste planning efforts, C&A Carbone has significant impact on numerous existing state programs. For this reason and because the case has not yet generated a significant body of critical commentary, it receives more attention in this Article than

163 Oregon DEQ, 114 S. Ct. at 1351-53.
164 “Flow control” refers to a state or local government’s directives that the trash its citizens generate go to specified waste processing and/or disposal facilities. Flow control is more, therefore, than regulation of how trash may be handled; it is a claim that the government exclusively may control trash, despite citizen or competitor assertions that others might as safely and more economically take care of portions of the community’s trash management needs.
165 C&A Carbone, 114 S. Ct. at 1682.
166 See infra notes 198-201 and accompanying text.
167 In response to the C&A Carbone decision, several legislative initiatives have been sponsored which would effectively overrule the decision, as least for some flow control regimes. For example, during the final editing stages of this Article, hearings were proceeding before the House Subcommittee on Commerce, Trade, and Hazardous Materials on flow control proposals. This Article proceeds on the assumption that the C&A Carbone decision will remain controlling precedent for state waste planning efforts.
168 For two examples of critical analysis written prior to the C&A Carbone decision, see Michael D. Diederich, Jr., Does Garbage Have Standing?: Democracy, Flow Control and a Principled Constitutional Approach to Municipal Solid Waste Management, 11
that allotted to pre-1994 Court precedents. After first setting the factual and case law background for flow control, this section briefly analyzes the C&A Carbone decision and then considers what forms of flow control should still survive constitutional attack.

1. Background Regarding Flow Control

The government-offered justifications for flow control are a mixture of health and safety concerns, political practicality, and economic concerns. Since trash poses serious health and safety risks, government legitimately may insist that generators not do whatever they wish with trash they generate. As a practical matter, a system directing only how individuals dispose of their trash can lead to serious enforcement problems unless substantial funds are expended to ensure compliance. It is easier to require everyone to use a facility or service that safely handles trash to the government's satisfaction. Directing all waste generated in the governing area to a single such approved facility constitutes flow control. An additional reason for flow control is financial. Where the government seeks to provide disposal services itself or enter into long-term contracts for its citizens, a guaranteed base amount of trash may be necessary to make trash management projects economically viable. The C&A Carbone Court, however, found these health and safety and/or related financial justifications unpersuasive against Commerce Clause attack.

In invalidating Clarkstown's particular ordinance, the Court did more than strike down an experimental or innovative regulation. Unlike the situation in any of the previous waste cases before the Court, flow control is something most states have instituted in one form or another and have considered key to their internal waste management.

---


169 In previous cases, state regulation methods at issue were ones which a number of states might desire to copy if the technique were found to be constitutional, but which most states had not yet implemented and which some probably would not implement even if found to be constitutional.

170 Most states seem to have utilized flow control, despite Justice O'Connor's citation to only 21 statutes that authorize flow control. C&A Carbone, 114 S. Ct. at 1690 (O'Connor, J., concurring). Justice O'Connor's listing omitted explicit or assumed municipal or county power to direct local trash which was not established as part of comprehensive waste planning. She did not include, for example, the Kentucky statutes discussed immediately following in the text. As two early Court precedents also indicate, local ability to control waste via monopoly franchises has a long history. All such waste collection monopolies would also be included as flow control and have thus been ruled
strategies. Flow control arrangements are primarily implemented at the local level but occasionally are set up to operate at a statewide level. In Kentucky, for example, long before the legislature’s Special Session on solid waste, the Louisville area used home rule authorization to direct that all trash generated in the city go to a municipal incinerator.171 In the 1980s, section 109 of the Kentucky Revised Statutes assumed the validity of flow control power when it authorized counties and waste management districts to enter into contracts for the disposal of waste generated within the county or waste management district.172 The 1991 Special Session of the Kentucky legislature continued to assume such power in local government when it turned this authorization into a command that all counties provide their residents with access to collection services.173 Although most states similarly put primary authority for flow control with local authorities, some states, like New Jersey and Delaware, exercise flow control at the statewide level through boards or authorities which route all waste generated in the state.174 As Justice O’Connor correctly pointed out, Congress assumed, without explicitly authorizing its implementation, that localities had the authority to enter into long-term contracts for disposal of their citizens’ trash and to direct locally generated trash to specific locations.175 In short, flow control is widespread.

Until July of 1991, no court had found flow control unconstitutional in response to challenges raised under due process, antitrust, or the dormant Commerce Clause.176 The United States Supreme Court in two 1905 decisions, California Reduction Co. v. Sanitary Reduction Works177 and Gardner v. Michigan,178 upheld ordinances which grant-

---

173 See id. § 224.43-315 (Baldwin 1992). At the state level, Kentucky statutes also have provided the Kentucky Natural Resources and Environmental Protection Cabinet (the “Cabinet”) with authority in emergency situations to direct waste collected in one waste management district or county to be deposited at particular disposal facilities elsewhere in the state. See id. § 224.10-105(3), (4).
175 See C&A Carbone, 114 S. Ct. at 1691-92 (O’Connor, J., concurring).
177 199 U.S. 306, 310 (1905).
178 199 U.S. 325, 327 (1905).
ed monopoly franchises to private contractors for collection of San Francisco and Detroit garbage. In each case, competitors of the contractor who was awarded the franchise were denied the right to markets they formerly had serviced and were thereby put out of business. The Court found that the cities’ franchises did not violate due process, even though less burdensome alternatives might have been available. More recent lower court decisions had uniformly upheld local garbage monopolies and flow control against antitrust attack, emphasizing not only that a state action exception to antitrust claims exists, but also that the challenged action, local garbage collection, is a traditional governmental function and therefore subject to less intrusive governmental scrutiny.

Prior to DeVito v. Rhode Island Solid Waste Management Corp., lower courts displayed uniformity in their rejection of challenges to flow control under the dormant Commerce Clause. The cases upholding flow control emphasized the legitimacy of the state action, the fact that the burden of increased costs associated with flow control was placed upon the citizens subject to the regulation rather than outsiders, and the fact that any effect on interstate commerce was minimal and incidental. The pendulum started to swing the other way, however, with the 1991 DeVito decision.

---

179 See, e.g., id. at 333 (“If it be said that the city might have adequately guarded the public health and at the same time saved the property rights of its owner on whose premises garbage and refuse were found, the answer is that the city evidently thought otherwise, and we cannot confidently say that its constituted authorities went beyond the necessities of the case ...”). Given the time period of these decisions, in the height of Lochner-type substantive due process analysis, this deference to the validity of local police powers over supposed free market property interests is significant. See Lochner v. New York, 198 U.S. 45 (1905).


In *DeVito*, a federal district court granted a preliminary injunction against Rhode Island’s enforcement of its flow control and tipping fee regulations for commercial trash generated within Rhode Island.\(^{184}\) Under Rhode Island statutes which mandated that the state-owned and operated landfill exclusively handle Rhode Island trash needs, household residential trash could be charged a tipping fee of no more than around fourteen dollars per ton.\(^{185}\) To operate this facility without incurring significant debt or requiring subsidies via general revenues, operating costs would have to be recovered by continually raising the tipping fee for commercial waste, even though both household and commercial waste were being directed to the same disposal facility and arguably creating the same amount of environmental harm.\(^{186}\) At the time of suit, Rhode Island was charging a tipping fee of forty-nine dollars per ton for commercial waste.\(^{187}\) *DeVito*, a Massachusetts waste hauling company, could charge Rhode Island commercial facilities considerably less to have their waste disposed of at facilities outside Rhode Island. Viewing Rhode Island’s restrictions on the disposal of commercial waste as unfair economic protectionism, the *DeVito* court declared them unconstitutional under the dormant Commerce Clause.\(^{188}\)

Subsequent courts expanded the *DeVito* logic to strike down flow control efforts which did not charge different waste generators within the community different fees for disposal.\(^{189}\) Courts that thus invalidated flow control emphasized that the measuring stick for the burden on commerce was the effect on out-of-state companies that otherwise would receive the in-state trash, rather than the extent of the burden on in-state residents. Those courts also emphasized that solutions provided by interstate trash markets were necessary to solve national trash problems and contended that heightened scrutiny should be applied to such regulations.\(^{190}\) The *C&A Carbone* Court resolved this split among the lower courts by declaring flow control unconstitutional.\(^{191}\)

---

\(^{184}\) *DeVito*, 770 F. Supp. at 777.

\(^{185}\) *Id.* at 777 n.2.

\(^{186}\) See *id.* at 777, 781.

\(^{187}\) *Id.*

\(^{188}\) *Id.*


\(^{190}\) See cases cited *supra* note 189.

\(^{191}\) *C&A Carbone*, 114 S. Ct. at 1684.
2. The Quirkiness of the C&A Carbone Facts

The *C&A Carbone* case involved flow control by the town of Clarkstown, which required all trash discarded in the township to be sent to a local transfer station.\(^{192}\) Previously, the town dump had to be closed because of environmental violations and inadequacies, and Clarkstown had then entered into an agreement with a private contractor for a lease and buy back of a transfer station to be constructed by the private operator. To guarantee sufficient income to the contractor for return on investment to build the new facility, Clarkstown entered into a *put or pay agreement*\(^{193}\) with the contractor to provide a minimum volume of trash to the facility at a set tipping fee. To guarantee that enough trash would come to the facility to fulfill the put or pay agreement, Clarkstown enacted ordinances requiring that all trash discarded within the township go to the transfer station and mandating that no competing transfer stations could be constructed in Clarkstown.\(^{194}\)

The facts thus far stated make the *C&A Carbone* situation roughly analogous to other monopolistic flow control patterns for constructed facilities.\(^{195}\) The unique factual twists to the *C&A Carbone* litigation are provided by the nature of the petitioner, C&A Carbone, Inc., who was an alleged recycler of trash generated primarily from outside of Clarkstown. Carbone’s operations were opposed by the township when Carbone first sought a permit to operate as recycler because the town feared that the recycling operation was really a sham for Carbone to operate as an illegal transfer station. Carbone, however, won this battle and received a permit

\(^{192}\) *Id.* at 1680.

\(^{193}\) *Id.* A put or pay agreement means that the generator (Clarkstown) agrees to pay at least a minimum amount of money to the operator, figured on a set tipping fee multiplied by a set amount of trash. This total fee is paid whether or not the figured amount of waste actually is provided to the facility. The generator typically is guaranteed the tipping fee price for excess amounts of trash beyond the guaranteed minimum, but if he does not “put” the minimum amount with the facility he still must “pay” the minimum fee as if he had disposed of that much trash. When Clarkstown negotiated its put or pay arrangement with the constructor of the new transfer station, it figured minimum fees based on the amount of waste its residents would generate without regard to operations such as Carbone’s.

\(^{194}\) *Id.* at 1680-81.

to operate as a recycler. The residue generated from Carbone's recycling operations (the trash left after recyclables were removed), however, fit the town's definition of trash discarded within the township and thus under the ordinance was required to go to the town transfer station. Carbone claimed this result interfered with his rights under the dormant Commerce Clause to deal in interstate trash. Additionally, trash from town residents was found by the township to be coming to Carbone's facilities rather than to the town transfer station. Carbone, at least in his original briefs to the Court, asserted that the right to receive this town-generated trash for recycling at his facility was also protected by the dormant Commerce Clause.

In his reply brief, however, Carbone shifted exclusively to the out-of-state nature of his trash and largely dropped arguments about his alleged entitlement to process locally generated trash. Similarly, in parallel federal district court litigation, where Carbone won a temporary injunction against the ordinance, the basis for the injunction was that Carbone dealt primarily in trash which originated outside the township, and the federal court injunction was limited to this out-of-state generated trash (including residue left over after Carbone's "recycling" operations were completed in Clarkstown). These atypical facts would have permitted the Court to decide the case before it on fairly narrow grounds. The C&A Carbone Court instead chose to rule as broadly against flow control as any waste industry proponent might have desired.

196 See Town of Clarkstown v. C&A Carbone, Inc., 587 N.Y.S.2d 681, 684 (A.D. 2d. 1992), rev'd, 114 S. Ct. 1677 (1994). The parties vigorously disputed whether or not Carbone actually received high recyclable content trash and/or did serious recycling of trash coming to his facility before attempting to ship it for final disposal elsewhere. Id. at 681-83.
197 Id. at 683-86.
201 Carbone basically alleged that his recycling operations required that the residue he generated not be defined as discarded trash otherwise subject to the ordinance, both because it really originated from out-of-state and because he was performing a beneficial environmental service. The Court could have limited its holding to recyclers or transfer stations that receive primarily out-of-area trash. In typical flow control litigation, there is no dispute about the "quality" of trash generated or about where it is generated; the issue is just whether the government has a right to supplant economic competition for trash its citizens produce.
3. **The C&A Carbone Ruling**

As in other Court waste cases, the main argument between the parties and among the Justices was over which of the Court's various Commerce Clause tests should be applied to the state regulation. The five-vote majority applied strict scrutiny, finding that flow control was designed to discriminate against interstate commerce.\(^{202}\) Justice O'Connor, concurring, evaluated under the *Pike* balancing test but still found impermissible burdening of interstate commerce.\(^{203}\) Justice Souter's three-vote dissent blended a version of *Pike* balancing with market participant exemption to conclude that Clarkstown's ordinance accomplished an important governmental function without discriminating against or overly burdening interstate commerce.\(^{204}\)

Once it was clear which tests the various Justices would apply, it became apparent that Clarkstown's ordinance was doomed. As Justice Souter correctly noted, the majority's choice to link the Clarkstown ordinance with earlier in-state processing cases meant that the virtually fatal scrutiny imposed in those earlier cases would negatively determine Clarkstown's fate.\(^{205}\) On the other hand, if a version of the *Pike* test had been applied, as the Souter and O'Connor opinions indicated, the strong odds were that Clarkstown's ordinance would be upheld. Having so much depend on which test is applied arguably deflects from what should be a more substantively based Commerce Clause inquiry.\(^{206}\) Nevertheless, for the foreseeable future, parties arguing dormant Commerce Clause cases must argue not just the merits of their case, but also, or perhaps instead, that those merits require application of the test which favors their case.

In applying heightened scrutiny to the *C&A Carbone* facts, the majority rejected Clarkstown's claim that flow control regulates in an evenhanded fashion since it requires all waste, regardless of origin, to go to a designated facility. Instead, the majority focused upon the discrimina-

---

\(^{202}\) *C&A Carbone*, 114 S. Ct. at 1680.
\(^{203}\) *Id.* at 1687 (O'Connor, J., concurring).
\(^{204}\) *Id.* at 1702 (Souter, J., dissenting).
\(^{205}\) *Id.* at 1694-95 (Souter, J., dissenting).
\(^{206}\) In the author's view, indirectly framing the argument in terms of applicable tests rather than more directly asking if the challenged ordinance unduly burdens commerce masks the value judgment inherent in dormant Commerce Clause inquiries. *See supra* note 6. As Justice O'Connor correctly noted, "[T]here is no clear line separating these categories. 'In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.'" *C&A Carbone*, 114 S. Ct. at 1688 (O'Connor, J., concurring) (quoting Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986)).
tion against competition inherent in flow control. The majority's view, Clarkstown could not allow only one private company to receive Clarkstown's waste and require all Clarkstown residents to use that one company. This foreclosing of other private handlers from processing Clarkstown's waste constituted per se discrimination against interstate commerce.

The implications of the Court's holding on this issue of competition are potentially far reaching, involving any municipal or state monopoly where the state attempts to require its own citizens to use designated services. Justice Souter argued in dissent that flow control is unlike in-area processing regulations which the Court previously declared unconstitutional. In those earlier cases, the invalidated regulations had benefitted a group of in-area businesses and increased price of private goods primarily at the expense of those outside the area where the processing took place. Flow control, on the other hand, is a monopoly for public benefit which increases prices primarily for those who have chosen to institute the monopoly.

The majority considered these differences either inconsequential or an exacerbation of problems the Commerce Clause was designed to prevent. C&A Carbone is thus yet another example of the state (and any Justices in dissent) arguing at cross purposes to the majority of the Court. As Justice Kennedy saw it, the "town's own arguments" erased any doubt about the discriminatory intent of the regulation. When the town argued that its "discrimination" was evenhanded because it affected in-area and out-of-area processors alike, in the majority's view this meant that there was more discrimination, not less. Any argument that the town could not safely control waste disposal without completely controlling waste disposal fell on deaf ears. If monopoly itself was the evil to be avoided, arguments by the township that related to a perceived need for monopoly reinforced, rather than abated, constitutional problems.

\[Vol 83\]

---

207 C&A Carbone, 114 S. Ct. at 1682.
208 Id. at 1683.
209 Id. at 1694-98 (Souter, J., dissenting).
210 Justice O'Connor agreed with at least part of the dissent's argument. She emphasized that because in-town processors and out-of-towners were similarly "discriminated" against by Clarkstown's designated monopoly, the case needed to be evaluated under the Pike test rather than declared per se discriminatory and presumptively violative of the dormant Commerce Clause. Id. at 1688-89 (O'Connor, J., concurring). Justice O'Connor considered this distinction of "more doctrinal significance than the majority acknowledges." Id. at 1689 (O'Connor, J., concurring).
211 Id. at 1682.
Accordingly, for both the majority and Justice O'Connor, the availability of less discriminatory alternatives to solve health and safety problems refuted the town's arguments about the need to flow control waste. Health and safety concerns could always be addressed, at least in the abstract, by requiring that town-generated waste be handled only in healthy and safe ways by all waste handlers, including the town-designated facility.\textsuperscript{212} From the perspective of the majority and O'Connor, the only reason to insist on monopoly was an illegitimate financial one — the town needed a monopoly to cheaply ensure the financial welfare of its favored facility to the detriment of all competitors.\textsuperscript{213} Again, the majority and the town were arguing at cross purposes. The town emphasized that its obligation to address health and safety concerns was linked to its need to efficiently and cheaply do so via flow control.\textsuperscript{214} From the majority's perspective, such linkage was not constitutionally possible. In the Court's view, this asserted need for a cheap substitute for evenhanded rigorous regulation proved the economic protectionistic intent of the regulation and therefore reinforced rather than lessened the illegitimacy of the monopoly.

4. \textit{Limited Post-C&A Carbone "Flow Control" Possibilities}

\textit{C&A Carbone} ruled any flow control measure that absolutely prohibits competition for trash processing to be unconstitutional.\textsuperscript{215} If a waste handler or processor wants access to a local market, then the state cannot absolutely prohibit that access by requiring all trash to go elsewhere. If a local generator wants to handle his own trash or pay someone other than the government-approved handler to dispose of it, then the state cannot say who must handle trash but only how the waste must be handled. As sweeping as the \textit{C&A Carbone} holding is, however,

\begin{itemize}
\item \textsuperscript{212} See \textit{id.} at 1683 (suggesting as an alternative ordinance one that would contain "uniform safety regulations enacted without the object to discriminate"); \textit{cf. id.} at 1689-90 (O'Connor, J., concurring) (stating that while an ordinance that does not discriminate could violate the Commerce Clause by producing a high burden, the interest "could be achieved by simply requiring that all waste disposed of in the town be properly processed somewhere").
\item \textsuperscript{213} \textit{Id.} at 1683-84; \textit{cf. id.} at 1690 (O'Connor, J., concurring).
\item \textsuperscript{214} The town had been ordered to close the dump formerly used for its citizens' trash disposal, yet it was still obligated to ensure the safe disposal of its citizens' trash. Justice Souter agreed that this obligation to address a local problem gave the town's monopoly efforts more a feel of legitimate market participant status rather than of impermissible economic protectionism. \textit{See id.} at 1693, 1696-98 (Souter, J., dissenting).
\item \textsuperscript{215} \textit{Id.} at 1683.
\end{itemize}
it does not foreclose a state from, in effect, flow controlling most of the waste generated by its citizens.

_C&A Carbone_ does not prevent government from funding a non-monopoly collection service via tax revenues, making that service available to residents free of additional charge, and then directing the trash collected via that service to wherever the state wishes and at whatever cost the state has bid out. Those wishing to buy alternative trash service, at their own cost, could still do so. Just as a state does not violate the dormant Commerce Clause when it provides “free” public education to all who desire it and forces those who want alternative education to pay additionally for it, so a state which provides trash service at its own cost to its citizens does not violate the dormant Commerce Clause as long as it allows citizens to buy alternative trash services at their own cost should they desire to do so.\(^{216}\)

While some trash critics presumably would argue against any form of subsidized government trash service,\(^{217}\) the Court has not yet so directly reinstated _Lochner_-type substantive due process.\(^{218}\) Presumably all Carbone asked for in the _C&A Carbone_ case was to be allowed to compete with government on regulatory terms that would apply to all trash processors. Carbone’s tax dollars which had already gone to Clarkstown were available for use to directly subsidize whatever trash services the town wished to provide. But if Carbone could dispose of his own trash more cheaply by not taking advantage of any government-provided services for which he had already helped pay, then he must be allowed that opportunity to shop on the open market, according to the _C&A Carbone_ Court.\(^{219}\)

It should be apparent that few individual private generators would be able to resist highly subsidized government trash services. Accordingly, de facto flow control survives the _C&A Carbone_ ruling. Carbone, because he imported as much trash as possible from outside Clarkstown, generated an incredible volume of trash needing disposal.\(^{220}\) As a high-volume

---

\(^{216}\) _Cf._ Swin Resource Sys., Inc. v. Lycoming Co., 883 F.2d 245, 249 (3d Cir. 1989) (holding that a county did not violate the Commerce Clause by operating a landfill and giving preference to local garbage).

\(^{217}\) See, e.g., William L. Kovacs & Anthony A. Anderson, _States as Market Participants in Solid Waste Disposal Services — Fair Competition or the Destruction of the Private Sector?_, 18 ENVTL. L. 779, 815-16 (1988).

\(^{218}\) _Lochner v. New York_, 198 U.S. 45 (1905) (providing broad substantive due process analysis).

\(^{219}\) _C&A Carbone_, 114 S. Ct. at 1684.

\(^{220}\) _Id._ at 1680.
generator, he might have been able to negotiate a deal better than only a partly subsidized government service.

Clarkstown apparently did not subsidize its mandated service at all. The city's flow control ordinance led to a premium being charged to generators, so that the financing of the desired facility could take place quickly. This premium was in fact part of the ordinance's constitutional deficiency, according to the majority; the town tried to claim the benefits of market participation without putting the government at risk either financially or to the possibilities of competition. However, in situations where the municipality does subsidize waste disposal services for its citizens, only a high-volume generator would likely opt out of the government-provided service. Unlike the public education analogue, few "quality" and "ideology" based reasons support opting out of government-provided trash services. A government which votes for, funds and provides "free" trash service would probably find few citizens who would opt out; de facto flow control is the inevitable result of massive government subsidy.

In sum, the C&A Carbone decision foreclosed any shortcuts to market participation for governments which wish to flow control their citizens' waste. While governments which require their citizens to use only one trash service violate the Commerce Clause, results very similar to flow control can be achieved by governments willing to sufficiently subsidize a preferred service.

---

21 This financing strategy was not necessarily a bad one, if flow control had been found to be constitutional. As Justice Souter correctly noted, the town plan of putting the monetary load at the front end via fees roughly calculated to the volume of waste generated (i.e., the authorized tipping fee) served as a substitute for bonding measures which would require the town citizens to pay over longer time and perhaps at higher interest rates for the trash facility. See C&A Carbone, 114 S. Ct. at 1693, 1701-02 (Souter, J., dissenting).

22 Some may contend that potential Superfund liability is so real and so stiff that commercial generators, especially of low-level hazardous or special waste, may wish to opt out of government-subsidized services. The contention is that it makes sense to ensure that the waste is handled more safely than the government service might handle it so as to avoid Superfund liability. On the environmentalist side, it is also at least hypothetically possible that extremely committed conservationists might opt out of disposal services which fail to recycle or otherwise "properly" dispose of municipal trash so as to protect the environment. Realistically, it seems the number of those opting out of a highly subsidized government program would be few. Still, this risk of desertion is what distinguishes such market participant flow control from the monopoly form of flow control declared unconstitutional in C&A Carbone.
III. APPLICATION OF THE COURT'S DORMANT COMMERCE CLAUSE RULINGS TO KENTUCKY'S WASTE MANAGEMENT REGIME

Like the statutory waste management schemes in most states, the relevant provisions in the Kentucky Revised Statutes are the product of neither a single legislative session nor a single will even in any

223 Although the 1991 Special Session created numerous new waste management provisions, significant aspects of Kentucky's waste management program were in place prior to the 1991 legislature's action. Chapter 109 of the Kentucky Revised Statutes, vesting waste management authority in counties and/or in “109” boards created by agreements between counties, remained largely unchanged by the Special Session. The power of the Cabinet to set technical conditions for and issue permits under § 224.40-310 of the Kentucky Revised Statutes similarly continued basically unmodified by the legislature’s action. For example, prior to the 1991 Special Session, as part of the Wilkinson administration's effort to capture the environmental initiative, the Cabinet issued, under existing regulatory powers, emergency regulations preventing landfills from increasing out-of-state volumes for facilities which did not meet highest technical requirements. See 401 KY. ADMIN. REGS. 47:132E, 134E, 136E (1990). These regulations required no legislative action or reform but had the effect of dramatically decreasing the number of facilities which could operate profitably in the Commonwealth and decreased some of the externalized costs to be felt by those in the vicinity of disposal facilities.

The 1991 legislature tinkered with but confirmed the broad reach of the Cabinet’s regulatory authority. See, e.g., KY. REV. STAT. ANN. § 224.10-.105 (Baldwin 1992) (granting additional powers rather than decreasing existing powers). Some limited modifications or clarifications of Cabinet power in particular areas were enacted. For example, industry dissatisfaction with the delay involved in issuing permits led to the enactment of § 224.10-220 and § 224.40-310(10), (12), which place time limits on Cabinet action for permits filed and eliminate the possibility of a de novo hearing on permits approved as to design but not yet constructed. Cf. Green Valley Envtl. Corp. v. Clay, 798 S.W.2d 141, 142 (Ky. 1990) (referencing November 1989 opinion of the Franklin Circuit Court which had invalidated operating permits issued by the Cabinet without opportunity for public appeal). Section 224.40-310(11) clarified that the Cabinet need not rely on industry's certification of compliance with permit conditions but instead had power to conduct timely independent inspections to insure a facility was being built in conformity to permit specifications.

Authorization to charge compensatory fees under § 68.178 of the Kentucky Revised Statutes predated the 1991 Special Session. The original administration-proposed legislation for the 1991 Special Session included modifying § 68.178 to allow significantly increased fees designed to deter out-of-state waste, but this proposal was abandoned in light of Government Suppliers Consolidated Services, Inc. v. Bayh, 753 F. Supp. 739 (S.D. Ind. 1990), declaring Indiana's similar system unconstitutional. Finally, the ambiguity regarding how much power local government has to act regarding a disposal facility's design or operation, see infra notes 229-50 and accompanying text, was not eliminated by the 1991 Special Session.
particular session. The result of different and often conflicting political pressures, Kentucky's waste management statutes attempt to address many different waste concerns.\footnote{224} In assessing how much of this legislation remains constitutional in light of U.S. Supreme Court precedents, especially of the last three years, it is important to reemphasize that there is not one legislative package or intent, but there is rather a collection of disparate pieces. The pieces occasionally seem designed to work harmoniously together around a single principle, but more often they seem thrown together as a result of political horsetrading, compromise, and perceived waste needs of the moment. The resulting conglomeration addresses related issues, often without a unifying principle, or perhaps

The main changes in waste management wrought by the 1991 Special Session included the following: putting teeth into requirements that local government realistically plan for and manage local waste, giving the Cabinet tools to more seriously track waste travelling into the Commonwealth, and giving the Cabinet power to keep closer oversight of those operating in the waste industry. See KY. REV. STAT. ANN. § 224.43-310, .43-315(4), .43-360 (Baldwin 1992).

\footnote{224} The waste management statutes try to address many different types of problems, including those dealing with waste tires, lead batteries, composting, permit fees, hospital incinerators, and substandard landfills. Most of these provisions have nothing to do with limiting out-of-area waste but instead address what Kentuckians must do with the waste they produce and how they must plan for disposal of that waste.

Some Kentucky statutes require development of programs or provide incentives or financial assistance to encourage waste reduction. For example, under § 224.10-610 through .10-650, the Cabinet has the power, duty, and some funding to promote recycling, encourage composting, and increase education regarding waste reduction and management. Similarly, under § 224.43-710 through .43-730, technical and financial assistance is provided to local communities for forming and implementing waste management and reduction plans. Sections 132.200, 139.480, and 152.052 provide tax breaks or incentives for recycling, while §§ 45A.520 through .540 include provisions to encourage state agencies and those who contract with them to use recycled goods.

Only provisions targeted solely at outsiders, such as the consent-to-service requirements of § 224.43-380 and the 25% differential fee possible under § 68.178, should be viewed as presumptively unconstitutional under current Court precedent. Other related aspects of Kentucky's regulation of waste which impose potentially significant burdens on outsiders do not seem necessarily aimed at controlling or discriminating against out-of-state waste. For example, the disclosure of background information mandated by § 224.40-330 and the manifest requirements of § 224.43-335 are both potentially good ways to ensure that only proper waste ends up being disposed at facilities in Kentucky, regardless of origin. See also infra notes 289-300 and accompanying text (discussing constitutionality of such evenhanded regulatory measures). In sum, since there is no single controlling impetus behind the many different statutes, one statute does not necessarily fail because an arguably related statute is found to be unconstitutional. Additionally, given the divergent motivations behind statutes, it is too difficult to determine how related statutes actually are.
even with conflicting reasons motivating the passage of sets of statutes which must attempt to operate in conjunction with each other. The job of "discerning" legislative intent in such situations is not so much one of being true to the reality of legislative vision(s), as it is one of imposing upon statutes priorities of purpose and/or of employing presumptions which attribute to the legislature desires and preferences it probably did not have and certainly did not articulate.

Two preliminary problems involved in assessing the constitutionality of Kentucky's waste statutes demonstrate the observations of the preceding paragraph. First, since many purportedly unconstitutional actions are taken at the local rather than state level, the amount of local control possible under the Kentucky waste management system must be determined. This task is not easy, given that ambiguity seems deliberately to have been left in the waste statutes regarding preemption issues, with all interested sides perhaps fearing a loss if the amount of local control had been conspicuously clarified. Second, in situations where the legislature probably intended an action that would now clearly be unconstitutional, but the wording of the statute itself is not unconstitutional, the problem of what the language now should mean comes to the fore. These two issues are addressed in the immediately succeeding parts of this Article, before the Article then turns to a discussion of the constitutionality of particular provisions of the Kentucky Revised Statutes.

A. Statutes Motivated by Unconstitutional Intent Still Can Constitutionally Control Waste Planning

One working premise of the 1991 Special Session was that the number of disposal facilities to be allowed to operate in Kentucky was to be driven by capacity needs identified in local Kentucky government plans.225 The additional assumption was that private in-state facilities could be captured primarily for in-state use. Such capture is clearly unconstitutional under Fort Gratiot.226 Yet the statutory language intended to authorize capture of in-area and in-state facilities for in-area and in-state use does not require capture; it just assumes and permits it. Additionally, and perhaps more importantly, the language of related statutes, while probably assuming that capture would occur, does not authorize capture, and in fact can be construed neutrally to accomplish other waste management goals which the legislature may or may

225 See, e.g., KY. REV. STAT. ANN. § 224.40-315 (Baldwin 1992) (denying approval of a disposal facility construction or expansion permit that is inconsistent with "[t]he capacity needs identified in the area solid waste management plan").  
226 See supra notes 77-101 and accompanying text.
not have intended, if it had realized that capture of private facilities for in-area waste would later be declared unconstitutional.

For example, the goal of limiting the amount of solid waste disposed of in the Commonwealth, enunciated at section 224.43-010 of the Kentucky Revised Statutes, probably originally assumed that most facilities in the Commonwealth would be handling primarily Commonwealth-generated waste and thus that a decrease of amounts disposed in-state would correspond to and reflect true waste reduction by Kentucky generators. Only if Kentucky facilities were handling primarily or solely in-state waste could measuring the amount of waste disposed of at Kentucky landfills be used as a shortcut to see if waste reduction by Kentucky generators was occurring. But since the language of section 224.43-010 is source-neutral, these provisions currently can be read as a legislative directive to limit environmental harm caused by disposal in the Commonwealth and to encourage alternatives to land disposal. Decreasing the amount of total landfill capacity available in the state, in other words, is a rationally based legislative solution to the problems of land disposal, apart from any desire to capture private facilities.

The legislature could, of course, revisit provisions which were probably designed to be implemented in what is now seen to be an unconstitutional manner; in the meantime, residual constitutional legislative directives should be implemented. Courts may presume that the legislature still intends its valid words to have effect, even when other portions of a statutory scheme are found to be unconstitutional. This principle of construing remainders constitutionally rather than ignoring legislative directives has important ramifications for construing statutes governing local planning.

B. Significant Local Control Is Possible

The issue of how much control local government should have over waste planning consumed much negotiation in the 1991 Special Session. The pre-

---

227 See KY. REV. STAT. ANN. § 224.43-010(4) (Baldwin 1992) (stating as the goal of the state the reduction of solid waste disposed of at municipal facilities).

228 Of course, since neither local government nor the state can reserve any decreased private capacity for local or in-state use under Fort Gratiot, the practical problems of how local and state governments would be able to dispose of locally generated trash if there is a decrease in landfill capacity could become significant. Conceivably, local government would be forced to export at increased cost to out-of-state facilities. It is this evenhandedness and reality of local burden (i.e., potentially significantly increased cost) accompanying an evenhanded cap on landfilling which reinforces the constitutionality of the measure. If the legislature has really said that landfill capacity should be reduced (via a requirement that less total waste be disposed of in the Commonwealth), then that directive cannot be ignored when the costs associated with the directive become real.
Fort Gratiot belief that local government might be able to exclude out-of-state waste as part of a comprehensive planning process partly contributed to the statutory emphasis upon local plans determining landfill capacity needs. Although these legislative assumptions about ability to capture private facilities for local use were clearly ruled unconstitutional in Fort Gratiot, the language emphasizing local planning, since it does not require capture, still validly can be implemented. Yet when the local government attempts to use its local planning authority in ways which severely affect interstate waste interests, burdened parties may claim that local government is exceeding its statutory mandate and should be preempted from regulating. Accordingly, the issue of how much local control is possible under the Kentucky regime must often be addressed in conjunction with challenges brought under the Commerce Clause.

1. The Starting Point of Shared Authority

Kentucky statutes, in many areas of waste management, unfortunately do not unambiguously declare how much authority local government has to manage waste. The statutes do, however, clearly indicate some amount of local power, by emphasizing a shared state and local responsibility for waste management. The state, for example, sets overall goals for waste reduction and management, promulgates technical and operational requirements for facilities, and supervises to make sure that governments develop and implement local plans and that those who handle or process waste do so according to Cabinet regulations. The local government is required to provide some form of universal trash

---

230 See, e.g., id. §§ 224.40-305, .40-310, .40-605.
231 See, e.g., id. § 224.43-340(10), (11).
232 See, e.g., id. § 224.40-650.
233 The "local" component of Kentucky waste management planning is factually more complicated than the text indicates. Under § 224.43-340 and § 224.43-345, "local governing bodies" are given the primary role for local waste management. These local governing bodies need not consist of single counties and in metropolitan areas require a working out of jurisdictional power sharing between the city and the county. See id. § 224.43-340.

In some waste management areas, however, the counties also apparently exercise waste powers independently, or at least co-extensively, with the local governing bodies. See, e.g., id. § 109.041(1) (Supp. 1993). As originally offered by Governor Wilkinson, regional development districts also played a much larger role in waste management. This offer was resisted by counties as a potential power grab, and the final version of § 147A-140 of the Kentucky Revised Statutes accordingly limited the role that area development districts could play in waste management.
collection,\(^{234}\) is obligated to develop a local plan for waste management,\(^{235}\) and is given significant organizational and contracting authority under Chapter 109 of the Kentucky Revised Statutes to implement the locally developed waste plan.\(^{236}\) When Kentucky statutes explicitly give local government power to act in waste management, there can be no argument of absolute preemption, just disagreement as to what the statutory terms mean in relation to other statutory provisions which explicitly also give the Cabinet power to act.

On the other hand, even when statutes specifically do preempt local government from regulating, there may still be an indication that some otherwise extant local power has been diminished or removed. In the absence of the preemptive statute, in other words, the assumption would be that the local government had power to regulate. Relatively few examples exist where Kentucky waste management statutes specifically indicate that only the Cabinet may regulate. One example, section 109.041(4) of the Kentucky Revised Statutes, specifically provides that “no county or waste management district shall regulate special wastes.”\(^{237}\) The only thing left to argue about under such a statute is what it means to “regulate” and whether the county may take actions that would affect special waste which would not be considered, for purposes of the preemptive statute, “regulating” it.\(^{238}\) The additional implication,

\(^{234}\) See id. § 224.43-315 (Baldwin 1992).

\(^{235}\) See id. §§ 224.43-340, .43-345.

\(^{236}\) Some waste statutes grant more specific waste management powers to local government. For example, under § 68.178 of the Kentucky Revised Statutes, the local county government may charge and collect license fees against any waste disposal facility operating in the county. Under § 224.43-340(12) and § 109.042, the local government may hire local enforcement officers to ensure that disposal facilities are operating according to applicable state regulations.

The home rule provisions of § 67.083(3) and (6) also grant Kentucky counties broad but ambiguous authority to regulate trash. See, e.g., 79 Op. Att’y Gen. 84 (1979) (stating that county may require solid waste haulers to transport all waste to a county-operated facility); 82 Op. Att’y Gen. 236 (1982) (stating that county may direct residents to use county receptacles and prohibit others from using such). But cf. infra notes 259-67 and accompanying text (indicating that any such mandatory flow control, while not preempted, would be unconstitutional).

\(^{237}\) KY. REV. STAT. ANN. § 109.041(4) (Baldwin Supp. 1993). Special wastes include particular enumerated waste products, as well as “[o]ther wastes . . . designated special wastes by the Cabinet.” Id. § 224.50-760(1) (Baldwin 1992). Additionally, § 224.01-010(31)(a) excludes from the definition of solid waste those special wastes designated by § 224.50-760. Given the explicit exclusions of these provisions, any waste which the Cabinet designates as special waste is not capable of being directly regulated by a local governing body.

\(^{238}\) Section 109.041 of the Kentucky Revised Statutes does not preempt, for example,
however, is that local government probably has power to regulate other types of waste for which its power has not thus been specifically preempted.

In at least two types of situations, local government should not be preempted from regulating. In “unexercised preemption” situations, the local government still has room to act because preemptive state power has not yet been fully exercised. In “consistent with” situations, local regulation is not preempted because it complements state authority by addressing different regulatory concerns. Because many of the disputes in Kentucky about how much local control can be exercised involve these two types of situations, the preliminary answer to the question of how much authority local government has to regulate waste is “quite a lot.”

the siting aspects of local zoning regulations, but it relates more to how special wastes must be treated and handled and to what types of design requirements might be required for facilities which dispose of special wastes. Cf. 92 Op. Att’yGen. 33 (1992) (stating that KY. REV. STAT. ANN. § 100.324 does preempt a local government from objecting to the siting of a landfill for utility waste, so long as the utility waste was produced incidentally to the utility’s production of power).

A third type of situation, where local government would only sometimes get to regulate, involves “more stringent than” situations. These are situations where the local government argues that its regulations may coexist with state action because the state only provides minimums rather than exclusively sets standards. See generally KY. REV. STAT. ANN. § 67.083(6) (Baldwin 1992).

Due to space constraints, these types of situations cannot be explored even in cursory fashion here. Every time a local governing body attempts to impose additional liner or other engineering requirements for a sanitary landfill, the question of whether such local regulation is preempted comes to the forefront. Because each such local regulation must be evaluated on a case-by-case basis, in comparison to the state regulatory power being exercised by the Cabinet, it would significantly expand this Article to explore “more stringent than” preemption adequately here. Additionally, the primary “local control” disputes which dominated the 1991 special legislative process and which have caused post-1991 friction between the Cabinet and local governments have involved more basic issues of what the local government may say about siting landfills or excluding waste rather than about these other very important matters.

As indicated by the comparison to federal preemption cases in succeeding text, analogy to federal preemption law may be instructive as to how preemption analysis should proceed under Kentucky law. Although theoretically distinct, preemption under both Kentucky and federal precedents seems to proceed along similar lines.

The leading Kentucky preemption case, Commonwealth v. Do, Inc., 674 S.W.2d 519 (Ky. 1984), seems basically in harmony with federal preemption law regarding types of preemption. In Do, Louisville and Jefferson County had instituted criminal charges against defendant Do for violation of local health regulations involving Do’s paint operations. D argued that the legislature’s delegation to the Cabinet for Human Resources of a statewi
2. Unexercised Preemption

In some Kentucky waste situations, the state potentially could prevent localities from regulating but has not yet done so. For example, under section 189.231(3) of the Kentucky Revised Statutes, "[t]he Secretary of Transportation may restrict or regulate traffic upon state-maintained highways in such a manner as is reasonably necessary to promote the safety of the traveling public." Under this statute, in combination with other statutes, the Transportation Cabinet could declare that hazardous waste should travel only on certain state and county roads. But the statute does not require the Secretary to regulate; it uses the permissive "may." Accordingly, if a local community, concerned about the transport of hazardous waste through the community, wished to regulate so that waste would travel on certain routes and avoid others, this power would not be preempted until and unless the Secretary promulgated its own routes. The example illustrates the larger point that in situations

lead poisoning prevention program preempted local government's ability to regulate in the area. Id. at 520-21. The Kentucky Supreme Court disagreed, finding that since the program at issue specifically included funding for local initiatives, some local power to regulate must exist. Id. at 521. Additionally, the court examined statutory provisions outside of the statewide lead paint prevention program and found local power generally to regulate public health. The court emphasized that localities were not prohibited from regulating just because the state had acted in the same area. Id. The key inquiries would be whether there was truly conflict between what both governments were asking the defendant to do and whether the exercise of complementary authority was in the public interest. See id. at 522.

The U.S. Supreme Court's most recent statements regarding preemption in an environmental context are contained in Gade v. National Solid Waste Management Ass'n, 112 S. Ct. 2374 (1992) (holding that an Illinois hazardous waste worker-training law was impliedly preempted by the federal Occupational Safety and Health Act), and Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991) (holding that a local ordinance regulating pesticides was not preempted by the Federal Insecticide, Fungicide and Rodenticide Act).

The analogy to federal situations is helpful. For example, in Ray v. Atlantic Richfield Co., 435 U.S. 151, 171-73 (1978), the Court ruled that the Coast Guard, because it had not yet chosen to issue regulations governing pilotage, had not preempted local tug escort requirements. Cf. Union Elec. Co. v. EPA, 427 U.S. 246, 265-66 (1976) (stating that the EPA did not have veto power over some parts of state implementation plans because the EPA policy giving states discretion regarding what to include in their implementation plans). The federal agency might later change its mind and issue regulations which could take away local power to regulate, but in the meantime the local power is not preempted.

See, e.g., KY. REV. STAT. ANN. § 174.410(1) (Baldwin 1992) (giving the Secretary authority to regulate intrastate transport of hazardous materials).

The question at this point is just whether the local government may act at all, not
where discretionary state authority has not yet been implemented, local
government retains whatever police power regulatory authority it
otherwise would possess.

3. "Consistent with" Regulations

To capture the idea of what is involved in "consistent with"
preemption debates, consider the following not entirely hypothetical
situation. A local community desires to limit the amount of special
waste disposed of at local, privately owned facilities. Under section
109.041 of the Kentucky Revised Statutes, as previously noted, local
governments are prohibited from regulating special waste. But under
section 224.40-315, the Cabinet shall not approve permits to expand or
construct municipal solid waste disposal facilities unless consistent with
the relevant local plan. May a local government limit in its plan the
amount of landfilling going on in the community and thereby indirectly
limit how much commercial disposal of special waste takes place? The
answer seems to be "yes," as an example of the local government
regulating "consistently with" and not necessarily in frustration of the
state's exclusive control over special waste regulation. The key is
determining the scope of each government's power to regulate.

The Kentucky municipal solid waste disposal facility permitting
scheme is predicated upon the local governing body's determination of
how much disposal capacity is needed in the area. Although the local

whether its actions would violate other provisions of law, especially the Commerce
Clause. In the truck-routing hypothetical, to survive dormant Commerce Clause scrutiny,
the local regulation could not prohibit interstate movement of goods through the local
territory, regardless of how hazardous. Cf., e.g., Browning-Ferris, Inc. v. Anne Arundel
County, 438 A.2d 269, 278 (Md. 1981) (holding that differential treatment of in-area and
out-of-area waste and fees and manifest requirements that would impose unreasonable
burdens violate Commerce Clause). Assuming that a routing ordinance applied
evenhandedly and did not unreasonably restrict movement of goods through the local
territory, it probably would survive dormant Commerce Clause scrutiny.

Questions related to the concerns expressed in this hypothetical were asked of the
Attorney General's office during the time the author worked there. The answers suggested
in this Article of course reflect only the author's personal opinion on these matters.

See supra notes 237-38 and accompanying text.

See KY. REV. STAT. ANN. §§ 224.40-315, .43-345 (Baldwin 1992). The
assumption, now constitutionally infirm, was that capacity could be authorized for locally
generated trash, with out-of-area trash being required to receive separate authorization.
Yet limiting out-of-area trash was hardly the sole or even primary goal of required local
waste management planning. Other elements of the statutory framework emphasize the
need for waste reduction, including portions which encourage recycling and discourage
government is prohibited from directly controlling how special waste may be handled, it is encouraged to seek waste reduction generally and to look for ways to force waste generators to seek alternatives to landflling. Prohibiting or placing caps on the amount of landflling that goes on in the area is one of the most direct ways to discourage easy landflling, including easy landflling of special wastes. Additionally, nothing in the statutory waste management scheme indicates that private property owners (either generators or proposed disposers) have a vested right to landfll. Together with the home rule provisions of section 67.083 and the zoning provisions of chapter 100 of the Kentucky Revised Statutes, the waste management aspects of section 224 give local governments room enough to formulate local waste management plans that prohibit or severely limit private landflling in the planning unit's boundaries.

landflling. See, e.g., id. §§ 224.43-010, -345(g); see also 401 KY. ADMIN. REGS. 49:011 (1994) (governing contents of solid waste management plans required to be prepared by KY. REV. STAT. ANN. § 224.43-345 and incorporating by reference DIVISION OF WASTE MANAGEMENT, GUIDELINES FOR PREPARATION OF AN AREA SOLID WASTE MANAGEMENT PLAN (1992) [hereinafter GUIDELINES]). The author thanks Vicki Pettus of the Cabinet for passing the guidelines on to him.

While § 224.43-345(1)(g)(3) requires “establishment of a siting procedure and development program to assure the orderly location, development, and financing of new or expanded municipal solid waste management facilities,” this part does not, in conjunction with the rest of the statute, require local communities to encourage disposal facilities to be sited in the area. Since privately owned landfills are the least favored disposal alternative under § 224.43-010(3), it would not make sense for proliferation of landfills to be considered “the optimal alternative[ ]” required to be implemented under § 224.43-345(1)(g). The real goal of siting is to provide access to disposal facilities for trash generated by the local community. As the remainder of § 224.43-345(1)(g)(3) indicates, “[t]he plan shall demonstrate how all persons in the planning area will within the near future have reasonable opportunity to dispose of their waste in a manner that complies with state and federal laws.” Local facilities would be sited to prevent open dumping, cf. id. § 224.43-345(1)(g)(3), and to assure adequate capacity for locally generated trash, cf. id. § 224.43-345(1)(f), (m). However, the assumption that local private disposal facilities could be compelled to address either problem is now constitutionally incorrect. Except for government-owned disposal facilities, cf. GUIDELINES, supra note 246, at ch. II, new disposal facilities cannot be created with the understanding that they will handle locally generated trash. Such would be unconstitutional under Fort Gratiot. See also infra notes 270-80 and accompanying text.

Construing remainders constitutionally, the monitoring and regulation of private facilities encouraged in connection with local planning should, post-Fort Gratiot, therefore be read to relate to health and safety concerns rather than to capacity concerns. Regulation of facilities for health and safety reasons seems, via the local planning statute, to be a shared Cabinet and local government responsibility in many situations. See, e.g., KY. REV. STAT. ANN. § 224.43-345(1)(g)(1) (Baldwin 1992) (indicating local regulations and ordinances may be passed to govern proper, safe, and sanitary management of solid waste.
If a local waste management plan, for example, capped total daily landfilling at 500 tons, then private area landfills should not be able to accept special waste on top of these plan limits. So long as the limits are directed to landfilling rather than to a particular type of landfilling, the local regulation is not at cross purposes to what the state

in the area covered by the plan). The most dramatic form of landfill regulation — prohibition of the entire activity — seems authorized by the local planning aspects of § 224.

Although the Cabinet has sometimes taken the position that local plans can only set limits for municipal solid waste to be landfilled in the area, see, e.g., Letter from Secretary Phil Shepherd to Union County Judge Executive Veatch (Apr. 21, 1992) (on file with the author), this interpretation is not justified by the overall statutory scheme or language. The Cabinet apparently puts improper emphasis on § 224.43-345(1)(f), which speaks in terms of a plan authorizing capacity only for out-of-area municipal solid waste. The strategy of preserving in-area facilities primarily for in-area use, however, which is behind authorizing separate capacity for out-of-area waste, whether municipal or otherwise, is unconstitutional under Fort Gratiot. It is accordingly risky to rely upon what is at least a partially unconstitutional statutory provision for the authority of local governing bodies to place capacity limits on anything. As demonstrated above, sources of authority for a local governing body to impose capacity limits on a landfill’s operations are found outside of § 224.43-345(1)(f). Whatever that section did or currently does mean, if local government is given power by other statutes to limit landfilling in its borders, then the Cabinet is obliged to give this local determination of what is in the locality’s best interests some deference unless the local power to regulate is preempted by other provisions of the Kentucky Revised Statutes.

Deference to local plans is mandated by § 224.40-315. Under subsection (2) of that statute, no permit to construct or expand a municipal solid waste disposal facility can be granted unless the application is consistent with several things, including not only “[t]he capacity needs identified in the area solid waste management plan,” but also “[e]ither elements of the area solid waste management plan.” If a local governing body has included in its plan absolute limits on landfilling activity, there is no reason these should not be considered “other elements” of the plan for purposes of § 224.40-315. So long as power to include these elements in the plan existed, the deference is required.

A different situation would be posed by a local ordinance which prohibited special waste landfilling per se. Such targeting of special waste would be preempted by the Cabinet’s conclusions that special waste can be landfilled. In other words, if a local government permitted some landfilling but purported to ban all landfilling of special waste, such local regulation would be in conflict with the Cabinet’s determination that it is permissible to landfill special waste. However, a local determination that only a certain amount of landfilling shall take place, without regard to what goes in the landfill, would not be preempted. But cf. supra note 238 (describing the rare situation of electric utility special waste preemption should a utility desire to erect a facility just for its special waste by-products).

The practical reality is that much special waste ends up being disposed of at municipal solid waste facilities. Under § 224.01-010(15), a municipal solid waste disposal facility is defined to include any facility “where the final deposition of any amount of
exclusively is allowed to regulate but rather is aimed at a different area of concern where the local government properly is authorized to speak. So long as the cap left it to the facility to divide its capacity between special waste and other waste, local government would not be regulating special waste so as to trigger the preemption of section 109.041 of the Kentucky Revised Statutes.

In these situations of "consistent with" preemption analysis, the key is determining the scope of the legislature's intended authorizations of power to both state and local governments. Rather than viewing these as either/or situations where if the state gets to regulate the locals do not, the better approach is to look for intersecting circles of authority. Where the local government is acting pursuant to statutory authority in the form of a circle different from that defining how the state exclusively may regulate, the overlap of authorizations should be construed to allow both levels of government to act. Thus, there can be no preemption of local authority to regulate within its circle, even though the local regulation overlaps with state level concerns.250

municipal solid waste occurs, whether or not mixed with or including other waste allowed under Subtitle D of the Federal Resource Conservation and Recovery Act." Special waste is a type of Subtitle D waste. The point is that many landfills, when they are constructed and operated, desire to take a variety of wastes, so long as they can obtain approval from the Cabinet on technical grounds that their facility is constructed with adequate safeguards to protect against the type of waste desired to be handled. The commodity which the landfill operator has to offer is airspace (i.e., capacity), and it is in his economic interest to sell that airspace to the highest and/or most dependable bidders. Special waste, because it possesses some of the characteristics of RCRA Subtitle C waste, sometimes can command a higher per unit disposal price. Alternatively, some special wastes, like dirt from around leaking underground storage tanks (if not too contaminated), might be beneficial to the landfill operator as possible cover material or absorbent which could be used to layer other wastes received or to reduce the amount of dirt which the landfill operator otherwise would have to put in at his cost in order to sandwich disposal layers.

250 Comparison to federal preemption cases seems to confirm this analysis. In Pacific Gas & Electric v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 222-23 (1983), for example, the Court affirmed a state's denial of a nuclear facility permit on financial grounds related to spent fuel disposal costs, even though the exclusive power to regulate all safety aspects of a nuclear plant's operations, including what should be done with spent fuel, rested with the federal Nuclear Regulatory Commission. Similarly, in Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 246 (1984), the Court found that normal state punitive damages law was not preempted for nuclear accidents causing bodily injury, even though the punitive damage awards permitted under state law may hamper the mission of the Nuclear Regulatory Commission to encourage siting of facilities and use of nuclear power.
C. Several Parts of Kentucky's Waste Management Scheme Violate the Dormant Commerce Clause

1. Differential Fees Charged

In *Carpenter v. Commonwealth*, the Kentucky Court of Appeals upheld the constitutionality of a statute which allowed Kentucky counties to charge a waste facility license fee 25% higher for out-of-area waste, with the total license fee for such waste being up to 6.25% of gross receipts received for such waste by the solid waste disposal facility. Before the extra 1.25% could be charged for out-of-area waste, the local government must have found the differential to be reasonably related to additional governmental services required because of the out-of-area waste. *Carpenter* is no longer good precedent in light of the *Oregon DEQ* decision, and a fresh challenge should result in a court declaring the differential fee portion of section 68.178 of the Kentucky Revised Statutes to be unconstitutional.

The *Carpenter* court rejected challenges that this compensatory fee statute violated the dormant Commerce Clause. Although the landfill owner alleged both facial discrimination and discrimination in effect, he offered no real counter-argument to the Commonwealth’s position that the fee at issue was connected to unique problems presented by out-of-state waste. In a battle of assertions, the *Carpenter* court correctly ruled that the statute was presumed to be reasonably related, so long as the Commonwealth’s arguments seemed to be logical. At any rate, since *Carpenter* offered no significant proof to counter the Commonwealth’s position, the fee was upheld.

The likelihood of continuing to be able to defend differential fees on grounds of alleged differential harms is slim. Given the Court’s insistence in *Oregon DEQ* that all differential fees will be subjected to the strictest scrutiny, the possibility of less discriminatory alternatives to fees seems

---

251 See 831 S.W.2d 188, 190 (Ky. Ct. App. 1992) (setting forth the relevant provisions of KY. REV. STAT. ANN. § 68.178(2) (Baldwin 1992)).

252 See id. Examples of such services include “impacts on roads, litter control or emergency services.” KY. REV. STAT. ANN. § 68.178(2)(b) (Baldwin 1992).

253 The *Carpenter* facility is, of course, bound under principles of res judicata to judicial determinations that the fee assessed was valid. Similarly, any agreements entered into between landfill owners and counties which took into account the possible unconstitutionality of § 68.178, yet bound the owner to pay a fee, would be presumed valid as voluntary agreements between the parties on a disputed or ambiguous point.

254 See *Carpenter*, 831 S.W.2d at 192.

255 Id.
This insistence leaves only the possibility of arguing that the local character of section 68.178 of the Kentucky Revised Statutes makes the taxing event substantially equivalent as required by the Oregon DEQ Court. Such is a losing argument. Although the causal connection between harms caused to local government by out-of-area waste being locally deposited is clear and direct, reality of harms was not the focus of the Court’s insistence upon substantial equivalence in Oregon DEQ. Under the Oregon DEQ logic, the problem with any fee that attempts to make up through general revenues what it charges directly to out-of-area waste is that such a different type of taxing event means generators of the same type waste from outside the area may be charged more by the local government for causing the same harm or receiving the same service. Although the Oregon DEQ emphasis and rationale may be incorrect, the Court has clearly spoken. In short, that portion of section 68.178 of the Kentucky Revised Statutes which permits differential fees is unconstitutional.

---

256 See supra notes 137-38, 212-14.

257 Even absent the substantial equivalence requirement, other problems with portions of the differential fee authorized under § 68.178 exist. Philadelphia and Fort Gratiot clearly rejected the argument that the difficulty of siting disposal facilities, even where there is strong obligation to care for locally generated trash, can justify a state or local government in imposing burdens of local planning needs on out-of-area trash (at least where private disposal facilities are involved). Philadelphia, 437 U.S. at 626; Fort Gratiot, 112 S. Ct. at 2028. It logically follows that compensatory fees may not attempt to recover for local planning costs related solely to the management of local trash. Unfortunately, the Kentucky statute authorizes just such improper recoupment for local planning. In fact, § 68.178(2)(b) explicitly states that its 1.25% differential may be justified “by showing an unplanned for reduction in waste disposal capacity and a need to provide for future disposal capacity.” This portion of the statute allowing compensatory fee recovery for state planning regarding local waste and any fees charged pursuant to it would be unconstitutional under Philadelphia and Fort Gratiot, even had Oregon DEQ never been decided.

From the state or local community’s perspective, increased volumes of out-of-area waste certainly will eat up available and permitted landfill capacity and clearly will impose waste planning costs which the government will have to pass on to its own citizens. But Philadelphia and Fort Gratiot state that these are precisely the sorts of costs which cannot be imposed via bans on out-of-area trash. It would not make sense to allow a cost to be imposed through the back door under the label “compensatory fee” when that cost was explicitly foreclosed at the front door when called a “ban.”

258 This fact does not mean that the local government cannot subsidize local waste generators to give them a competitive advantage against outsiders. See generally supra notes 153-62 and accompanying text (discussing what type of subsidies should survive
2. Mandatory Flow Control

As Oregon DEQ dealt a death blow to differential compensatory fees, C&A Carbone meant the end of mandatory flow control. Under sections 109.059 259 and 109.062 260 of the Kentucky Revised Statutes, local government is authorized to flow control all waste within its jurisdiction. As previously mentioned, 261 such authority was also exercised in Kentucky by local government under presumably valid local police powers. C&A Carbone made clear that any such mandatory form of flow control is unconstitutional. However, this fact does not mean that a local government is without power to attach flow control conditions to waste services it subsidizes or provides. 262 Accordingly, the exact form of flow control instituted at the local level determines the constitutionality of actual flow control measures.

Brief consideration of two pending federal cases involving challenges to local Kentucky flow control measures demonstrates the importance of potential differences in local implementation. In Collection, Services, Inc. v. Daviess County, private waste collectors challenge an April, 1994, Daviess County ordinance requiring all waste collected in Daviess County to be deposited at facilities owned and operated by the county. 263 The local ordinance seems clearly unconstitutional in light of C&A Carbone.

The only apparent difference between the facts in Daviess County and C&A Carbone is that the Daviess County waste is being flow controlled to a government-owned facility. As Justice Souter's C&A Carbone dissent indicated, it was hardly clear in that case whether to draw the line on Clarksville's transfer station on the private or public side, given the lease

constititutional attack).

259 "Any county or solid waste management district may require the use of any solid waste management facility or other facility [meeting Cabinet standards] by all persons situated within the geographical boundaries thereof." KY. REV. STAT. ANN. § 109.059 (Baldwin 1992).

260 "Any county or waste management district which requires the mandatory use of any solid waste management facility or other facility pursuant to ... 109.059 may require the use of any collection system or mode by all persons within the geographical boundaries thereof." Id. § 109.062.

261 See supra notes 171-72.

262 See supra notes 215-22 and accompanying text.

263 No. 94-0121 (E.D. Ky. amended complaint filed July 15, 1994). The author is advised by county representatives that this litigation is presently on "hold," since the county currently is choosing not to enforce its flow control ordinances and is in the process of drafting new ordinances which would not possess the constitutional infirmities discussed in text.
and buy back arrangement the New York township had negotiated in connection with the facility. More importantly, the unconstitutional aspects of flow control, according to the C&A Carbone Court, come about as a result of shutting off competition and are therefore unrelated to the nature of the facility to which waste is flow controlled. The private collectors bringing suit against Daviess County cannot be forced under C&A Carbone to take waste they collect from Daviess County customers to Daviess County facilities.

The second pending Kentucky flow control case poses potentially more complicated issues. In Browning-Ferris Industries of Kentucky, Inc. v. Hardin County Fiscal Court, the unsuccessful bidder for a local collection franchise challenges the constitutionality of Hardin County's requirements that successful bidders must flow control collected waste to the local publicly owned facility. It is unclear from the complaint whether the franchise being bid purports to be a truly exclusive franchise (thus enabling the successful bidder to collect all trash generated in Hardin County). If so, such a truly monopolistic franchise would be unconstitutional under C&A Carbone. It would be easy, however, to correct constitutional infirmities in any franchise bid solicitation or agreement. The local government could choose not to enforce any exclusive rights to collect but still could subsidize or encourage use of the winning service so as to make it worthwhile for bidders to seek a franchise.

Plaintiff BFI, however, apparently does not seek invalidation of the exclusive nature of any franchise awarded, which is what makes this case

---

264 C&A Carbone, 114 S. Ct. at 1694-95 (Souter, J., dissenting).
265 Market participant logic only protects from Commerce Clause scrutiny when the actions of the transfer station are being questioned. A publicly owned transfer station, for example, could charge differential fees or refuse to accept out-of-area waste and not violate the Commerce Clause. See also infra notes 281-88 (discussing market participant waste situations). But when the government flow controls, the fact that it flow controls to a publicly owned facility does not invest the flow controlling action with market participant status. From the perspective of ousted competitors, the destination of the waste, whether to a government or a privately owned facility, does not matter; they are still unable to service former customers.
266 No. C94-0416 L(A) (W.D. Ky. filed July 1, 1994).
267 Simply using local government mailing tools to publicize the benefits of using the government-sponsored franchise may be enough to encourage widespread use of a collection service whose bid price is competitive. Space limitations prevent a detailing of all possibilities which a creative local government might explore to encourage use of a favored collection facility. Additionally, nothing in C&A Carbone requires that any and all comers be permitted access to local trash markets. A local government may impose evenhanded standards or requirements applicable to all trash collectors without violating the Commerce Clause.
interesting and the plaintiff's legal position untenable. In its prayer for relief, BFI instead requests the court to order Hardin County to execute an exclusive franchise with it, minus any restrictions on where BFI would have to take the collected waste. Such a "have-your-cake-and-eat-it-too" result is definitely not required by the dormant Commerce Clause and in fact is opposite to the logic of the C&A Carbone decision. If the franchise is exclusive, it is that exclusivity which violates the dormant Commerce Clause's protections, according to the C&A Carbone Court. On the other hand, if the franchise is not exclusive, it is like public education or any other state-supported service. Private competitors may compete for any business still available, on whatever terms they are able to negotiate. But they can demand neither that a non-exclusive franchise include only terms with which they feel comfortable, nor that a franchise stay exclusive and then claim that this exclusivity does not violate the Commerce Clause. Under a non-exclusive franchise, Hardin County could direct franchised waste wherever it wants. This case thus demonstrates the potential for both constitutional and unconstitutional flow control, depending on how a local waste management plan is implemented.

3. Consent-to-Service Only for Out-of-Staters

Section 224.43-380(1) of the Kentucky Revised Statutes states that no person may transport or cause to be transported solid waste from outside Kentucky to a disposal facility in Kentucky unless all persons in the waste chain have irrevocably consented in writing to the jurisdiction of Kentucky courts for actions arising out of their waste disposal actions. The similar Ohio provision upon which Kentucky's statute was based was declared unconstitutional by a federal district court in National Solid Waste Management Association v. Voinovich. Although argument can be made that Kentucky's consent-to-service statute stands in a more constitutionally defensible position than that of Ohio because it is coupled with other regulatory measures for keeping track of waste wherever

---

268 763 F. Supp. 244 (S.D. Ohio 1991), rev'd and remanded, 959 F.2d 590 (6th Cir. 1992). In reversing the trial court's summary judgment in favor of waste industry, the Sixth Circuit ruled only that Ohio was entitled to its day in court to prove whether its challenged legislation was tailored closely enough to unique problems caused by out-of-state waste to permit differential treatment. National Solid Waste Management Ass'n v. Voinovich, 959 F.2d 590, 592 (6th Cir. 1992). The Sixth Circuit opinion focused on differential fee provisions and largely ignored the consent-to-service aspects of Ohio's legislation. Id. at 591-93. On the merits, and especially post-Fort Gratiot, ChemWaste, Oregon DEQ, and C&A Carbone, the Ohio federal district court probably correctly ruled Ohio's consent-to-service requirements unconstitutional.
generated, which Ohio's statutes lacked, these arguments cannot ultimately save the provision, given the strict scrutiny the Court currently employs against any measures which treat waste or persons differently because of origin.

Similar to failing arguments in *Oregon DEQ*, arguments by the Commonwealth that consent-to-service is not usually needed for in-state actors since they are already subject to Kentucky's jurisdiction would likely avail little. The effective two-pronged counter-argument is that: 1) out-of-state actors also are usually subject to a state's long-arm reach if their actions affect the Commonwealth, and 2) many in-state actors might later be as unobtainable for suit as their out-of-state counterparts. In short, if the consent-to-service provisions are aimed to bring all persons who handle Kentucky-disposed waste before Kentucky tribunals when something goes wrong, the provisions target only part of the potential problem. A less discriminatory alternative of having *all* actors irrevocably consent to service, whether their actions occur in-state or out and whether they haul in-state or out-of-state waste, would put Kentucky to the proof of demonstrating whether its concerns are really an inability to obtain jurisdiction or instead are merely the expression of a desire to hassle out-of-staters who wish to ship waste to Kentucky. In sum, because heightened scrutiny would be triggered by this provision which targets outsiders, the consent-to-service provisions of section 224.43-380(1) of the Kentucky Revised Statutes likely would be found unconstitutional in any lawsuit by outsiders against whom the provisions might be enforced.269

4. *Capture of Private Facilities for In-Area or In-State Waste*

As discussed previously, one of the underlying assumptions to parts of the 1991 Special Session's work was that it would be possible for a local community to authorize disposal capacity for in-area private facilities on the condition that the authorized capacity be reserved for the community's own waste needs.270 *Fort Gratiot* unequivocally declared such usurpation of private competition unconstitutional.

---

269 The author is not aware, however, of any vigorous enforcement by the Cabinet of these provisions or of Cabinet promulgation of regulations pursuant to the consent-to-service legislative mandate. Accordingly, the issue may not be ripe for adjudication in any tribunal and is of no concern to waste industry until and unless it is seriously implemented.

270 See supra notes 225-28, 246-47 and accompanying text.
The assumptions in the Kentucky control of private facilities for local and state use in fact went much further than the *Fort Gratiot* facts and were even less constitutionally defensible. Under the Kentucky logic, as interpreted by the Cabinet soon after passage of the legislation, communities were thought to have the power not only to authorize capacity solely for in-area trash but also to pick and choose sources for any capacity they authorized for out-of-area trash.\(^2\) Kentucky counties thus could authorize capacity solely for Kentucky counties. Although such county authorizations would blatantly allow the political subdivisions of the state, acting in concert, to accomplish a goal prohibited the state as a whole,\(^2\) the Cabinet apparently did not understand or did not wish to agree with what *Philadelphia* required.\(^3\)

Additionally, the Cabinet itself was given some powers by which it might directly reserve in-state private capacity for in-state use. For example, under section 224.43-360(2) of the Kentucky Revised Statutes, the Cabinet was permitted to allow deviance from otherwise controlling regulations on sub-standard landfill design to assure capacity for “solid waste generated in Kentucky” and “industrial solid waste generated in Kentucky as the result of economic development.”\(^4\) Similarly, under section 224.10-105(3) of the Kentucky Revised Statutes, pending approval of local and state plans, the Cabinet was given power “[t]o issue, continue in effect, revoke, modify, suspend, deny or condition permits . . . as necessary . . . to meet solid waste disposal capacity needs of the area and to assure disposal capacity for solid waste generated in Kentucky.”\(^5\) Under subsection (4) of the same statute, the Cabinet possessed authority to limit the amount of waste accepted at facilities in the state “as otherwise necessary to assure capacity for disposal of waste generated in the Commonwealth.”\(^6\)

\(^2\) During the summer and fall of 1991, the author attended meetings at which the Cabinet explained this as its position.

\(^3\) *Cf.* supra notes 88-93 and accompanying text (applying similar points to the *Fort Gratiot* case).

\(^4\) While it certainly would be better from a waste planning standpoint to know that all Kentucky waste was going to facilities under the Cabinet’s direct supervision and that no new facilities would need to be sited unless they were either needed for Kentucky-generated waste or desired by the community where they were to be sited, such reservation of private facilities for public use is not permissible under *Fort Gratiot* and *Philadelphia*.

\(^5\) The last provision smacks directly of economic protectionism. The waste is being allowed to go to a facility (presumably at favorable prices since the facility has not had to comply with the most stringent landfill design requirements) precisely to accommodate Kentucky’s economic development needs.

\(^6\) KY. REV. STAT. ANN. § 224.10-105(3) (Baldwin 1992).

\(^7\) *Id.* § 204.10-105(3).
While the final legislation contained fewer of these direct assertions of authority to restrict in-state facilities for in-state use than were contained in the version originally put forth by the governor, the fact that the Cabinet construed ambiguous capacity authorizations to mean that local bodies could pick and choose out-of-area sources demonstrates either that an original "feel" in the proposed legislation carried over and contaminated its later implementation, or at least that ambiguity may be construed unconstitutionally when desired.

Some courts have argued that an operator, after entering into a side host agreement which incorporates unconstitutional restrictions and obtaining the financial rewards of that agreement, would be estopped to challenge its provisions. However, such a result is not certain. In an action for breach of contract, the defendant operator might be allowed to argue that the illegality of the contract provisions was a complete defense to his breach of those provisions, or alternatively, that he was coerced into agreeing to the terms as unfair pre-conditions for allowing his permit to be processed. Either way, the arguments and allegations could tie up the local governing body in potentially expensive and unnecessary litigation. More immediate problems are posed where competition for local capacity or permits existed. Granting a permit to one competitor for unconstitutional reasons would provide the competitor with ammunition to invalidate the government’s actions.

277 For example, an early version of § 224.43-310(2) of the Kentucky Revised Statutes contained explicit provisions that disposal capacity exist in the Commonwealth for waste generated in the Commonwealth and that efforts be encouraged to limit the amount of out-of-state trash coming into the Commonwealth. The provisions discouraging out-of-state trash were excised in the final legislation, and the capacity restrictions were toned down in § 224.43-310(2)(c) and (d) to indicate that the plan more generally should address capacity needs for in-state generated trash.

278 An example of such an agreement would be the local governing body entering into a long-term contract with a local landfill for disposal of locally generated waste on condition that the landfill agree to limit the volume of out-of-area waste it accepts at its facility. The most direct attempt to evade constitutional restrictions through side agreements would be an agreement that local government would not oppose a facility, but only on the condition that it accept only trash from certain areas.

279 Cf. Medical Waste Assocs. v. Mayor of Baltimore, 966 F.2d 148, 153 (4th Cir. 1992) (holding that operator of a medical waste facility was estopped from challenging the constitutionality of a zoning ordinance from which the operator derived permission to contract its facility and by which it was subject to certain operating restrictions). For a good statement of current case law regarding whether medical waste can be restricted by origin, absent estoppel, see BFI Medical Waste Systems, Inc. v. Whatcom County, 983 F.2d 911, 913 (9th Cir. 1993).

Most of the provisions of the Kentucky Revised Statutes dealing with waste planning are not tainted with any assumptions that out-of-area waste should be handled differently from in-area waste. Background checks, manifests, recycling incentives, and other evenhanded regulatory measures are viable ways to ensure that only proper waste is landfilled. These regulatory methods do sometimes place more burden on out-of-area waste than in-area waste, but that fact is not reason to strike them. If the statutes are not implemented or applied in discriminatory fashion, then evenhanded efforts are entitled to judicial deference regarding legitimate local purpose. However, if states or communities persist in incorporating into statutes clearly unconstitutional waste management approaches or in vigorously applying unconstitutional aspects of statutes, they run the serious risk that courts will not distinguish the good from the bad.

D. Several Possibilities for Constitutional Regulation Should Be Explored

Rather than encourage unconstitutional back door deals or pass questionable legislative measures, Kentuckians should concentrate on putting teeth into regulatory efforts which stand a realistic chance of surviving dormant Commerce Clause scrutiny. The possibilities for such state effort can be divided into two broad types: market participant exemption and evenhanded regulation. Evenhanded regulation can then also be divided into two subtypes: regulation that treats waste differently on the basis of its contents (as opposed to its origin) and regulation that insists that all waste be processed, handled, or tracked in a certain way.

1. Monopolistic Market Participation

Fairly late in the 1991 Special Session committee review process, a form of market participation legislation was introduced in an effort to constitutionally solve Kentucky's waste problems. The specific system proposed, based on part of Delaware's statewide flow control regime, has now effectively been ruled unconstitutional by C&A Carbone. Ironically, however, the C&A Carbone ruling may make it

---

281 Representative Pete Worthington proposed the legislation.
282 See DEL. CODE ANN. tit. 7, §§ 6001(e)(6), 6002(38), 6010(e)-(g), 6025, 6401-6431 (1991) (stating that Delaware Solid Waste Authority must exclude all out-of-area waste from publicly owned facilities and must permit only publicly owned facilities within the designated areas).
283 See supra notes 164-214 and accompanying text. Only the part of the Delaware
easier for states to argue that market participation can be used monopolistically to keep out-of-state waste from coming into most\textsuperscript{284} in-state landfills.

The way to block out-of-state trash but still provide landfills to address in-state needs would be to first allow only publicly owned landfills to be constructed and operate in a state and then to authorize the publicly owned facilities to handle only in-state generated trash.\textsuperscript{285} Publicly owned facilities in a competitive environment have successfully claimed market participant exemption from dormant Commerce Clause scrutiny when they discriminate against out-of-state waste by banning it or charging it higher fees.\textsuperscript{286} The question is whether states which allow publicly owned facilities to be the only landfill game in the state would still be entitled to claim market participant exemption.

A good argument can be made that preventing private ownership of landfills does not impede values which the \textit{interstate} Commerce Clause is designed to protect.\textsuperscript{287} The \textit{C&A Carbone} ruling ensures that no state program requiring all waste generated in Delaware to be flow controlled to Delaware-owned facilities would be unconstitutional under \textit{C&A Carbone}. \textit{C&A Carbone} thus effectively overruled \textit{Harvey & Harvey v. Delaware Solid Waste Authority}, 600 F. Supp. 1369 (D. Del. 1985) (holding Delaware’s flow control provisions to be constitutional).

\textsuperscript{284} To prevent out-of-state waste from coming into \textit{all} landfills located within the state, the state would have to purchase all existing private landfills and then institute market participant restrictions. Attempted revocation of private landfill permits would likely produce protracted and uncertain litigation. The prohibitive cost in condemning existing facilities for state use likely means a lag time for private permits to expire before all landfills in a state could handle only in-state garbage under a monopolistic market participant regime.

\textsuperscript{285} Cf. \textit{supra} note 282 (describing Delaware system).

\textsuperscript{286} See, e.g., \textit{Swin Resource Sys., Inc. v. Lycoming County}, 883 F.2d 245, 248-51 (3d Cir. 1989) (stating that a county, recognized by the court as a market participant rather than a market regulator, legitimately attempted to “preserve its landfill’s capacity for local residents” through higher fees for, and volume limits on, “distant waste”); \textit{LeFrancois v. Rhode Island}, 669 F. Supp. 1204, 1212 (D.R.I. 1989) (upholding as constitutional a state statute criminalizing the disposal of out-of-state waste in a publicly owned landfill where there was no alternative, privately owned disposal site for such waste); \textit{County Comm’rs v. Stevens}, 473 A.2d 12, 18-22 (Md. 1984) (stating that a county acting as a participant in the business of landfill services could limit the availability of its services to citizens of the county without violating the Commerce Clause); \textit{cf. Waste Aid Sys., Inc. v. Citrus Co.}, 613 F. Supp. 102, 107 (M.D. Fla. 1985) (reaching same result as \textit{County Comm’rs} under an Equal Protection challenge).

\textsuperscript{287} A state cannot condition the development of natural resources on the requirement that only the state’s own citizens benefit from the development. However, a disposal facility can be sited in any state which has the political will to build the facility in the face of local NIMBY opposition. \textit{See Cox, supra} note 4, at 819-23.
can hoard all of its citizens' trash within state boundaries. Any out-of-state competitor who can make in-state generators or haulers a better deal, under *C&A Carbone*, cannot be denied the opportunity to service the local waste market. It is this possibility for interstate commercial competition, not any particular form of private enterprise, which the Commerce Clause is designed to protect.\(^{288}\)

What additionally distinguishes such monopolistic market participation (and indeed any form of market participation) from the anti-competitive flow control found unconstitutional in *C&A Carbone* is that no government can claim the benefits of market participant exemption until it has put its money where its regulatory mouth is. Market participation always costs. In sum, what keeps market participation “honest” is both the possibility of out-of-state competition and the self-inflicted “bite” of in-state cost. Accordingly, monopolistic market participant exemption seems a possibility worth exploring for states which want to manage their own, but only their own, trash.

2. Evenhanded Regulation

The monopolistic market participation described in the previous paragraphs has not been wholly implemented in any state\(^ {289}\) and accordingly has little case law to evaluate it. On the other hand, challenges to facially evenhanded regulation are a mainstay of the Court’s dormant Commerce Clause diet. The state’s goal is to have any such regulation evaluated under the more lenient *Pike* standard rather than the virtual per se rule of invalidity associated with discriminatory measures.\(^{290}\)

---


\(^{289}\) Cf. supra note 282 (dealing with Delaware provisions); ME. REV. STAT. ANN. tit. 38, §§ 1310-X, 2156 (West Supp. 1994) (providing for no new commercial landfills and no expansion of existing facilities except to contiguous land).

\(^{290}\) See supra notes 62-64 and accompanying text (discussing Philadelphia’s two-tiered analysis). Since the per se rule applies to measures which discriminate on their face and/or in effect, there is room in the Court’s current dormant Commerce Clause jurisprudence for significant argument about whether a facially neutral statute which has disparate impact should be subjected to *Pike* balancing or to heightened scrutiny. *Compare* Government Suppliers Consol. Servs., Inc. v. Bayh, 975 F.2d 1267, 1279 (7th Cir. 1992) (holding that challenged provisions regulating the transported disposal of municipal waste had the practical effect of discriminating against interstate commerce) *with* Norfolk S. Corp. v. Oberly, 822 F.2d 388, 405 (3d Cir. 1987) (holding that the less strict *Pike* balancing test was appropriately applied to cases where the burden on interstate commerce was incidental).
The easy cases for upholding state waste regulation involve clearly evenhanded measures which do not produce disparate impacts. For instance, a requirement that all municipal solid waste disposed of in-state be deposited only in landfills with double liners might deter out-of-state waste to some extent by driving up the cost of waste disposal, but these regulations equally would drive up costs for all in-state generators. Similarly, an absolute ban on in-state landfilling is the most obviously constitutional way to deter out-of-state waste. The Commerce Clause does not promote any absolute right to build landfills or to build landfills only of a certain type.

a. Treating Waste Differently Based on Type or Content

More serious Commerce Clause challenges arise when a state regulates so that impacts are felt more harshly by out-of-staters than by in-state interests. However, Philadelphia explicitly leaves open regulating more harshly, including banning, based on the type rather than the origin.

---

291 In this regard, Eastern Kentucky Resources v. Fiscal Court, No. 94-62 (E.D. Ky. filed Aug. 9, 1994), bears watching to see if the judiciary will properly resist industry efforts to impale evenhanded regulatory efforts because of previously less-than-pure local motives. That controversy, arising in Magoffin County, involves local resistance to a proposed mega-landfill designed to take primarily out-of-state waste. After several fiscal court changes of vote, heavy local political pressure, and Cabinet insistence that Magoffin County adopt a local plan stating whether there would or would not be local authorization for large-scale disposal capacity, the Magoffin Fiscal Court adopted a plan which authorized no new in-area disposal capacity.

The clear intent of the plan was to stop the proposed landfill in its tracks. However, the local plan prohibited any new landfill from setting up shop in Magoffin County, regardless of its proposed sources or methods of operation. In short, the Magoffin County measure under attack, while motivated by partisan political pressures, is an evenhanded regulatory measure which should provide a fairly easy case for upholding deference to legitimate local purpose (the desire to prohibit the deleterious activity of landfilling) under established dormant Commerce Clause precedents. See also, e.g., Al Turi Landfill, Inc. v. Town of Goshen, 556 F. Supp. 231 (S.D.N.Y. 1982) (stating that a local zoning regulation which curtails disposal capacity is constitutional).

The spurned landfill plaintiffs in the Magoffin County case detail numerous examples of local political favoritism and pressure, point to probable unconstitutionality of other statutes, and emphasize early Special Session motivation to keep out out-of-state waste as purported proof that they have been unconstitutionally harmed. In the end, however, all that is relevant is whether the particular statutes at issue — the provisions of the Kentucky Revised Statutes which empower a local government to decide for itself how much landfilling it wants to take place within the community — and the particular plan adopted pursuant to those statutes are constitutional. Magoffin County's evenhanded ban does not violate the Commerce Clause.
of waste.\textsuperscript{292} To resist imposition of the heightened scrutiny test, the regulating government must be able to prove that the regulation accomplishes a legitimate local purpose which only incidentally (i.e., as a result of accomplishing the local purpose) affects out-of-state commerce.

One such type of local regulatory measure apparently authorized\textsuperscript{293} but not yet seriously implemented under Kentucky statutes is to ban waste which could be recycled. At least three related reasons exist why bans on recyclables have not been enthusiastically embraced. First, in order to get recyclables out of local waste, government would have to expend considerable funds and effort. Second, mere \textit{allegations} of differences in quality of out-of-area waste would not be sufficient to keep it out; serious inspection and enforcement efforts for both in- and out-of-state waste would have to be undertaken to demonstrate difference. Finally, even if local waste quality differences could be achieved and demonstrated relative to some out-of-area waste, local waste would not be superior to \textit{all} out-of-area waste; much out-of-area waste would and should be able to get through local bans based on quality or type. In sum, regulating against type of waste is neither an easy nor a costless solution to the burdens imposed by out-of-state waste, which is precisely what demonstrates its constitutionality.

\textit{b. Rigorous Regulation, with Differential Impact}

An example of rigorous evenhanded regulation which similarly should survive scrutiny is the manifest requirements of section 224.43-335 of the Kentucky Revised Statutes. Under these provisions, all waste, regardless of origin, must be accompanied by information about its geographic source, type, prior handling, and weight and by certification that no illegal waste knowingly was introduced into the waste.\textsuperscript{294} Waste which has travelled greater distance or through more hands may have to be accompanied by more information, but the measure still significantly burdens in-state waste transporters. When a state thus imposes real burdens on in-state as well as out-of-state waste, it must seriously weigh whether the regulation is worth the costs involved. In fact, these Kentucky manifest provisions have not been implemented.\textsuperscript{295} One

\textsuperscript{292} See Philadelphia, 437 U.S. at 626-27, 629.


\textsuperscript{294} See id. § 224.43-335.

\textsuperscript{295} See Kentucky Natural Resources & Envtl. Protection Cabinet, Recycling Issues Paper for 1994 Proposed Legislation 29-31 (Nov. 1993) (stating, without significant explanation, that a manifest system for solid waste is unwarranted and
possible explanation for non-implementation is potential resistance to these real costs by local interests.

What this means for Kentucky and other states wishing constitutionally to deter waste burdens is that regulation affecting out-of-state interests cannot be costless in regard to in-state interests and hope to survive dormant Commerce Clause scrutiny. Several types of regulation which impose real costs on local citizens but may impose incidentally greater costs on particular out-of-state waste interests can be imagined. Requirements that waste trucks be pre-registered before they transport waste to in-state facilities,\(^2\) that drivers receive training in how to identify improper waste, that waste trucks be limited to carrying only waste or construction type materials,\(^3\) or that those who are involved in the waste business undergo rigorous background checks\(^4\) before being allowed to transport waste would all require industry to identify and dedicate personnel to the waste transportation enterprise. Out-of-state interests could not economically engage in one-shot or impromptu brokered hauls under such requirements, but neither could local disposers.

Out-of-state back haulers would stand to lose more potential profits by a dedicated fleet requirement than local haulers (because of the hauling distances involved), but the dedication requirement would impose real costs on insiders as well. The central question which should be asked of such requirements is whether the enactments really serve a legitimate local purpose. Making sure that responsible personnel engage in waste hauling and that one can identify in advance who will be involved in hauling seems rationally related to the legitimate concern that trash be properly handled. Preventing foodstuffs or consumer goods from being carried in vehicles which have carried waste seems rationally related to


\(^3\) Cf. Government Suppliers Consol. Servs., Inc. v. Bayh, 975 F.2d 1267, 1270 (7th Cir. 1992) (considering an Indiana statute that provided for limitations on the type of cargo carried by waste trucks as effectively requiring the use of semi-dedicated vehicles when transporting waste to Indiana).

\(^4\) See, e.g., OHIO REV. CODE ANN. §§ 3734.41, .42 (Anderson Supp. 1992) (requiring an applicant to, inter alia, file a disclosure statement and submit to an investigative report); cf. KY. REV. STAT. ANN. § 224.40-330 (Baldwin 1992) (requiring a disclosure statement but no investigation). The background check required by § 224.40-330 is being defended against constitutional attack in Atwoods of North America, Inc. v. Kentucky Natural Resources & Environmental Protection Cabinet, No. 93-CI-01873 (Franklin Cir. Ct. filed Nov. 23, 1993).
health and safety concerns. Proof of legitimate purpose is provided in shortcut fashion by demonstrating that the regulation very seriously burdens the state's own.

Once the court has determined that the regulation does serve a legitimate local purpose, the *Pike* test requires that the opponent of the regulation demonstrate burdens on interstate commerce that clearly exceed the governmental benefits.\(^{299}\) For the examples considered above, it is hard to see why allowing anyone to transport waste in any type of vehicle without prior registration and/or background investigation is necessary to the nation's survival. An admittedly closer case is presented by an outright ban on backhauling.\(^{300}\) The main point, however, is that evenhanded measures which truly burden the state's own should be presumed valid. The *Pike* test is properly deferential to evenhanded regulatory measures which really regulate rather than just pretend to do so.

**CONCLUSION: STATES SHOULD REGULATE EVENHANDEDLY AND/OR AT REAL COST IN ORDER TO SURVIVE DORMANT COMMERCE CLAUSE ATTACKS**

The political pressures and externalities associated with waste disposal mean that state and local governments will continue to attempt to find ways to manage their own trash without becoming dumping grounds for others' burdens. Although the U.S. Supreme Court's articulations of its various Commerce Clause tests seem increasingly protective of vested economic interests and skeptical of state motivations, there is still room within current dormant Commerce Clause jurisprudence for states to regulate out-of-state waste without violating the Constitution. Legitimate state efforts which are neither pretexts for discrimination nor shortcuts to imposing real burdens on the state's own citizens should be upheld. Waste industry does not have a vested right to an unregulated market. The regulatory solutions most likely to survive Commerce Clause scrutiny — market participation, subsidized differences in quality, evenhanded rigorous regulation — impose real costs on the government implementing them and require states to deal with health and safety problems not only in word but in common sense practical terms. Kentucky and other states

\(^{299}\) See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1979).

\(^{300}\) The possibility of easily implemented but potentially less burdensome alternatives, such as required sanitizing of vehicles which had previously carried trash, would need to be evaluated. If the opponent could demonstrate these alternatives to be clearly less burdensome, then it seems under the *Pike* test that a ban would be unconstitutional.
wishing to regulate in the area without having their efforts declared unconstitutional should focus only on such methods of waste regulation until and unless the Court changes the dormant Commerce Clause ground rules.