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Flow Control Ordinances that Require Disposal of Trash at a Designated Facility Violate the Dormant Commerce Clause.

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CONSTITUTIONAL LAW—Dormant Commerce Clause—Flow Control Ordinances That Require Disposal of Trash at a Designated Facility Violate the Dormant Commerce Clause.

C & A Carbone, Inc. v. Town of Clarkstown, ___ U.S. ___, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994).

After the State of New York shut down the Town of Clarkstown's environmentally unsound landfill,[1] the town procured a private contractor to build and operate a solid waste transfer station to separate recyclable from nonrecyclable waste.[2] Clarkstown contracted to finance the facility by guaranteeing a minimum waste flow, for which the contractor would charge haulers a tipping fee above the market rate.[3] To meet its guarantee, the town passed a flow control ordinance requiring all nonrecycled, nonhazardous waste in the locality, whether generated in Clarkstown or not, to be brought to the transfer station.[4] Subsequently, the Clarkstown

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1. C & A Carbone, Inc. v. Town of Clarkstown, ___ U.S. ___, ___, 114 S. Ct. 1677, 1680, 128 L. Ed. 2d 399, 405 (1994). From the 1950s until 1990, the town provided a landfill for local use. Brief for Respondent at 8, C & A Carbone, Inc. v. Town of Clarkstown, ___ U.S. ___, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994) (No. 92-1402). By the 1980s, the New York Department of Environmental Conservation deemed the landfill an environmental hazard and sued the town for violation of state landfill regulations. *Id.* As part of a consent decree, the town was required to close the old landfill and build a transfer station capable of processing for shipment all locally produced waste. *Id.*

2. *Carbone*, ___ U.S. at ___, 114 S. Ct. at 1680, 128 L. Ed. 2d at 405. At the end of five years, the town could purchase the facility for the nominal fee of one dollar. *Id.*

3. *Id.* Clarkstown was liable under the contract for lost revenue if the minimum waste was not received. *Id.*

4. *Carbone*, ___ U.S. at ___, 114 S. Ct. at 1680, 128 L. Ed. 2d at 405. Section 3 of the town ordinance states in pertinent part:

> C. All acceptable waste generated within the territorial limits of the Town of Clarkstown is to be transported and delivered to the Town of Clarkstown solid waste facility located at Route 303, West Nyack, New York or to such other disposal or recycling facilities operated by the Town of Clarkstown or to recycling centers established by special permit pursuant to Chapter 106 of the Clarkstown Town Code, except of recyclable materials which are separated form solid waste at the point of origin or generation of such solid waste, which separated recyclable materials may be transported and delivered to facilities within the town as aforesaid, or to sites outside the town. As to acceptable waste brought to said recycling facilities, the unrecycled residue shall be disposed of at a solid waste facility operated by the Town of Clarkstown.

CLARKSTOWN, N.Y., LOCAL LAWS no. 9, § 3 (1990), *reprinted in* C & A Carbone v. Town of Clarkstown, ___ U.S. ___ app., 128 S. Ct. 1677 app., 114 L. Ed. 2d 399 app. (1994). Section 5 of the ordinance addresses out-of-town waste:

Police Department caught C & A Carbone, Inc. (Carbone), a local waste handler, shipping nonrecyclable waste that had not been processed at the town's station to an out-of-state landfill.[5] Clarkstown sued Carbone in the New York Supreme Court, seeking to enjoin the company from processing trash at any location other than the town facility.[6] In response, Carbone sued the town to enjoin the ordinance in the United States District Court for the Southern District of New York.[7] The federal court granted the injunction, finding that a "sufficient likelihood" existed that the flow control ordinance violated the Dormant Commerce Clause of the United States Constitution.[8] However, the federal court dissolved the injunction[9] after the state trial court granted Clarkstown's motion for summary judgment.[10] The state court found the ordinance to be a constitutional exercise of Clarkstown's police power and thus not a violation of the Dormant Commerce Clause.[11] The New York Appellate Division affirmed, reasoning that the ordinance did not discriminate geographically, but rather applied to all trash within the town, whether generated locally or not.[12] The New York Court of Appeals then declined to hear Carbone's appeal.[13] Carbone sought review of the New York courts' decisions, and the United States Supreme Court granted certiorari.[14]

> A. It shall be unlawful, within the town, to dispose of or attempt to dispose of acceptable or unacceptable waste of any kind generated or collected outside the territorial limits of the Town of Clarkstown, except of acceptable waste disposed of at the town operated facility, pursuant to agreement with the Town of Clarkstown and recyclables, as defined in Chapter 82 of the Clarkstown Town Code, brought to a recycling center established by special permit pursuant to Chapter 106 of the Clarkstown Town Code.

Id. § 5; *see also* Rockland County Solid Waste Treatment and Disposal Act, 1991 N.Y. Laws ch. 569, at 1072 (McKinney Supp. 1994) (authorizing all municipalities in town's county to require disposal of local waste at designated facility).

5. *Carbone*, ___ U.S. at ___, 114 S. Ct. at 1681, 128 L. Ed. 2d at 406. The ordinance allowed waste processors like Carbone to continue sorting out recyclables; however, nonrecyclable trash was to be deposited at the transfer station. *Id.* Carbone was not allowed to directly ship waste out of state. *Id.*

6. *Id.*

7. C & A Carbone, Inc. v. Town of Clarkstown, 770 F. Supp. 848, 850 (S.D.N.Y. 1991).

8. *See id.* at 854 (recognizing likelihood that plaintiffs would demonstrate unconstitutionality of law).

9. *Carbone*, ___ U.S. at ___, 114 S. Ct. at 1681, 128 L. Ed. 2d at 406.

10. *Id.*

11. *Id.*

12. Town of Clarkstown v. C & A Carbone, Inc., 587 N.Y.S.2d 681, 686 (App. Div. 1992), *rev'd*, ___ U.S. ___, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994).

13. Town of Clarkstown v. C & A Carbone, Inc., 605 N.E.2d 874 (N.Y. 1992).

14. C & A Carbone, Inc. v. Town of Clarkstown, 508 U.S. ___, 113 S. Ct. 2411, 124 L. Ed. 2d 635 (1993).

HELD—*Reversed*.[15] Flow control ordinances that require disposal of trash at a designated facility violate the Dormant Commerce Clause.[16]

Article I, Section 8 of the United States Constitution grants Congress the power to regulate interstate commerce.[17] In the absence of congressional action, the United States Supreme Court has recognized a restriction on the states' ability to regulate interstate commerce—the Dormant Commerce Clause.[18] Under this dormant aspect of the Commerce Clause, the Court has invalidated many commerce-restricting state regulations.[19] Importantly, the Dormant Commerce Clause doctrine does not emanate directly from the Constitution, but instead flows from the body

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15. *Carbone*, ___ U.S. at ___, 114 S. Ct. at 1681, 128 L. Ed. 2d at 407 (1994).

16. *See id.* at ___, 114 S. Ct. at 1681–82, 128 L. Ed. 2d at 407 (holding that ordinance discriminates against and regulates interstate commerce).

17. *See* U.S. CONST. art. I, § 8 (stating that "[t]he Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . ."); *see also* New York v. United States, 112 S. Ct. 2408, 2418, 2428 (1992) (pointing to Constitution as Congress's source of power to regulate interstate commerce, but invalidating requirement that states adopt federal regulations on radioactive waste or take ownership of such waste because requirement violated constitutional division of authority); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 242–43, 261-62 (1964) (upholding Title II of Civil Rights Act of 1964 because racial discrimination by private businesses obstructs interstate commerce); United States v. Darby, 312 U.S. 100, 103 (1941) (upholding federal regulation of hours and wages of workers engaged in production of goods destined for interstate commerce). *See generally* 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 4.8-4.10 (4th ed. 1991) (describing development of modern Commerce Clause jurisprudence that has led to deferential review which gives Congress "complete grant of power" to regulate interstate commerce); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 5-4, at 306-07 (2d ed. 1988) (noting that until 1930s, dormant aspect of Commerce Clause was more prevalent than positive aspect).

18. *See, e.g.*, Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 669 (1981) (proposing that Commerce Clause limits state regulation in some areas of commerce); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 350 (1977) (emphasizing that state power to regulate commerce is limited to matters of local concern); Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 766–67 (1945) (providing that there is "a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it"). One commentator has advocated the abandonment of the dormancy doctrine. Richard D. Friedman, *Putting the Dormancy Doctrine out of Its Misery*, 12 CARDOZO L. REV. 1745, 1745 (1991).

19. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322, 325 (1979) (invalidating state prohibition against minnow exportation); *Hunt*, 432 U.S. at 354 (affirming holding that invalidated requirement for in-state apple packaging); Buck v. Kuykendall, 267 U.S. 307, 315-16 (1925) (overturning state licensing requirement for use of public highways); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 574 (noting numerous instances in which Court overturned state regulations as violative of Dormant Commerce Clause); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 125 (suggesting that

of Commerce Clause jurisprudence that has gained legitimacy throughout the years.[20]

In the 1824 landmark case of *Gibbons v. Ogden*,[21] the Supreme Court first discussed the existence of a latent aspect of the Commerce Clause, suggesting that a grant of power to Congress to regulate commerce precludes state regulation in the same area.[22] Shortly thereafter, the Court formally applied the concept in *Willson v. Black Bird Creek Marsh Co.*,[23] upholding a health and safety regulation it found was not "repugnant to the [federal] power to regulate commerce in its dormant state."[24] How-

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Court has overly broadened scope of Dormant Commerce Clause in reviewing state legislation).

20. *See* Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019, 2023 (1992) (declaring that Supreme Court has "long recognized" Dormant Commerce Clause); Wyoming v. Oklahoma, 112 S. Ct. 789, 800 (1992) (stating that "[i]t is long-established that, while a literal reading evinces a grant of power to Congress, the Commerce Clause also directly limits the power of the states to discriminate against interstate commerce"); New Energy Co. v. Limbach, 486 U.S. 269, 273 (1988) (stating that "[i]t has long been accepted that the Commerce Clause . . . limits the power of the states to discriminate against interstate commerce"); Henry P. Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 15 (1975) (characterizing Dormant Commerce Clause as example of constitutional common law and concluding that it was "too late in the day" for Supreme Court to turn back).

21. 22 U.S. (9 Wheat.) 1 (1824).

22. *Gibbons*, 22 U.S. at 197-210. The Court did not actually establish the Dormant Commerce Clause in *Gibbons*, but instead merely discussed the concept. 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 11.2 (2d ed. 1992). Chief Justice Marshall insisted that the only question before the Court was whether a state could regulate an area of commerce if Congress was already regulating it. *Gibbons*, 22 U.S. at 200. Even though the Court did not directly reach the Dormant Commerce Clause issue, some Justices expressed support for the theory. *See id.* at 222–39 (Johnson, J., concurring) (holding that positive grant of power to Congress to regulate interstate commerce precluded states from regulating interstate commerce); *see also* Missouri Pac. R.R. Co. v. Stroud, 267 U.S. 404, 408 (1924) (stating that "[i]t is elementary and well-settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive"); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 126 (contending that, had Court followed *Gibbons* analysis, coherent Dormant Commerce Clause jurisprudence would have resulted because all state regulations involving interstate commerce would automatically be invalid). *But see* The License Cases, 46 U.S. (5 How.) 504, 579 (1847) (Taney, C.J., concurring) (finding *Gibbons* too restrictive on state power); FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 64-73 (1937) (arguing that *Gibbons* doctrine was too radical for early federalists).

23. 27 U.S. (2 Pet.) 245 (1829).

24. *Willson*, 27 U.S. at 252. *Willson* represents the first time the Court used the word "dormant" in relation to the Commerce Clause. Prior to *Willson*, the Court had an opportunity to recognize a negative aspect of the Commerce Clause, but instead chose to review the constitutional challenge under Article I, § 10, clause 2. *See* Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 459 (1827) (holding state license fee invalid because states cannot levy

ever, in the 1851 decision of *Cooley v. Board of Wardens*,[25] the Court rejected the idea that the Commerce Clause precludes all state regulation.[26] The *Cooley* Court held that only selected items of commerce fall under the exclusive control of Congress; otherwise, the states are free to regulate some aspects of interstate trade.[27] In *Welton v. Missouri*,[28] decided twenty-four years later, the Court invoked the Dormant Commerce Clause to interpret congressional inaction as evidence of an intent that the area of commerce remain unregulated.[29]

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imposts or duties on imports without consent of Congress); *see also* U.S. CONST. art. I, § 10, cl. 2 (listing state actions that require congressional approval). Chief Justice Marshall died before he could contribute to any other Dormant Commerce Clause decisions. *See* 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 11.3 (2d ed. 1992) (noting that Chief Justice Marshall died during oral arguments in *Mayor of New York v. Miln*); *see also* Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 132 (1837) (avoiding question of whether Commerce Clause is exclusive by finding challenged regulation void under Supremacy Clause); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 577 (stating that neither *Gibbons* nor *Willson* explains how or when federal inaction regarding commerce can be defined as "dormant").

25. 53 U.S. 299 (1851).

26. *Cooley*, 53 U.S. at 317-18; *accord* Parker v. Brown, 317 U.S. 341, 359-60 (1942) (reiterating that states may regulate commerce in areas of local concern so long as Congress has not regulated that area); California v. Thompson, 313 U.S. 109, 113-14 (1941) (holding that Commerce Clause does not prohibit states from regulating areas of local concern even if regulation affects interstate commerce); Minnesota Rate Cases, 230 U.S. 352, 399-400 (1913) (permitting states to regulate commerce until Congress preempts regulations); *see also* Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra*, 71 OR. L. REV. 409, 414–15 (1992) (describing Court's application of *Cooley* doctrine by classifying state regulation as either national or local in character and invalidating regulation if it substantially impacted interstate commerce). *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6–4 (2d ed. 1988) (discussing how *Cooley* doctrine's categorization of regulations as local or national led to conflicting Court decisions); Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, 61 GEO. WASH. L. REV. 657, 680–81 (1993) (stating that *Cooley* Court believed that states could only be restrained by Dormant Commerce Clause when regulated activity demanded uniform national regulation).

27. *Cooley*, 53 U.S. at 319; *accord Southern Pac. Co.*, 325 U.S. at 766-67 (affirming that, in absence of congressional action, states may regulate "matters of local concern"); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 185 (1938) (recognizing that some matters are of local concern and therefore are left to states); *see also* Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 151-56 (advocating *Cooley* approach to Dormant Commerce Clause analysis, wherein Court decides what matters are local and what matters are national).

28. 91 U.S. 275 (1875).

29. *Welton*, 91 U.S. at 282; *accord* Brennan v. Titusville, 153 U.S. 289, 302 (1894) (voiding state police regulation that conflicted with congressional silence); *In re* Rahrer, 140 U.S. 545, 559-60 (1891) (asserting that congressional silence indicates congressional will that interstate commerce remain unregulated); Brown v. Houston, 114 U.S. 622, 631

Despite the absence of textual support for the Dormant Commerce Clause in the Constitution, the Supreme Court has overturned many state and local laws that either blatantly discriminate against or unduly burden interstate commerce.[30] When reviewing a challenged regulation, the Court employs two types of review.[31] First, the Court subjects a facially discriminatory regulation to a strict and nondeferential standard of review established in *City of Philadelphia v. New Jersey*.[32] Under this stan-

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(1885) (stating that "[s]o long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that commerce shall be free and untrammelled"); Hall v. DeCuir, 95 U.S. 485, 490 (1877) (explaining that, when silent, Congress adopts common-law regulation of commerce). The Court had attempted to justify its decisions in previous cases. *See Welton*, 91 U.S. at 282–83 (citing four cases as support, including *Brown v. Maryland*, in which Court invalidated state license fee as import duty conflicting with Article I requirement of prior congressional approval). *But see* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 580 n.72 (noting that no cases prior to *Welton* "alluded to the idea of inferring congressional intent from congressional silence"). Later, the Court ceased its attempts to determine whether to base Dormant Commerce Clause jurisprudence on the *Willson*, *Cooley*, or *Welton* doctrines. *See Southern Pac.*, 325 U.S. at 768 (stating that "[w]hether . . . this long-recognized distribution of power between the national and the state governments is predicated upon the implications of the commerce clause itself, or upon the presumed intention of Congress, where Congress has not spoken, the result is the same").

30. *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970) (rejecting in-state packing requirement for all cantaloupes grown in state); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 530 (1959) (invalidating state mudguard requirements as conflicting with regulations of other states and therefore overly burdensome); Dean Milk Co. v. City of Madison, 340 U.S. 349, 356 (1951) (nullifying local ban on out-of-city milk even though ban was enacted to protect public health); *see also* Christopher S. Marchese, *The Dormant Commerce Clause and Airport Noise: A Case For Narrow Judicial Review*, 44 BAYLOR L. REV. 645, 668–69 (1992) (noting increase in Dormant Commerce Clause litigation over past 50 years in light of Court's willingness to review state regulations); James H. Andrews, *Garbage Makes Its Way to Supreme Court*, CHRISTIAN SCI. MONITOR, Jan. 1, 1994, at 4 (noting that "'[f]or 50 years, the Supreme Court has struck down nearly all restrictions on interstate commerce'" (quoting Mary L. Savage, Marquette University Law School)).

31. *See Fort Gratiot*, 112 S. Ct. at 2024 (explaining distinction between two types of review); *Pike*, 397 U.S. at 142 (explaining that type of review depends on degree of interference with interstate commerce); Paul S. Kline, *Publicly-Owned Landfills and Local Preferences: A Study of the Market Participant Doctrine*, 96 DICK. L. REV. 331, 360–61 (1992) (supporting two-tiered approach to reviewing Dormant Commerce Clause challenges as useful way for Court to strike down economically protectionist state legislation while upholding nondiscriminatory legislation that only incidentally burdens commerce). *But see* Shaun Anderson, Comment, Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources: *Solid Waste Management and the Dormant Commerce Clause*, 28 NEW ENG. L. REV. 745, 780 (1994) (noting that Court decisions suggest abandonment of more lenient review by using only less-deferential, strict scrutiny review).

32. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978) (announcing that facially discriminatory state and local regulations are subject to "per se rule of invalidity"); *see also* South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, 100

dard, facially discriminatory regulations are usually held per se invalid.[33] However, if the regulation pursues a legitimate state goal that is not protectionist, the Court may uphold the regulation if the state or locality can prove it is the least burdensome means of achieving that goal.[34] The Court introduced the second type of review in *Pike v. Bruce Church, Inc.*[35] Under this standard, if a regulation is not facially discriminatory and pursues local interests, the Court will uphold it so long as the concomitant burdens on interstate commerce do not outweigh the local benefits.[36] When applying this more deferential type of review, the Court

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(1984) (striking requirement for in-state lumber processing under *City of Philadelphia*'s per se rule); Chemical Waste Management, Inc., v. Hunt, 112 S. Ct. 2009, 2013 (1992) (applying analytical framework introduced in *City of Philadelphia* to state statute requiring higher disposal fees for out-of-state waste disposal); Shaun Anderson, Comment, Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources: *Solid Waste Management and the Dormant Commerce Clause*, 28 NEW ENG. L. REV. 745, 774 (1994) (contending that Court prefers strict and nondeferential standard of review).

33. *See City of Philadelphia*, 437 U.S. at 626-27 (asserting that strict scrutiny will apply to all discriminatory regulations whether or not regulation had protectionist purpose); *see also* Maine v. Taylor, 477 U.S. 131, 138 (1986) (stating that regulation may discriminate "either on its face or in practical effect"); *Hughes*, 441 U.S. at 337 (contending that facially discriminatory legislation has "fatal defect" and requires at least strict scrutiny). Some commentators have argued that the Court should only review facially discriminatory regulations. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 251–53 (12th ed. 1991) (noting that Court applies strict scrutiny review to regulations having discriminatory effect or purpose in addition to regulations that are facially discriminatory); Robert A. Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885, 893 (1985) (asserting that reviewing only facially discriminatory state legislation comports with historical purpose of Commerce Clause—prevention of economic isolation).

34. *See Fort Gratiot*, 112 S. Ct. at 2024 (commenting that Michigan had not proven that waste import ban represented only way to achieve state goal); *Wyoming v. Oklahoma*, 112 S. Ct. at 801 (invalidating regulation requiring use of specified amount of Oklahoma-mined coal because state did not prove exhaustion of all nondiscriminatory alternatives); *Limbach*, 486 U.S. at 274 (stating that Ohio failed to prove tax credits for state-produced ethanol represented sole means of reducing air pollution); *Taylor*, 477 U.S. at 147-48 (holding that Maine's ban on baitfish importation served as only method to protect in-state fish supply from disease). One commentator has criticized the Court's application of the second part of the strict scrutiny test. *See* Edward A. Fitzgerald, *The Waste War:* Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources *and* Chemical Waste Management, Inc. v. Hunt, 13 STAN. ENVTL. L.J. 78, 106–12 (1994) (contending that Court should not have used strict scrutiny to invalidate Alabama regulation requiring higher rates for out-of-state hazard waste disposal because regulation pursued legitimate state goal in least burdensome way).

35. 397 U.S. 137 (1970).

36. *Pike*, 397 U.S. at 142; *see also Fort Gratiot*, 112 S. Ct. at 2024-25 (rejecting state's request that Court apply less stringent review to solid waste landfill restrictions); *Hunt*, 112 S. Ct. at 2014 n.5 (discounting state's attempt to have Court apply less stringent review to regulation requiring higher rates for out-of-state hazardous waste dumping); Brown-For-

considers whether the regulation evenhandedly applies to local and non-local interests and whether less burdensome alternatives exist.[37]

According to the Supreme Court, Congress may authorize the states to enact regulations that would otherwise violate the Dormant Commerce Clause.[38] In the area of waste management, Congress enacted the Solid

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man Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579–80, 585 (1986) (determining that added expense paid by out-of-state consumers outweighed benefits of alcohol price reduction for in-state consumers). *But see Southern Pac.*, 325 U.S. at 794 (Black, J., dissenting) (scolding Court for attempting to balance railroad's economic well-being against railroad employees' safety); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1284–87 (1986) (concluding that Court's balancing act is mere "lip service" and that Court is using intuition rather than analysis to find economic protectionism and strike legislation); Mark Tushnet, *Scalia and the Dormant Commerce Clause: A Foolish Formalism?*, 12 CARDOZO L. REV. 1717, 1724–26 (1991) (contending that balancing is legislative process, not judicial process).

37. *Pike*, 397 U.S. at 142; *accord* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471–72 (1981) (upholding regulation restricting sale of milk in nonreturnable plastic containers because it evenhandedly applied to both in-state and out-of-state companies); *see also Kassel*, 450 U.S. at 675 (holding that evenhanded regulations are usually valid because excessive burdens are checked by internal political processes); David Pomper, Comment, *Recycling* Philadelphia v. New Jersey*: The Dormant Commerce Clause, Postindustrial "Natural" Resources and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309, 1316–17 (1989) (suggesting that Court should use Dormant Commerce Clause only to void state regulations that discriminate against interests not represented in state decisionmaking). *But see* Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 133 (recognizing difficulty in organizing local consumers and that such consumers may not act as political safeguard within state or locality passing burdensome regulations).

38. Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 769 (1945); *see* White v. Massachusetts Council of Constr. Employers, 460 U.S. 204, 213 (1983) (upholding discriminatory regulations imposed by cities on federally financed construction projects approved by Congress against Dormant Commerce Clause challenges); Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 960 (1982) (emphasizing that Congress's intent to safeguard state legislation from Dormant Commerce Clause attacks must be "expressly stated"); Stephen M. Johnson, *Beyond* City of Philadelphia v. New Jersey, 95 DICK. L. REV. 131, 132 n.11 (1990) (explaining that Congress may grant states power to regulate in ways inconsistent with Supreme Court's interpretation of Dormant Commerce Clause). *But see* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 446–57 (1982) (contending that Court should use Privileges and Immunities Clause to strike down discriminatory state legislation and should defer to congressional review and preemption of burdensome state legislation through Supremacy Clause of Article VI); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 582–83 (indicating that Dormant Commerce Clause is unsupported by Constitution, as is facet of Dormant Commerce Clause jurisprudence that allows Congress to revive law previously declared unconstitutional). *See generally* U.S. CONST. art. IV, § 2 (stating that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"); U.S. CONST. art. VI, cl. 2 (stating that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land").

Waste Disposal Act (SWDA) in 1965,[39] amending the law with the Resource Conservation and Recovery Act of 1976 (RCRA).[40] The main focus of the legislation concerned hazardous waste,[41] and the text and legislative history of these statutes indicate that Congress intended for local authorities to direct solid waste management.[42] RCRA encourages

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39. Solid Waste Disposal Act of 1965, Pub. L. No. 89-272, tit. II, 79 Stat. 992 (codified as amended at 42 U.S.C. §§ 6901-6992k (1988)).

40. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, § 2, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6992k (1988)).

41. *See id.* (establishing first comprehensive regulatory scheme for treatment, storage, and disposal of hazardous waste); Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334 (codified as amended at 42 U.S.C. §§ 6921-6933 (1988)) (establishing additional standards for identifying and listing hazardous wastes for generators, transporters, and managers of hazardous waste); Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (codified as amended at 42 U.S.C. §§ 6921-6939b (1984)) (promulgating additional guidelines for hazardous waste aimed at preventing groundwater contamination); *see also* 137 CONG. REC. S5282 (daily ed. Apr. 25, 1991) (statement of Sen. Chafee) (stating that previous RCRA amendments focused on hazardous waste); Ann R. Mesnikoff, Note, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home*, 76 MINN. L. REV. 1219, 1221–22 (1992) (noting that legislation in 1980s focused on developing comprehensive response to hazardous waste problem). Hazardous waste and municipal solid waste are not necessarily mutually exclusive. *See* 42 U.S.C. § 6903(5) (1988) (defining hazardous waste as type of solid waste); Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. § 9601(14) (1986)) (amending Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) by defining hazardous waste without distinguishing substance's source); *see also* B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1205 (2d Cir. 1992) (holding that municipalities may be held liable under CERCLA for disposal and treatment of household waste that contains hazardous substances). *See generally* Randolph L. Hill, *An Overview of RCRA: The "Mind-Numbing" Provisions of the Most Complicated Environmental Statute*, 21 Envtl. L. Rep. (Envt'l L. Inst.) 10,254 (May 1991) (explaining EPA definitions for solid waste and hazardous waste, including the technical criteria used to classify solid waste as hazardous waste).

42. Section 6901(a)(4) of Title 42 of the United States Code provides in pertinent part:

> (a) Solid Waste
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> The Congress finds with respect to solid waste—
>
> . . . .
>
> (4) that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal as set forth above have became a matter national in scope and in concern and necessitate Federal action through financial and technical assistance and leadership in the development, demonstration, and application of new and improved methods and processes to reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal practices.

42 U.S.C. § 6901(a)(4)(1988). RCRA orders the EPA to establish solid waste planning guidelines for state and local authorities. *Id.* § 6942. The preamble for the municipal waste landfill regulations promulgated by the EPA states that "[t]he actual planning and direct

states to submit plans for solid waste management, and if the plans are approved, the states receive federal money and advice to implement them.[43] To guarantee a steady waste supply for facility operation, RCRA discourages states from forbidding municipalities from entering into long-

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implementation of solid waste programs under Subtitle D . . . remain largely State and local functions, and the act authorizes States to devise programs to deal with State-specific conditions and needs." Solid Waste Disposal Facility Criteria, 40 C.F.R. pt. 256 (1994). The original House Report for RCRA states:

> It is the Committee's intent that the federal government will provide the technical assistance necessary for the states, in cooperation with their own local governments, to develop an adequate regional system and the ability to implement such a system for the disposal of waste, without the federal government becoming additionally involved in the affairs of state or local government.
>
> . . . .
>
> It is the responsibility of the state and local or regional authorities to decide which discarded material functions will be state or regional agency responsibilities or local responsibilities.

H.R. REP. NO. 1491, 94th Cong., 2d Sess. 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6278. Additionally, the original House Report states that "federal assistance should be an incentive for state and local authorities to act to solve the discarded materials problem. At this time federal preemption of this problem is undesirable, inefficient, and damaging to local initiative." *Id.* at 6270-71; *see also* OFFICE OF TECHNOLOGY ASSESSMENT, CONGRESS OF THE UNITED STATES, FACING AMERICA'S TRASH: WHAT NEXT FOR MUNICIPAL SOLID WASTE? 8 (1989) (noting that Congress left responsibility for nonhazardous solid waste to state, regional, and local governments); Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra*, 71 OR. L. REV. 409, 450–51 (1992) (observing that state plan following RCRA guidelines would have little value without authority to enact local waste flow regulations); Ann R. Mesnikoff, Note, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home*, 76 MINN. L. REV. 1219, 1222 (1992) (asserting that legislative history indicates that Congress left solid waste planning to states).

43. 42 U.S.C. § 6941 (1988) Section 6943 lists the requirements for federal approval of state plans:

> (a) Minimum requirements
>
> In order to be approved under section 6947 of this title, each State plan must comply with the following minimum requirements—
>
> . . . .
>
> (2) The plan shall . . . prohibit the establishment of new . . . dumps . . . .
>
> (3) The plan shall provide for the closing or upgrading of all existing open dumps within the State . . . .
>
> (4) The plan shall provide for the establishment of such State regulatory powers as may be necessary to implement the plan.
>
> . . . .
>
> (6) The plan shall provide for such resource conservation or recovery and for the disposal of solid waste in sanitary landfills or any combination of practices so as may be necessary to use or dispose of such waste in a manner that is environmentally sound.

42 U.S.C. § 6943(a) (1988). RCRA also provides for federal assistance for approved plans:

term contracts with private companies.[44] Furthermore, RCRA authorizes the Environmental Protection Agency (EPA) to assist states and local entities in removing legal, financial, and institutional barriers that prevent the construction of new facilities meeting federal guidelines.[45]

(a) Authorization of Federal financial assistance

. . . .

(2)(A) The Administrator is authorized to provide financial assistance to States, counties, municipalities, and intermunicipal agencies and State and local public solid waste management authorities for implementation of programs to provide solid waste management, resource recovery, and resource conservation services and hazardous waste management. Such assistance shall include assistance for facility planning and feasibility studies; expert consultation; surveys and analyses of market needs; marketing of recovered resources; technology assessments; legal expenses; construction feasibility studies; source separation projects; and fiscal or economic investigations or studies . . . .

Id. § 6948(a)(2)(A). RCRA is not a federal mandate to the states and localities; failure to comply would only result in the loss of federal funding and assistance. *Id.* § 6947(b)(3). However, regular federal assistance for solid waste programs effectively ended in 1988. *See id.* § 6948(a)(1) (authorizing federal funding only through fiscal year 1988); Ann R. Mesnikoff, Note, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home*, 76 MINN. L. REV. 1219, 1224 (1992) (noting that federal assistance for state solid waste planning was ineffective and ceased entirely in 1988).

44. Section 6943 of the United States Code provides in pertinent part:

(5) The plan shall provide that no State or local government within the State shall be prohibited under State or local law from negotiating and entering into long-term contracts for the supply of solid waste to resource recovery facilities, from entering into long-term contract for the operation of such facilities, or from securing long-term markets for material and energy recovered from such facilities or for conserving materials or energy by reducing the volume of waste.

42 U.S.C. § 6943(a)(5) (1988). RCRA defines "long-term contract" as "a contract of sufficient duration to assure the viability of a resource recovery facility (to the extent that such viability depends upon solid waste supply)." *Id.* § 6903(11). Congress expressed approval for sending solid waste to energy facilities as a response to decreasing landfill space. *See id.* § 6901(b)(8) (urging immediate action to develop alternatives to landfilling because cities are "running out of suitable solid waste disposal sites"). However, financing these facilities is difficult. *See* David Holmstrom, *Decision on Waste Disposal Raises Environmental Eyebrows*, CHRISTIAN SCI. MONITOR, June 28, 1994, at 6 (noting Huntsville, Alabama's reliance on flow control method to pay $111 million outstanding debt on its solid waste facility); James T. O'Reilly, *After the Applause Ends: Examining the Legal Issues in Municipal Solid Waste Disposal and Recycling*, 41 FED. B. NEWS & J. 106, Feb. 1994 (noting that guaranteed waste supply is required to finance new waste incineration plants, landfills, and recycling facilities), *available in* Westlaw, JLR Database, FEDBNJ File, at *5–6.

45. 42 U.S.C. § 6948(d)(3)(a)-(c) (1988). Section 6948 provides in pertinent part:

(3) [T]he Administrator is authorized to provide technical assistance to States, municipalities, regional authorities, and intermunicipal agencies upon request, to assist in the removal or modification of legal, institutional, and economic impediments which have the effect of impeding the development of systems and facilities to recover energy and materials from municipal waste or to conserve energy or materials which contribute to the waste stream. Such impediments may include—

Although Congress has not yet reauthorized RCRA[46] or passed further solid waste legislation,[47] in 1993 the Legislature directed the EPA to study flow control measures.[48] This directive coincided with bills intro-

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(A) law, regulation, and policies . . . ;
(B) impediments to the financing of facilities to conserve or recover energy and materials from municipal waste through the exercise of State and local authority to issue revenue bonds . . . ;
(C) impediments to institutional arrangements necessary to undertake projects . . . including the creation of special districts, authorities, or corporations where necessary having the power to secure the supply of waste of a project.

Id. RCRA also provides personnel to help state and local governments, as well as federal agencies, with technical, marketing, financial, and institutional planning. *Id.* § 6913; *see also* H.R. REP. NO. 1491, 94th Cong., 2d Sess. 3, 15 (1976) (stating that advice provided by § 6913 includes "evaluation of the proposal; obtaining of suitable financial package; [and] deciding who should and will dump at the facility"), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6252; Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra*, 71 OR. L. REV. 409, 450–51 (1992) (contending that detail of RCRA guidance for state plans precludes idea that Congress did not authorize waste flow control). *But see* Sidney M. Wolf, *The Solid Waste Crisis: Flow Control and the Commerce Clause*, 39 S.D. L. REV. 529, 566–69 (1994) (characterizing flow control as mere economic protectionism).

46. *See 102d Congress: RCRA*, Daily Env't Rep. (BNA) (Oct. 23, 1992) (noting that, in 1984, Congress reauthorized RCRA funding only through 1988), *available in* Westlaw, BNA-DEN Database, at *1. Since 1988, Congress has funded RCRA through an annual appropriations process. *Id.* However, it appears that Congress may seriously consider RCRA amendments and reauthorization in 1995. *See Congress: Refusal to Fund Unauthorized Programs May Fuel Rewrites of Environmental Bills*, Nat'l Env. Daily (BNA) (Jan. 10, 1995) (discussing how increasing congressional reluctance to fund unauthorized programs through appropriations may spur reauthorization of statutes, including Clean Water Act and RCRA), *available in* Westlaw, BNA-NED Database, at *1–3.

47. *See 102d Congress: RCRA*, Daily Env't Rep. (BNA) (Oct. 13, 1992) (reporting failure to enact legislation aimed at allowing states or localities to restrict solid waste imports and legislation expressly allowing flow control), *available in* Westlaw, BNA-DEN Database, at *2; *Congressional Research Service Report to Congress, Environmental Protection: From the 103d Congress to the 104th Congress Dated Jan. 3, 1995*, Daily Env't Rep. (BNA) (Jan. 10, 1995) (noting that, despite widespread support, 103d Congress failed to enact legislation allowing state or local restrictions on waste shipment), *available in* Westlaw, BNA-DEN Database, at *8. *See generally* Marylou Scofield, *RCRA Reauthorization: Moving the Incineration Issue to the Front Burner*, 3 FORDHAM ENVT. L. REP. 183 (1992) (detailing RCRA reauthorization bills and concluding that proposed expansion of federal role in reviewing state and regional plans should also include active local participation in enforcement and policy-making).

48. H.R. CONF. REP. NO. 902, 102d Cong., 2d Sess. 48 (1992). The EPA conducted public hearings to garner information on the following issues: (1) the definition of flow controls; (2) impacts on waste source reduction and recycling; (3) alternatives to flow control; (4) health and environmental impacts; (5) economic impacts; and (6) waste management impacts, especially concerning financing and building facilities. Meeting Notice, 58 Fed. Reg. 37,477–79 (1993); *see also* Samuel J. Morley, *Flow Control Ordinances and the Commerce Clause: Whose Trash Is It Anyhow?*, 67 FLA. B.J. 79 (1993) (noting that EPA

duced in both houses that would have expressly authorize state and local governments to enact and enforce flow control regulations.[49]

Despite congressional activity in the area of waste management, the Supreme Court has summarily struck down state and local regulations that affect the interstate movement of solid waste.[50] In the landmark case

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was ordered to hold series of meetings during summer and fall of 1993 on merits of flow control and issue report in late 1994), *available in* Westlaw, JLR Database, FLBJ File, at *2. *But see* Brief for Petitioners at 18-19, C & A Carbone, Inc. v. Town of Clarkstown, ___ U.S. ___, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994) (No. 92-1402) (asserting that congressional and EPA attention to flow control confirms that Clarkstown's ordinance is not authorized by Congress to override Dormant Commerce Clause). *See generally* Sidney M. Wolf, *The Solid Waste Crisis: Flow Control and the Commerce Clause*, 39 S.D. L. REV. 529, 532 (1994) (noting that flow control has been called "one of the most significant waste management issues of the 1990s").

49. *E.g.*, H.R. 4683, 103d Cong., 2d Sess. (1994); H.R. 4662, 103d Cong., 2d Sess. (1994); H.R. 4859, 103d Cong., 2d Sess. (1994); H.R. 4643, 103d Cong., 2d Sess. (1994); S. 2227, 103d Cong., 2d Sess. (1994). The House Energy and Commerce Committee approved H.R. 4683 on August 18, 1994. *See Energy and Commerce Panel Approves Broader of Two Flow Control Bills*, Daily Rep. for Executives (BNA) No. 1994, at A-159 (Aug. 19, 1994). The bill permitted flow control for local governments with facilities either in operation or in significant planning as of May 15, 1994, the day before the Court decided *Carbone*. *Id.* One of the bill's sponsors, Representative Frank Pallone, stated that he "hope[d] that the final result . . . will be to put state and local governments in the same position they were in before the Supreme Court decision." Ellen Gamerman, *Panel OK's Bill to Increase State Controls on Solid Waste*, STATES NEWS SERV. (July 21, 1994), *available in* LEXIS, NEWS Library, SNS File, at *1. Some commentators felt this bill did not give local governments enough control. *See Energy and Commerce Panel Approve Broader of Two Flow Control Bills*, WASH. INSIDER (BNA) (Aug. 19, 1994) (quoting Deane Shea of the National Association of Counties as stating that bill is "'still not helping many, many communities that had planned on flow control but that do not qualify now'"), *available in* Westlaw, BNA-BWI Database, at *3. Others believed the bill went too far. *See id.* (quoting Representative Bill Richardson, author of narrower rival bill, stating that Pallone bill would extend flow control "in perpetuity" and allow municipal garbage monopolies). On October 14, 1994, the House approved a compromise version of the bill that drew the support of proponents of flow control and industries like B.F.I. *Solid Waste: Final Efforts on Interstate Transport, Municipal Flow-Control Measure Fall Short*, Daily Env't Rep. (BNA) (Oct. 14, 1994), *available in* Westlaw, BNA-DEN Database, at *1. However, the bill failed to pass the Senate by one vote. *Id.* The early days of the 104th Congressional session witnessed the introduction of an identical bill. *See General Policy: Bills on Superfund, Drinking Water, Flow Control, Waste Transport Introduced*, Daily Env't Rep. (BNA) (Jan. 13, 1995) (noting introduction of House Bill 90), *available in* Westlaw, BNA-DEN Database, at *1.

50. *See* Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 114 S. Ct. 1345, 1350 (1994) (voiding regulation imposing higher fees for out-of-state waste disposal); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019, 2023 (1992) (invalidating restriction on out-of-county waste movement); Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009, 2012 (1992) (striking regulation imposing higher fees for out-of-state hazardous waste disposal); City of Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978) (nullifying waste import ban); Michael D. Diederich, Jr., *Does Gar-*

of *City of Philadelphia v. New Jersey*,[51] the Court held that a New Jersey law banning the importation of garbage to all state landfills violated the Dormant Commerce Clause.[52] Because the law was facially discriminatory and other, less burdensome options were available to serve the state's purpose, the Court concluded that the law was "per se invalid."[53] The Court further explained that garbage constitutes an article of commerce for purposes of Commerce Clause analysis and does not exclusively fall within the realm of local health and safety concerns as traditionally believed.[54] Fourteen years later, in *Fort Gratiot Sanitary*

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bage Have Standing?: Democracy, Flow Control and a Principled Constitutional Approach to Municipal Solid Waste Management, 11 PACE ENVTL. L. REV. 157, 215-20 (1993) (distinguishing flow control from types of waste import bans previously voided by Court by contending that waste processed locally never enters into interstate commerce); Shaun Anderson, Comment, Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources: *Solid Waste Management and the Dormant Commerce Clause*, 28 NEW ENG. L. REV. 745, 745 (1994) (suggesting that Court summarily applied *City of Philadelphia* to *Fort Gratiot* without considering state health and safety arguments).

51. 437 U.S. 617 (1978).

52. *City of Philadelphia*, 437 U.S. at 629. The Court has recognized "quarantine" laws that ban importation of noxious articles. *See* Maine v. Taylor, 477 U.S. 131, 151-52 (1986) (upholding state ban on diseased baitfish); Sligh v. Kirkwood, 237 U.S. 52, 61-62 (1915) (upholding state ban on immature and non-edible citrus fruit because such fruit injured state citrus industry). However, in *City of Philadelphia*, the Court refused to classify the state statute as a quarantine law because imported waste posed no greater threat than in-state waste. *City of Philadelphia*, 437 U.S. at 628–29; *see also* Stephen M. Johnson, *Beyond* City of Philadelphia v. New Jersey, 95 DICK. L. REV. 131, 132–33 (1990) (stating that, in aftermath of *City of Philadelphia*, some states nonetheless attempted to enact similar import bans, which federal courts summarily declared unconstitutional); Shaun Anderson, Comment, Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources: *Solid Waste Management and the Dormant Commerce Clause*, 28 NEW ENG. L. REV. 745, 757–58 (1994) (commenting that Supreme Court has abandoned deferential standard for quarantine laws and now applies strict scrutiny).

53. *City of Philadelphia*, 437 U.S. at 628-29; *accord Fort Gratiot*, 112 S. Ct. at 2023-24 (holding that state's waste movement restrictions were clearly discriminatory and unnecessary in light of feasible nondiscriminatory alternatives); *Oregon Waste Sys.*, 114 S. Ct. at 1351 (asserting that state's higher fees for out-of-state waste disposal were "per se invalid" because other nondiscriminatory methods existed); *see* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1092 (1986) (urging Court to limit its Dormant Commerce Clause review to purposefully discriminatory legislation); *see also* Stephen M. Johnson, *Beyond* City of Philadelphia v. New Jersey, 95 DICK. L. REV. 131, 142–43 (1990) (noting exception of strict scrutiny application if state acts as market participant in regulated activity).

54. *City of Philadelphia*, 437 U.S. at 622–23; *accord Fort Gratiot*, 112 S. Ct. at 2022–23 (noting that "[s]olid waste, even if it has no value, is an article of commerce"); *Hunt*, 112 S. Ct. at 2013 n.3 (classifying hazardous waste, like municipal waste, as article of commerce and characterizing transactions between generators and landfill operators as interstate commerce). *But see* Michael D. Diederich, Jr., *Does Garbage Have Standing?: Democracy, Flow Control and a Principled Constitutional Approach to Municipal Solid Waste*

Landfill, Inc. v. Michigan Department of Natural Resources,[55] the Court nullified a regulation requiring private landfill owners to obtain permission to import garbage from outside the county.[56] Because the regulation treated waste from other in-state counties and waste from other states equally, the Court broadened the scope of the Dormant Commerce Clause by invalidating the regulation as facially discriminatory.[57] Using the same analytical framework in *Chemical Waste Management, Inc. v.*

Management, 11 PACE ENVTL. L. REV. 157, 166–68 (1993) (arguing that waste management is municipal function like "control of fire, police, education, and sewer services"); Jerry Abramson, *Garbage is a Local Issue*, PLAIN DEALER (Cleveland), June 7, 1994, at B7 (arguing that solid waste management is local issue); *cf.* Gardner v. Michigan, 199 U.S. 325, 332–33 (1905) (arguing that Court should defer to locality's determination that property rights of individuals "must be subordinated to general good" of public health); California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 324 (1905) (rejecting takings challenge to city regulation requiring that all garbage be disposed of at specified private facility); Hybud Equip. Corp. v. City of Akron, 654 F.2d 1187, 1192 (6th Cir. 1981) (asserting that "[c]ontrol of local sanitation, including garbage collection and disposal . . . is a traditional, paradigmatic example of the exercise of municipal police powers reserved to state and local governments under the Tenth Amendment"), *vacated on other grounds*, 455 U.S. 931 (1982).

55. 112 S. Ct. 2019 (1992).

56. *Fort Gratiot*, 112 S. Ct. at 2023. In *Fort Gratiot*, the Michigan Legislature enacted a statute requiring all private landfills to obtain permission prior to transporting waste across county lines. *Id.* at 2022. However, counties were permitted to accept waste from other counties and other states. *Id.* at 2025. Further, the dissent noted that the law economically injured Michigan residents. *Id.* at 2029 (Rehnquist, C.J., dissenting); *see* Shaun Anderson, Comment, Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources: *Solid Waste Management and the Dormant Commerce Clause*, 28 NEW ENG. L. REV. 745, 772–73 (1994) (regarding regulation invalidated in *Fort Gratiot* as evenhanded); *see also* South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 90 (1984) (explaining that Dormant Commerce Clause prevents legislative burdens on unrepresented out-of-state interests); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 444 n.18 (1978) (contending that state's political structure serves as check on burdensome regulations affecting both local and nonlocal interests); David Pomper, Comment, *Recycling* Philadelphia v. New Jersey: *The Dormant Commerce Clause, Postindustrial "Natural" Resources and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309, 1316–17 (1989) (arguing that Dormant Commerce Clause's main purpose should be to protect unrepresented interests).

57. *Fort Gratiot*, 112 S. Ct. at 2025–26. *Compare* Christine E. Carlstrom, Note, 27 SUFFOLK U. L. REV. 203, 210 (1993) (agreeing with Court in *Fort Gratiot* that regulation was not evenhanded) *with* Shaun Anderson, Comment, Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources: *Solid Waste Management and the Dormant Commerce Clause*, 28 NEW ENG. L. REV. 745, 773 (1994) (contending that regulation in *Fort Gratiot* was evenhanded and constitutional). *But see* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 n.17 (1981) (upholding state law prohibiting sale of milk in plastic containers, but permitting sale of milk in paper containers because no discrimination between intrastate and interstate commerce existed); *Rice*, 434 U.S. at 444 n.18 (noting that safety regulations are generally upheld because "their burden usually falls on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations").

Hunt,[58] the Court struck down an Alabama statute that imposed higher disposal fees for out-of-state hazardous waste deposited at Alabama facilities.[59]

After these decisions, the constitutional status of flow control regulations remained uncertain, as reflected by a split among the circuit courts.[60] Although federal legislation purports to reserve waste manage-

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58. 112 S. Ct. 2009 (1992).

59. *Hunt*, 112 S. Ct. at 2013–15. The Court deemed the Alabama statute facially and practically discriminatory. *Id.* Furthermore, the Court suggested other alternatives Alabama could have pursued: (1) a "per-ton additional fee on all hazardous waste disposed of within Alabama"; (2) "a per-mile tax on all vehicles transporting hazardous waste across Alabama roads"; or (3) "an evenhanded cap on the total tonnage landfilled at [the specific site]." *Id.* at 2015-16. Because the statute was facially discriminatory and because the State failed to prove that no other feasible alternatives existed to fulfill its goals, the statute failed the strict standard of review established in *City of Philadelphia*. *Id.* at 2016; *accord Oregon Waste Sys.*, 114 S. Ct. at 1349 (striking down state statute mandating higher fees for out-of-state waste disposal). However, Chief Justice Rehnquist did not regard the Alabama statute as isolationist. *Hunt*, 112 S. Ct. at 2018 (Rehnquist, C.J., dissenting). He further contended that "it is the 34 States that have no hazardous waste facility whatsoever, not to mention the remaining 15 States with facilities all smaller than [Alabama's], that have isolated themselves." *Id.*; *see also* Petitioners' Brief at 13, *Carbone* (No. 92-1402) (contending that regulation struck down in *Hunt* constituted sophisticated attempt to restrain waste trade); Edward A. Fitzgerald, *The Waste War:* Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources *and* Chemical Waste Management, Inc. v. Hunt, 13 STAN. ENVTL. L.J. 78, 80 (1994) (considering regulation voided in *Hunt* facially discriminatory, but arguing that Court should have upheld regulation because of absence of less burdensome alternatives). Robert O. Jenkins, Note, *Constitutionally Mandated Southern Hospitality: National Solid Wastes Management Association and Chemical Waste Management, Inc. v. Alabama Department of Environmental Management*, 69 N.C. L. REV. 1001, 1021 (1991) (criticizing invalidation of statute because it constituted Alabama's attempt to comply with federal regulations requiring regional plans for hazardous waste disposal).

60. *Compare* J. Filiberto Sanitation, Inc. v. New Jersey Dep't of Envtl. Protection, 857 F.2d 913, 923 (3d Cir. 1988) (upholding flow control regulation because Filiberto failed to prove that regulation was discriminatory under strict scrutiny test and failed to prove regulation was burdensome in light of obvious benefits under *Pike* balancing test) *and Hybud Equip. Corp.*, 654 F.2d at 1194–95 (upholding municipal regulation monopolizing waste collection and disposal because burden of regulation fell hardest on city residents and regulation did not prevent waste from entering stream of commerce or place burden on commerce) *with* Waste Sys. Corp. v. County of Martin, 985 F.2d 1381, 1389 (8th Cir. 1993) (invalidating as per se invalid county regulation requiring disposal at compost facility because real purpose of regulation was to assure financial viability of local facility at expense of out-of-state commerce) *and* Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775, 785 (D.R.I.) (invalidating flow control regulation as facially discriminatory because it prohibited waste from leaving state and discriminatory in effect because it favored one facility over out-of-state and in-state competitors), *aff'd per curiam*, 947 F.2d 1004 (1st Cir. 1991). *See generally* Ann R. Mesnikoff, Note, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home*, 76 MINN. L. REV. 1219, 1239-41 (1992) (describing rationale of two opposing positions); Samuel J. Mor-

ment for state and local control, the Supreme Court has rebuked many state attempts to regulate waste.[61] Nevertheless, approximately twenty-seven states allow local flow control ordinances.[62] Furthermore, past Supreme Court rulings invalidated garbage import restrictions but not garbage export restrictions.[63]

In *C & A Carbone, Inc. v. Town of Clarkstown*, the United States Supreme Court held that flow control regulations violate the Dormant

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ley, *Flow Control Ordinances and the Commerce Clause: Whose Trash Is It Anyhow?*, 67 FLA. B.J. 79 (1993) (analyzing arguments put before courts in *DeVito* and *Filiberto*), *available in* Westlaw, JLR Database, FLBJ File, at *4-7.

61. *See supra* note 50 and accompanying text; *see also* Sidney M. Wolf, *The Solid Waste Crisis: Flow Control and the Commerce Clause*, 39 S.D. L. REV. 529, 566–67 (1994) (predicting prior to *Carbone* decision that flow control would be considered unconstitutional based on reasoning of previous waste cases); Samuel J. Morley, *Flow Control Ordinances and the Commerce Clause: Whose Trash Is It Anyhow?*, 67 FLA. B.J. 79 (1993) (advocating resolution of flow control issues by Supreme Court decision in *Carbone* and congressional legislation), *available in* Westlaw, JLR Database, FLBJ File, at *2.

62. *See* C & A Carbone, Inc. v. Town of Clarkstown, ___ U.S. ___, ___, 114 S. Ct. 1677, 1690, 128 L. Ed. 2d 399, 417 (1994) (O'Connor, J., concurring) (noting that more than 20 states have statutes authorizing flow control). The following statutes contain flow control measures: COLO. REV. STAT. § 30-20-107 (West 1986 & Supp. 1994); CONN. GEN. STAT. ANN. § 22a-220a (West 1985 & Supp. 1994); (DEL. CODE ANN. tit. 7, § 6406(31) (1991); FLA. STAT. ANN. § 403.713 (West Supp. 1995); HAW. REV. STAT. § 340A-3(a) (1985); ILL. ANN. STAT. ch. 34, para. 5-1047 (1993); IND. CODE ANN. § 36-9-31-3,-4 (Burns 1993); IOWA CODE ANN. § 28G.4 (West Supp. 1994); LA. REV. STAT. ANN. § 30:2307(9) (West 1988); ME. REV. STAT. ANN. tit. 38, 1304-B(2) (West 1989 & Supp. 1994); MINN. STAT. ANN. § 115A.80 (West Supp. 1995); MISS. CODE ANN. § 17-17-319 (Supp. 1994); MO. REV. STAT. § 260.202 (Vernon 1990); N.J. STAT. ANN. §§ 13:1E22, 48:13A-5 (West 1991 & Supp. 1994); 1991 N.Y. LAWS 569, at 1687–89; N.C. GEN. STAT. § 130A-294 (1990); N.D. CENT. CODE § 23-29-06(6), (8) (Supp. 1993); OHIO REV. CODE ANN. § 343.01(H)(2) (Baldwin 1991); OR. REV. STAT. § 268.317(3)-(4) (1993); PA. STAT. ANN. tit. 53, § 4000.303(e) (Supp. 1994); R.I. GEN. LAWS § 23-19-10(40) (Supp. 1993); TENN. CODE ANN. § 68-211-814 (Supp. 1994); VT. STAT. ANN. tit. 24, § 2203a, 2203b (1992); VA. CODE ANN. § 15.1–28.01 (Michie Supp. 1994); WASH. REV. CODE. ANN. §§ 35.21.120, 36.58.040 (West 1990 & Supp. 1994); W. VA. CODE § 24-2-1h) (Supp. 1994); WIS. STAT. ANN. § 159.13(3), (11) (West Supp. 1994); *see also* Sidney M. Wolf, *The Solid Waste Crisis: Flow Control and the Commerce Clause*, 39 S.D. L. REV. 529, 568 (1994) (construing aggregate effect of 27 states' flow control policies as major impact on interstate commerce); Ann R. Mesnikoff, Note, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home*, 76 MINN. L. REV. 1219, 1231–33 (1993) (describing structure of enabling legislation of two states concerning flow control).

63. *See supra* note 50 and accompanying text; *see also* Michael D. Diederich, Jr., *Does Garbage Have Standing?: Democracy, Flow Control and a Principled Constitutional Approach to Municipal Solid Waste Management*, 11 PACE ENVTL. L. REV. 157, 215–21 (1993) (agreeing with Court that import bans are protectionist and therefore unconstitutional, but asserting that local control of garbage problem is not protectionist and should be upheld). *See generally* Sidney M. Wolf, *The Solid Waste Crisis: Flow Control and the Commerce Clause*, 39 S.D. L. REV. 529, 566–69 (1994) (asserting that flow control, used as ban on waste export, is unconstitutional according to previous Supreme Court waste decisions).

Commerce Clause.[64] Justice Kennedy, writing for the majority, echoed the reasoning of the Court's previous solid waste cases and declared Clarkstown's ordinance facially discriminatory and protectionist.[65] Justice Kennedy rebuffed the argument that, because the ordinance applied evenhandedly to both local and out-of-state garbage producers, it was not discriminatory.[66] Furthermore, Justice Kennedy characterized the ordinance as interstate in reach;[67] by favoring one local company, he stated, the regulation increased the cost for out-of-state waste disposal and denied out-of-state businesses a share of the local waste market.[68] Distinguishing *Carbone* from precedent, Justice Kennedy concluded that although the ordinance contained no export or import ban, the article of commerce was not the garbage itself, but the processing and disposing of the garbage.[69] Justice Kennedy further explained that Clarkstown could address its garbage problems through safety regulations and higher taxes or municipal bonds to ensure the solid waste transfer station's financial viability.[70] In addition, Justice Kennedy asserted that the town could not

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64. C & A Carbone, Inc. v. Town of Clarkstown, ___ U.S. ___, ___, 114 S. Ct. 1677, 1682, 128 L. Ed. 2d 399, 407 (1994).

65. *Id.* Justice Kennedy applied the analytical framework established in *City of Philadelphia v. New Jersey*, which presumes that discriminatory statutes favoring local business, but impeding interstate commerce, are per se invalid. *Id.* at ___, 114 S. Ct. at 1683, 128 L. Ed. 2d at 409; *see City of Philadelphia*, 437 U.S. at 624 (stating that "where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected").

66. *Carbone*, ___ U.S. at ___, 114 S. Ct. at 1682, 128 L. Ed. 2d at 407. Justice Kennedy analogized *Carbone* to *Dean Milk Co. v. Madison*, which held that municipalities, as well as states, cannot enact discriminatory legislation. *Id.* at ___, 114 S. Ct. at 1682, 128 L. Ed. 2d at 408; *see* Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951) (holding that municipality cannot pass discriminatory ordinance, even to ensure health and safety, "if reasonable nondiscriminatory alternatives . . . are available"). However, Justice Kennedy did not completely refute the town's argument because the law invalidated in *Dean Milk* did not apply to in-city residents. *See Dean Milk*, 340 U.S. at 351 (striking law prohibiting sale of milk in city unless processed within five-mile range of city).

67. *Carbone*, ___ U.S. at ___, 114 S. Ct. at 1683, 128 L. Ed. 2d at 408. Justice Kennedy noted that the town facility processed out-of-town waste. *Id.* at ___, 114 S. Ct. at 1681, 128 L. Ed. 2d at 407.

68. *Id.* at ___, 114 S. Ct. at 1680, 128 L. Ed. 2d. at 407.

69. *Id.* at ___, 114 S. Ct. at 1682–83, 128 L. Ed. at 408. According to Justice Kennedy, the ordinance deprived everyone but the contracted processor the opportunity to serve the needs of the local waste market. *Id.* Instead of recognizing the exclusion of local businesses, Justice Kennedy focused on the acute anticompetitiveness of the ordinance and its impact on out-of-state businesses. *Id.*

70. *Id.* at ___, 114 S. Ct. at 1683–84, 128 L. Ed. 2d at 409-10. Justice Kennedy viewed the ordinance as a revenue raiser to ensure the financial viability of the town facility. *Id.* at ___, 114 S. Ct. at 1684, 128 L. Ed. 2d at 410. Justice Kennedy preferred that the town operate within the confines of the free market to manage waste. *Id.* at ___, 114 S. Ct. at 1683, 128 L. Ed. 2d at 409.

justify the ordinance as a means of ensuring environmentally safe landfill disposal because the town had no police power over out-of-town sites.[71] Therefore, because less burdensome alternatives existed, the majority declared Clarkstown's facially discriminatory flow control measure unconstitutional.[72]

Justice O'Connor, concurring, contended that the ordinance was not facially discriminatory because it applied evenhandedly to all garbage and garbage processors, whether local or not.[73] However, applying the less stringent balancing test first employed in *Pike v. Bruce Church, Inc.*,[74] Justice O'Connor nevertheless found the ordinance unconstitutional because the burdens on interstate commerce outweighed the local benefits.[75] Moreover, Justice O'Connor agreed with the majority that less discriminatory methods for achieving Clarkstown's goals existed.[76] Unlike the majority, Justice O'Connor also addressed the contention that RCRA and SWDA authorize state and local flow control ordinances.[77] Although Justice O'Connor agreed that the legislation indicates Congress's intent to allow local governments to enact flow control measures to manage garbage, she concluded that Congress was not "unmistakably clear" in authorizing flow control.[78]

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71. *Carbone*, ___ U.S. at ___, 114 S. Ct. at 1683, 128 L. Ed. 2d at 409.

72. *Id.* at ___, 114 S. Ct. at 1683-84, 128 L. Ed. 2d at 409–10.

73. *Id.* at ___, 114 S. Ct. at 1689, 128 L. Ed. 2d at 416 (O'Connor, J., concurring). Justice O'Connor stressed that health and safety regulations like the town ordinance affect both in-state and out-of-state interests and therefore provide a safeguard against legislative discrimination. *Id.*

74. 397 U.S. 137 (1970).

75. *Carbone*, ___ U.S. at ___, 114 S. Ct. at 1690-91, 128 L. Ed. 2d at 417–18 (O'Connor, J., concurring). As an example, Justice O'Connor pointed out that New Jersey law requires that nonrecyclable waste separated out of state be returned for processing. *Id.* at ___, 114 S. Ct. at 1690, 128 L. Ed. 2d at 418. However, the ordinance required that all waste brought into town be processed at its facility. *Id.* Justice O'Connor found the ordinance to impose an impermissible burden on interstate commerce. *Id.* at ___, 114 S. Ct. at 1691, 128 L. Ed. 2d at 418. *But see id.* at ___ n.16, 114 S. Ct. at 1700–01 n.16, 128 L. Ed. 2d at 430 n.16 (Souter, J., dissenting) (explaining how waste processed at town facility could be returned to New Jersey in compliance with that state's law).

76. *Id.* at ___, 114 S. Ct. at 1690, 128 L. Ed. 2d at 417 (O'Connor, J., concurring).

77. *Id.* at ___, 114 S. Ct. at 1691-92, 128 L. Ed. 2d at 418–19.

78. *Id.* at ___, 114 S. Ct. at 1691, 128 L. Ed. 2d at 418. Justice O'Connor noted that, although RCRA orders the EPA to help states secure waste for new facilities, the EPA regulations provide that state plans should allow for unrestricted interstate movement of waste. *Id.* at ___, 114 S. Ct. at 1692, 128 L. Ed. 2d at 419. Justice O'Connor also noted that RCRA does not contain the more express language of the House Report, which mandated that state planning involving flow control remain undisturbed. *Id.* Finally, Justice O'Connor challenged Congress to override the Court's opinion and authorize flow control. *Id.* at ___, 114 S. Ct. at 1692, 128 L. Ed. 2d at 420.

Justice Souter, in a dissent joined by Chief Justice Rehnquist and Justice Blackmun, criticized the majority for unreasonably extending Dormant Commerce Clause jurisprudence to "strike down an ordinance unlike anything this Court has ever invalidated."[79] Additionally, Justice Souter attacked the majority for failing to recognize the distinctions between the previously invalidated laws, which blatantly discriminated against out-of-state or out-of-town interests, and Clarkstown's ordinance, which allowed one private actor to fulfill an important government obligation by proxy.[80] According to Justice Souter, local citizens and out-of-staters were similarly burdened by the ordinance, and local businesses as a class gained no benefit from the ordinance.[81] Furthermore, in applying the *Pike* balancing test, Justice Souter, unlike Justice O'Connor, found no burden on the interstate waste business.[82] Finally, Justice Souter noted that Carbone failed to prove that it suffered harm because of the law.[83]

In *C & A Carbone, Inc. v. Town of Clarkstown*, as in other Commerce Clause cases, the Justices struggled over which test should be used to determine whether a law violates the Dormant Commerce Clause.[84] For

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79. *Carbone*, ___ U.S. at ___, 114 S. Ct. at 1692, 128 L. Ed. 2d at 423-24 (Souter, J., dissenting).

80. *Id.* at ___, 114 S. Ct. at 1692, 128 L. Ed. 2d at 420. Justice Souter agreed that the town ordinance shared two superficial similarities with the processing cases which the majority used to strike down the ordinance: (1) the ordinance regulated a processing service; and (2) the ordinance excluded out-of-town waste processors. *Id.* at ___, 114 S. Ct. at 1694-95, 128 L. Ed. 2d at 423. However, Justice Souter indicated that, because the ordinance excluded all competition, the majority was invalidating an anticompetitive regulation, not a protectionist regulation. *Id.* at ___, 114 S. Ct. at 1696, 128 L. Ed. 2d at 424-25. Furthermore, Justice Souter asserted that the ordinance fulfilled a public purpose—waste control—and not a protectionist economic purpose in which local private actors were benefited to the exclusion of nonlocal economic actors. *Id.* at ___, 114 S. Ct. at 1696-98, 128 L. Ed. 2d at 425-26.

81. *Id.* at ___, 114 S. Ct. at 1696, 128 L. Ed. 2d at 424.

82. *Id.* at ___, 114 S. Ct. at 1700, 128 L. Ed. 2d at 430. Justice Souter repeatedly referred to the additional costs town residents incurred as a result of this ordinance. *Id.* at ___, ___, 114 S. Ct. at 1699–1700, 1702, 128 L. Ed. 2d at 429–32. Justice Souter rejected Carbone's argument that higher disposal fees burdened on interstate commerce. *Id.* at ___, 114 S. Ct. at 1699, 128 L. Ed. 2d at 428. Instead, Justice Souter found that the ordinance's burdens fell solely on town citizens. *Id.* at ___, 114 S. Ct. at 1700, 128 L. Ed. 2d at 430.

83. *Carbone*, ___ U.S. at ___, 114 S. Ct. at 1700, 128 L. Ed. 2d at 430 (Souter, J., dissenting). Justice Souter found no evidence in the record that the ordinance negatively affected out-of-town transfer stations, landfills, or incinerators that would have sought the town's business in the absence of flow control. *Id.* at ___, 114 S. Ct. at 1700-01, 128 L. Ed. 2d at 430.

84. In *Carbone*, the majority applied the strict scrutiny test for facially discriminatory regulations used in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). C & A Carbone, Inc. v. Town of Clarkstown, ___ U.S. ___, 114 S. Ct. 1677, 1682, 128 L. Ed. 2d 398, 407 (1994). Justice O'Connor, concurring, applied the more lenient test, established in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), for nondiscriminatory regulations that

instance, in *Carbone*, the Justices reached three entirely different results after applying the same precedent.[85] However, none of the Justices attempted to locate textual support for the Dormant Commerce Clause in the Constitution: the majority cited the Framers' desire to curtail protectionist state legislation,[86] and all three opinions rested upon the longevity of the Dormant Commerce Clause doctrine.[87]

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incidentally burden interstate commerce. *Id.* at ___, 114 S. Ct. at 1689–90, 128 L. Ed. 2d at 416–17 (O'Connor, J., concurring). Justice Souter, dissenting, also applied the *Pike* balancing test. *Id.* at ___, 114 S. Ct. at 1698, 128 L. Ed. 2d at 427 (Souter, J., dissenting). Similarly, the Justices differed in two previous waste management cases. *Compare* Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 114 S. Ct. 1345, 1351 (1994) (applying strict scrutiny review) *and* Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019, 2023–24 (1992) (applying strict scrutiny review) *with Oregon Waste Sys.*, 114 S. Ct. at 1359 (Rehnquist, C.J., dissenting) (applying *Pike* test) *and Fort Gratiot*, 112 S. Ct. at 2028 (Rehnquist, C.J., dissenting) (applying *Pike* test).

85. The majority declared the ordinance unconstitutional because it was facially discriminatory and the town had other methods available to obtain its goal. *Carbone*, ___ U.S. at ___, 114 S. Ct. at 1684, 128 L. Ed. 2d at 409–10. Justice O'Connor, concurring, found the ordinance unconstitutional because "it impose[d] an excessive burden on interstate commerce." *Id.* at ___, 114 S. Ct. at 1687, 128 L. Ed. 2d at 414 (O'Connor, J., concurring). Justice Souter, dissenting, found the ordinance neither facially discriminatory nor burdensome and therefore constitutional. *Id.* at ___, 114 S. Ct. at 1702, 128 L. Ed. 2d at 431–32 (Souter, J., dissenting). The level of constitutional review applied often determines the outcome of a case. *Compare* Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775, 785 (D.R.I.) (applying strict scrutiny and invalidating flow control regulation), *aff'd per curiam*, 947 F.2d 1004 (1st Cir. 1991) *with* J. Filiberto Sanitation, Inc. v. New Jersey Dep't of Envtl. Protection, 857 F.2d 913, 921 (3d Cir. 1988) (applying *Pike* test and finding flow control regulation constitutional). *See generally* Samuel J. Morley, *Flow Control Ordinances and the Commerce Clause: Whose Trash Is It Anyhow?*, 67 FLA. B.J. 79 (Oct. 1993) (noting that under strict scrutiny review, state has burden of proving absence of less discriminatory methods), *available in* Westlaw, JLR Database, FLBJ File, at *3.

86. *See Carbone*, ___ U.S. at ___, 114 S. Ct. at 1682, 128 L. Ed. at 407 (stating that purpose of Commerce Clause is to prohibit those "jealousies and retaliatory measures the Constitution was designed to prevent").

87. The majority claimed that its opinion rested "upon well settled principles of our Commerce Clause jurisprudence." *Id.* at ___, 114 S. Ct. at 1680, 128 L. Ed. 2d at 405. In her concurring opinion, Justice O'Connor stated that the Court had "long ago" concluded that the Commerce Clause forbade state regulation of interstate commerce. *Id.* at ___, 114 S. Ct. at 1687-88, 128 L. Ed. at 414 (O'Connor, J., concurring). Justice Souter's dissent related that the Court had "long read" the Dormant Commerce Clause to restrict state power. *Id.* at ___, 114 S. Ct. at 1694, 128 L. Ed. 2d at 422 (Souter, J., dissenting). Furthermore, the dissent stated that this restriction on state power "has been seen implicit in the Commerce Clause" to avoid protectionism and preserve national unity. *Id.* However, one member of the *Carbone* majority has repeatedly questioned the continuing existence of the Dormant Commerce Clause. *See, e.g.*, American Trucking Ass'ns v. Smith, 496 U.S. 167, 202 (1990) (Scalia, J., concurring) (calling Dormant Commerce Clause jurisprudence "arbitrary, conclusory, and irreconcilable with the constitutional text"); Tyler Pipe Indus., Inc. v. Washington, 483 U.S. 232, 265 (1987) (Scalia, J., concurring and dissenting) (stating that

Although the Dormant Commerce Clause has developed a guise of legitimacy through the years, the text of the Constitution does not explicitly provide that congressional power over interstate commerce precludes state regulation of interstate commerce.[88] For instance, the express prohibitions of state power found in Article I, Section 10 do not include a restriction on state regulation of interstate commerce.[89] Furthermore, states are not restrained from regulating interstate commerce by the second and third clauses of Article I, Section 10, which list state actions re-

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"the Court for over a century has engaged in an enterprise that it has been unable to justify by textual support or even coherent nontextual theory, that it was almost certainly not intended to undertake, and that it has not undertaken very well"); *see also* Richard D. Friedman, *Putting the Dormancy Doctrine out of Its Misery*, 12 CARDOZO L. REV. 1745, 1745 (1991) (labeling Dormant Commerce Clause as "historical anomaly" that should not be upheld by stare decisis).

88. *See* U.S. CONST. art. I, § 8, cl. 3 (empowering Congress to regulate commerce among states); *see also Tyler Pipe*, 483 U.S. at 261 (Scalia, J., concurring and dissenting) (stating that "the language of the Commerce Clause gives no indication of exclusivity"); City of Philadelphia v. New Jersey, 437 U.S. 617, 623 (1978) (inferring restraints on state power from past Court decisions but not from words of Constitution); Amy M. Petragnani, Comment, *The Dormant Commerce Clause: On Its Last Leg*, 57 ALB. L. REV. 1215, 1238 (1994) (arguing that, unless Commerce Clause is construed as exclusive federal power, courts have no authority under constitution to review state legislation regulating commerce); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 572–73 (asserting that Dormant Commerce Clause has no textual support and in fact undermines constitutional balance of powers).

89. Article I, § 10, cl. 1 provides:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

U.S. CONST. art. I, § 10, cl. 1. One Justice has noted a textual correlation between grants of power and denials of power in the Constitution. *See Tyler Pipe*, 483 U.S. at 261–64 (Scalia, J., concurring and dissenting) (explaining that grant of power to Congress to regulate commerce is not matched with denial of states to regulate commerce, as is case for other areas such as power to make money or treaties). Justice Scalia has proposed that Article IV, § 2 should be used instead of the Dormant Commerce Clause. *See id.* at 265 (stating that "rank discrimination against citizens of other States . . . is regulated not by the Commerce Clause but by the Privileges and Immunities Clause"); *see also* U.S. CONST. art. IV, § 2 (prohibiting state discrimination against citizens of other states); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 606–12 (advocating replacement of Dormant Commerce Clause by Privileges and Immunities Clause). *But see* Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 CHI. L. REV. 487, 499 (1981) (asserting that two clauses serve different purposes, with Dormant Commerce Clause emphasizing regulation of business affecting more than one state and Privileges and Immunities Clause emphasizing one state's treatment of out-of-state resident).

quiring congressional consent.[90] Nevertheless, the *Carbone* Court inferred Commerce Clause restraints based on the Framers' concerns about regional Balkanization and national unity.[91] When the Court decided *City of Philadelphia v. New Jersey*,[92] Justice Stewart discussed the supposed restraints imposed on the states by the Dormant Commerce Clause, but admitted that "[t]he bounds of these restraints appear nowhere in the words of the Commerce Clause."[93] Because the Supreme

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90. Article I, § 10, cl. 2 states:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

U.S. CONST. art. I, § 10, cl. 2. Furthermore, Article I, § 10, cl. 3 provides:

> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

U.S. CONST. art. I, § 10, cl. 3. During the formative years of Dormant Commerce Clause jurisprudence, challenges to the Clause were sometimes paired with Article I, § 8 challenges. *See* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 321 (1851) (rejecting challenge under second and third clauses of Article I, § 8 concerning statute that required local pilot for ships entering Port of Philadelphia); Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 445 (1827) (holding license fee for import sales unconstitutional under second clause of Article I, § 10); *see also* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 582 n.85 (analogizing Dormant Commerce Clause to second and third clauses of Article I, § 10 and concluding that they prohibit state actions absent congressional consent); Robert A. Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885, 891–92 (1985) (explaining that Constitution does not support restriction on state power to regulate interstate commerce).

91. *See supra* note 86 and accompanying text; *see also* Letter from James Madison to Joseph Campbell (Feb. 13, 1829) (describing Commerce Clause as "negative and preventive provision against injustice among the States themselves"), *reprinted in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 14–15 (1864); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 431 (1982) (asserting that historical evidence indicates Framers, especially Madison, intended Commerce Clause to act as restraint on states rather than as positive grant of power to Congress); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1125 (1986) (concluding that Framers intended for Congress to have exclusive control over commerce to prevent state protectionism).

92. 437 U.S. 617 (1978).

93. *City of Philadelphia*, 437 U.S. at 623; *see Carbone*, ___ U.S. at ___, 114 S. Ct. at 1687-88, 128 L. Ed. 2d at 414 (O'Connor, J., concurring) (finding restraints on states based on Court's interpretation of Commerce Clause); H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 534–35 (1949) (presuming restraints on states from "great silences of the Constitution"); *see also* Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975) (discussing judicial activism in constitutional interpretation). *But see*

Court has taken the role of defining these restraints, the scope of the Dormant Commerce Clause and the Supreme Court's power have been expanded.[94]

In *Carbone*, the Court expanded a doctrine of dubious constitutional origin to thwart Clarkstown's efforts to protect the environment and welfare of its citizens.[95] In applying a more stringent standard of review for facially discriminatory regulations, the Court failed to adequately consider the absence of geographical discrimination in the ordinance.[96]

Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 599-605 (rejecting several justifications for Dormant Commerce Clause not found in text of document, including stare decisis, constitutional common law, and prevention of state protectionism).

94. *See Carbone*, ___ U.S. at ___, 114 S. Ct. at 1692–93, 128 L. Ed. 2d at 420–21 (Souter, J., dissenting) (lamenting further expansion of strict scrutiny review to evenhanded state regulations); *Tyler Pipe*, 483 U.S. at 265 (Scalia, J., concurring and dissenting) (noting that "it is astonishing that we should be expanding our beachhead in this impoverished territory, rather than being satisfied with what we have already acquired by a sort of intellectual adverse possession"); *see also* Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra*, 71 OR. L. REV. 409, 447 (1992) (criticizing *City of Philadelphia* for extending strict scrutiny review to environmental regulation); Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 4–5 (1987) (warning that constitutional interpretation must be textually based or Court's power goes unchecked).

95. *See Carbone*, ___ U.S. at ___, 114 S. Ct. at 1680, 128 L. Ed. 2d at 407 (striking down flow control ordinance). The dissent suggested that the town performed its required municipal function by providing environmentally sound waste disposal for its residents. *Id.* at ___, 114 S. Ct. at 1701-02, 128 L. Ed. 2d at 431 (Souter, J., dissenting). Furthermore, the dissent stressed that the Court's decision was neither compelled by precedent nor consistent with the "Court's reason for inferring a dormant or negative aspect to the Commerce Clause in the first place." *Id.* at ___, 114 S. Ct. at 1701, 128 L. Ed. 2d at 432; *see also Hunt*, 112 S. Ct. at 2018-19 (Rehnquist, C.J., concurring and dissenting) (chiding Court for forcing states to perform legislative "gymnastics" to protect public health and environment from hazardous waste); *Tyler Pipe*, 483 U.S. at 259 (Scalia, J., concurring and dissenting) (criticizing Court's expansion of Dormant Commerce Clause because of doctrine's "unstable structure").

96. *See Carbone*, ___ U.S. at ___, 114 S. Ct. at 1682, 128 L. Ed. 2d at 407-08 (finding ordinance discriminatory despite equal application to both in-town and out-of-town interests). In finding the evenhanded ordinance facially discriminatory, the Court relied on *Dean Milk Co. v. Madison*. *See id.* at ___, 114 S. Ct. at 1682, 128 L. Ed. at 408 (noting that *Dean Milk* Court "found it 'immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce'") (quoting Dean Milk Co. v. Madison, 340 U.S. 349, 354 n.4 (1951)). However, as the *Carbone* dissent noted, *Dean Milk* stands for the proposition that localities, as well as states, are prohibited from purposefully discriminating against outsiders. *Id.* at ___ n.8, 114 S. Ct. at 1696 n.8, 128 L. Ed. 2d at 425 n.8 (Souter, J., dissenting). The ordinance struck down in *Dean Milk* did not apply to local citizens because it prohibited the sale of milk in Madison unless bottled within five miles of the city. *Dean Milk*, 340 U.S. at 350. Justice O'Connor also

However, as Justice Kennedy noted, preventing local economic protectionism by the states is the thrust behind the Court's justification of the Dormant Commerce Clause.[97] Nevertheless, the Court classified an environmentally protective regulation as economically protective.[98] Furthermore, the Court focused on Clarkstown's attempt to ensure the viability of the processing station, yet did not consider the economic burdens suffered by town residents and businesses.[99] If the Court perceived the

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distinguished *Carbone* from *Dean Milk*, as well as from *Fort Gratiot*, by stating that the regulation, whether state, county, or city, must favor local interests at the expense of nonlocal interests to discriminate against interstate commerce. *Id.* at ___, 114 S. Ct. at 1688-89, 128 L. Ed. 2d at 415-16 (O'Connor, J., concurring); *see Fort Gratiot*, 112 S. Ct. at 2021-22 (describing regulation that restricted out-of-county waste, but not in-county waste). *But see* Sidney M. Wolf, *The Solid Waste Crisis: Flow Control and the Commerce Clause*, 39 S.D. L. REV. 529, 566–67 (1994) (asserting that flow control discriminates geographically by preventing out-of-state waste business from competing with locally formed monopoly).

97. *See supra* note 86 and accompanying text; *see also* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935) (stating that Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division"). *But see* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 600-01 (questioning Court's justification of Dormant Commerce Clause to restrict states in light of Constitution providing only positive grant of power to Congress).

98. *See Carbone*, ___ U.S. at ___, 114 S. Ct. at 1684, 128 L. Ed. 2d at 409-10 (stating that central purpose of flow control ordinance was to make facility profitable). *But see id.* at ___, 114 S. Ct. at 1701, 128 L. Ed. at 431 (Souter, J., dissenting) (recognizing environmentally sound waste processing as municipal responsibility served by flow control regulations); *Fort Gratiot*, 112 S. Ct. at 2030 (Rehnquist, C.J., dissenting) (lamenting Court's failure to allow state to adopt comprehensive program to maintain "attractive and safe environment"); *cf.* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981) (recognizing state prohibition of sale of milk in nonreturnable plastic containers as environmentally oriented, even though law favored in-state pulpwood industry); Michael D. Diederich, Jr., *Does Garbage Have Standing?: Democracy, Flow Control and a Principled Constitutional Approach to Municipal Solid Waste Management*, 11 PACE ENVTL. L. REV. 157, 215–21 (1993) (agreeing with Court that import bans on waste are economically protectionist and therefore unconstitutional, but asserting that flow control addresses local health and safety problems and should be constitutional); Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra*, 71 OR. L. REV. 409, 449 (1992) (arguing that New Jersey's waste import ban struck down in *City of Philadelphia* served environmental purpose consistent with state's police power).

99. *See Carbone*, ___ U.S. at ___, 114 S. Ct. at 1683-84, 128 L. Ed. 2d at 409-10 (stating that purpose of ordinance was to finance facility by mandating waste disposal with favored processor). The Court contended that the singling out of one company to process all waste made the ordinance's protectionism more acute. *Id.* at ___, 114 S. Ct. at 1683, 128 L. Ed. 2d at 409. However, the dissent asserted that, although the ordinance was anticompetitive, it was not discriminatory toward nonlocals. *Id.* at ___, 114 S. Ct. at 1697, 128 L. Ed. 2d at 424-25 (Souter, J., dissenting). According to the dissent, monopolies are barred by statutes like the Sherman Act, not by the Constitution. *Id.* at ___, 114 S. Ct. at 1699, 128 L. Ed. 2d at 428 (Souter, J., dissenting). The dissent further contended that "the only right to com-

town's facility as an anticompetitive money-making operation concealed by the thin veneer of environmental regulation, then the Court failed to consider the years of enormous debate and planning in which federal, state, and local governments have engaged to develop comprehensive waste management plans.[100] The New York State Department of Environmental Conservation's insistence that Clarkstown build the facility should have precluded any doubt that financial concerns motivated the town.[101]

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pete that [the Dormant Commerce Clause] protects is the right to compete on terms independent of one's location." *Id.* In addition to local competitors, the dissent noted that local citizens, as waste generators, had borne a large brunt of the financial burden. *Id.*; *see also* New Energy Co. v. Limbach, 486 U.S. 269, 273-74 (1987) (noting that agreements between states to exclude all other states from economic benefits within state are facially discriminatory and merit strict scrutiny); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 444 n.18 (1978) (noting that, when regulation affects in-state interests, state's political system acts as safeguard to protect interstate commerce from overly burdensome regulations); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 445 (1982) (stating that if out-of-staters are not represented by in-state legislature in legislation directly affecting their interests, such legislation is discriminatory); James M. O'Fallon, *The Commerce Clause: A Theoretical Comment*, 61 OR. L. REV. 395, 398 (1982) (advocating use of Dormant Commerce Clause to ensure that those not represented in decision-making process by local legislatures are protected).

100. *See* Solid Waste Disposal Act of 1965, Pub. L. No. 89-272, tit. II, 79 Stat. 992 (codified as amended at 42 U.S.C. §§ 6901-6992k (1988)) (reporting congressional findings regarding solid waste); Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, § 2, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6992k (1988)) (amending Solid Waste Disposal Act based on new congressional findings); N.Y. Envtl. Conserv. Law art. 27 (McKinney Supp. 1994) (promulgating state guidelines for solid waste planning); Sidney M. Wolf, *The Solid Waste Crisis: Flow Control and the Commerce Clause*, 39 S.D. L. REV. 529, 532 (1994) (describing solid waste management structure adopted by many states); Ann R. Mesnikoff, Note, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home*, 76 MINN. L. REV. 1219, 1223–34 (1992) (summarizing legislative history of RCRA and providing two examples of state planning).

101. *See Carbone*, ___ U.S. at ___, 114 S. Ct. at 1693, 128 L. Ed. 2d at 421 (Souter, J., dissenting) (explaining that town built facility to close down town's environmentally unsound landfill); *see also* Solid Waste Disposal Facility Criteria, 56 Fed. Reg. 50,978, 50,980 (1991) (codified at 40 C.F.R. 256 (1991)) (setting more stringent guidelines for landfills); OFFICE OF SOLID WASTE, U.S. ENVTL. PROTECTION AGENCY, RECYCLING WORKS! STATE AND LOCAL SOLUTIONS TO SOLID WASTE MANAGEMENT PROBLEMS 3 (1989) (referring to landfill closures resulting from new and tougher environmental standards); James T. O'Reilly, *After the Applause Ends: Examining the Legal Issues in Municipal Solid Waste Disposal and Recycling*, 41 FED. B. NEWS & J. 106 (Feb. 1994) (noting landfill siting problems faced by municipalities), *available in* Westlaw, JLR Database, FEDBNJ File, at *5–6; Michael R. Harpring, Comment, *Out Like Yesterday's Garbage: Municipal Solid Waste and the Need for Congressional Action*, 40 CATH. U. L. REV. 851, 855–56 (1991) (describing problems caused by landfill, including groundwater pollution and buildup of explosive methane gas). In addition to building a new recycling facility, the town was required to develop and implement a remedial action plan to clean up the contamination at

RCRA encourages the solid waste planning utilized by the State of New York and the town.[102] In implementing solid waste plans, the EPA requests that states, in order of preference, reduce, recycle, incinerate, and then landfill.[103] Moreover, both Congress and the EPA recognize that implementation of waste planning goals requires expensive facilities that would not be financially feasible unless the states can estimate and guarantee the volume of waste needed to sustain these facilities.[104] As a

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its old landfill. Town of Clarkstown v. C & A Carbone, Inc., 587 N.Y.S.2d 681, 682-83 (App. Div. 1992), *rev'd*, ___ U.S. ___, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994). In recognition of the town's need to use flow control measures to finance the new facility, New York passed a law that specifically allowed flow control within the county itself. Rockland County Solid Waste Treatment and Disposal Act, 1991 N.Y. Laws, ch. 569, at 1072 (McKinney); *see also* Brief for Respondent at 9, C & A Carbone, Inc. v. Town of Clarkstown, ___ U.S. ___, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994) (No. 92-1402) (noting that law was passed to boost town's authority to enact flow control).

102. *See* 42 U.S.C. § 6941 (1988) (announcing planning objectives for solid waste management); *id.* § 6942 (identifying guidelines for state planning); *id.* §§ 6943, 6947 (listing criteria for approval of state plans); *id.* § 6946 (stating procedure for development and implementation of state plans); H.R. REP. NO. 1491, 94th Cong., 2d Sess. 40 (1976) (urging cooperation between federal and state governments in developing solid waste plans), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6278; Solid Waste Disposal Facility Criteria, 56 Fed. Reg. 50,978 (1991) (codified at 40 C.F.R. 256 (1993)) (detailing guidelines for solid waste planning); Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra*, 71 OR. L. REV. 409, 451 (1992) (stating that purpose of RCRA is to encourage solid waste planning by states); Ann R. Mesnikoff, Note, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home*, 76 MINN. L. REV. 1219, 1223–24 (1992) (noting that Congress passed RCRA in response to inadequate state planning).

103. OFFICE OF SOLID WASTE, U.S. ENVTL. PROTECTION AGENCY, THE SOLID WASTE DILEMMA: AN AGENDA FOR ACTION 17 (1988). The EPA advises using all four practices to address solid waste problems; this technique is known as integrated waste management. *Id.* The town's waste management plan called for recycling at the facility prior to incineration or landfilling. *Carbone*, ___ U.S. at ___, 114 S. Ct. at 1680–81, 128 L. Ed. 2d at 406. This plan is consistent with RCRA, which encourages alternatives to landfilling. 42 U.S.C. § 6901 (b)(6) (1988). This plan is also consistent with New York guidelines. *See* N.Y. Envtl. Conserv. Law § 27-0106(1) (McKinney Supp. 1994) (adopting same integrated waste management hierarchy as that requested by EPA). *But see* Sidney M. Wolf, *The Solid Waste Crisis: Flow Control and the Commerce Clause*, 39 S.D. L. REV. 529, 530 n.15 (1994) (referring to environmentalists' criticism that integrated waste management does not properly utilize preferred options of reducing and recycling). *See generally* OFFICE OF TECHNOLOGY ASSESSMENT, CONGRESS OF THE U.S., FACING AMERICA'S TRASH: WHAT NEXT FOR MUNICIPAL SOLID WASTE? 1 (1989) (discussing increased local opposition to new landfills); James Hinshaw, Note, *The Dormant Commerce Clause After* Garcia*: An Application to the Interstate Commerce of Sanitary Landfill Space*, 67 IND. L.J. 511, 511 (1992) (describing demand for landfill space as old landfills fill up).

104. Title 42, Section 6942 of the United States Code provides in pertinent part:

(a) Guidelines for identification of regions

For purposes of encouraging and facilitating the development of regional planning for solid waste management, the Administrator . . . shall by regulation publish guide-

result, RCRA provides flexible planning guidelines that should allow states to consider potential waste generation and to use flow control measures.[105] However, in *Carbone*, only Justice O'Connor addressed the

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lines for the identification of those areas which have common solid waste management problems and are appropriate units for planning regional solid waste management services. Such guidelines shall consider—

(1) the size and location of areas which should be included,

(2) the volume of solid waste which should be included

. . . .

(b) Guidelines for State plans

[T]he Administrator shall . . . promulgate regulations containing guidelines to assist in the development and implementation of State solid waste management plans. . . . The guidelines shall contain methods for achieving the objectives specified in section 6941 of this title.

(c) Considerations for State plan guidelines

The guidelines promulgated under subsection (b) of this section shall consider—

. . . .

(4) population density, distribution, and projected growth;

. . . .

(8) the constituents and generation rates of waste;

(9) the political, economic, organizational, financial, and management problems affecting comprehensive solid waste management;

(10) types of resource recovery facilities and resource conservation systems which are appropriate.

42 U.S.C. § 6942 (1988). As part of the objective referred to in § 6942(b), states must predict present and future needs to determine the appropriate size of the facility. *Id.* § 6941; *see also* H.R. REP. NO. 1491, 94th Cong., 2d Sess. 3, 10 (1976) (stating that "[r]esource recovery facilities cannot be built unless they are guaranteed a supply of discarded material"), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6248; Michael B. Gerrard, *Fear and Loathing in the Siting of Hazardous and Radioactive Waste Facilities: A Comprehensive Approach to a Misperceived Crisis*, 68 TUL. L. REV. 1047, 1072–73 (1994) (noting that some municipalities have enacted taxes or flow control laws to keep their incinerators in operation); Robert B. McKinstry, Jr. & C. Baird Brown, *A Checklist for Legally Enforceable Obligations to Use Disposal Services*, C816 ALI-ABA 289, 299 (1993) (noting that many states require recycling in addition to flow control).

105. *See* 42 U.S.C. § 6902 (1988) (calling for federal-state partnership to promote better solid waste management, including "new and improved methods of collection, separation, and recovery of solid waste"); H.R. REP. NO. 1491, 94th Cong., 2d Sess. 5 (1976) (stating that purpose of RCRA was to provide states with "reasonably flexible guidelines"), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6242; H.R. REP. NO. 1491, 94th Cong., 2d Sess. 33 (urging federal, state, and local governments to work together to meet "very broad and flexible objectives of [RCRA]"), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6242; OFFICE OF SOLID WASTE, U.S. ENVTL. PROTECTION AGENCY, THE SOLID WASTE DILEMMA: AN AGENDA FOR ACTION 48-52 (1988) (stating that federal involvement should continue to be more limited than state involvement in solid waste management); Michael D. Diederich, Jr., *Does Garbage Have Standing?: Democracy, Flow Control and a Principled Constitutional Approach to Municipal Solid Waste Management*, 11 PACE ENVTL. L. REV. 157, 192 (1993) (questioning why courts would invalidate flow control regulations when Congress gave states broad power to regulate municipal solid waste); Ann R. Mesnikoff, Note, *Dis-*

contention that federal legislation concerning municipal solid waste authorized Clarkstown's flow control ordinance.[106] Although Justice O'Connor agreed that "Congress expected local governments to implement some form of flow control," she decided that congressional authorization was not "explicit" enough to satisfy the demands of Dormant Commerce Clause jurisprudence.[107] In effect, Justice O'Connor demanded the explicit use of an explicit congressional power, but at the same time did not require explicit justification for the Supreme Court's use of an implicit judicial power—the Dormant Commerce Clause.[108]

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posing of the Dormant Commerce Clause Barrier: Keeping Waste at Home, 76 MINN. L. REV. 1219, 1222 (1992) (stating that Congress "truly left [municipal solid waste] planning to the states").

106. *See Carbone*, ___ U.S. at ___, 114 S. Ct. at 1691, 128 L. Ed. 2d at 418 (O'Connor, J., concurring) (examining evidence that Congress authorized flow control under RCRA because of residual nature of Dormant Commerce Clause). One of the reasons the Court may not have considered RCRA authorization for flow control is that the town did not raise this argument prior to the Court's review. *See* Brief for Petitioners at 17, C & A Carbone, Inc. v. Town of Clarkstown, ___ U.S. ___, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994) (No. 92-1402) (noting that amicus briefs supplied this argument); *see also Hunt*, 112 S. Ct. at 2016 n.9 (rejecting argument by amici that Congress authorized statute and refusing to consider assertions); *City of Philadelphia*, 437 U.S. at 620 n.4 (finding invalidated statute consistent with RCRA, but only with respect to argument that RCRA preempted state statute); Christopher S. Marchese, *The Dormant Commerce Clause and Airport Noise: A Case for Narrow Judicial Review*, 44 BAYLOR L. REV. 645, 692–93 (1992) (recognizing Court's incompetence to decide most Dormant Commerce Clause cases because it is limited by record); Earl M. Maltz, *How Much Regulation is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47, 86–87 (1981) (asserting that counsel's skill in presenting evidence Court finds relevant too strongly affects outcome in Dormant Commerce Clause cases).

107. *Carbone*, ___ U.S. at ___, 114 S. Ct. at 1692, 128 L. Ed. 2d at 419 (O'Connor, J., concurring); *accord* Wyoming v. Oklahoma, 112 S. Ct. 789, 802 (1992) (requiring state to demonstrate "clear and unambiguous intent on behalf of Congress to permit the discrimination against interstate commerce"); South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 92 (1984) (mandating "clear expression of approval by Congress" before authorization can override Dormant Commerce Clause); Sporhase v. Nebraska, 458 U.S. 941, 953–54 (1982) (finding no indication that Congress intended to remove Dormant Commerce Clause restraints despite obvious congressional deference to state law); David Pomper, Comment, *Recycling* Philadelphia v. New Jersey*: The Dormant Commerce Clause, Postindustrial "Natural" Resources and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309, 1313 (1989) (stating that Congress may void state laws Dormant Commerce Clause would authorize and may authorize state laws Dormant Commerce Clause would void). *See generally* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 582 n.85 (noting that, although Dormant Commerce Clause and clauses two and three of Article I, § 10 function in same way by requiring congressional permission, none of them prohibit state regulation of interstate commerce).

108. *See Carbone*, ___ U.S. at ___, 114 S. Ct. at 1692, 128 L. Ed. 2d at 420 (O'Connor, J., concurring) (noting that application of Dormant Commerce Clause requires "explicit

Furthermore, the *Carbone* decision indicates the Court's willingness to make policy judgments which should fall under the domain of the legislature and not that of the judiciary.[109] The tests used for both levels of Dormant Commerce Clause scrutiny allow the Supreme Court to pit local public concerns against private economic interests.[110] In *Carbone*, the

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statutory authorization"). One commentator suggests that Congress has clearly authorized the states to manage municipal solid waste. *See* Michael D. Diederich, Jr., *Does Garbage Have Standing?: Democracy, Flow Control and a Principled Constitutional Approach to Municipal Solid Waste Management*, 11 PACE ENVTL. L. REV. 157, 187 (1993) (stating that Congress defined municipal solid waste management as local matter under RCRA). Furthermore, in *Garcia v. San Antonio Metropolitan Transit Authority*, the Supreme Court held that Congress, under the Commerce Clause, has the power to define federal and local functions. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549-50 (1985). Diederich argued that, under RCRA, Congress has expressly defined federal and local roles for waste management and that invalidation of flow control regulations contradict the Court's interpretation of the positive aspect of the Commerce Clause by presenting a completely different view of the federal process. Michael D. Diederich, Jr., *Does Garbage Have Standing?: Democracy, Flow Control and a Principled Constitutional Approach to Municipal Solid Waste Management*, 11 PACE ENVTL. L. REV. 157, 186–97 (1993); *see also* United States v. New York, 112 S. Ct. 2408, 2427–29 (1992) (holding that Congress can use preemption or encouragement to carry out federal objectives under Commerce Clause, but cannot coerce the states to act as extensions of federal government). *See generally* Jerome L. Wilson, *The Revival of State Sovereignty*, LEGAL TIMES, Apr. 18, 1994, at 28 (discussing implications of *Garcia* and *New York*).

109. *See* Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 898 (1988) (Scalia, J, concurring) (stating that Congress, not Supreme Court, should determine when nondiscriminatory state statutes overly burden interstate commerce); *Rice*, 434 U.S. at 449 (Blackmun, J., concurring) (contending that state safety regulation should be upheld under Dormant Commerce Clause unless found to be illusory); Morgan v. Virginia, 328 U.S. 373, 387 (1946) (Black, J., concurring) (stating that "whether state legislation imposes an 'undue burden' on interstate commerce raises pure questions of policy, which the Constitution intended should be resolved by the Congress"); Richard D. Friedman, *Putting the Dormancy Doctrine out of Its Misery*, 12 CARDOZO L. REV. 1745, 1745 (1991) (noting that courts utilize Dormant Commerce Clause to make political and economic judgments which should be made "by other branches of government"). *But see* Guy P. Kroesche, Note, *The Commerce Clause and the Balancing Approach: The Delineation of Federal and State Interests:* United Transportation Union v. Long Island Railroad, 1981 B.Y.U. L. REV. 189, 204–05 (favoring judicial activism under Dormant Commerce Clause doctrine).

110. *See Carbone*, ___ U.S. at ___, 114 S. Ct. at 1697, 128 L. Ed. 2d at 426 (Souter, J., dissenting) (distinguishing between laws that serve public interests and laws that serve private interests); *Pike*, 397 U.S. at 142 (establishing review of nondiscriminatory state legislation when burden on interstate commerce is balanced against local benefits); *Southern Pac.*, 325 U.S. at 794 (Black, J., dissenting) (chiding Court for attempting to balance death and injury caused by trains against economic strength of railroad industry); *cf.* Christopher S. Marchese, *The Dormant Commerce Clause and Airport Noise: A Case for Narrow Judicial Review*, 44 BAYLOR L. REV. 645, 692–93 (1992) (arguing that Court is unable to fully consider all local social interests in comparison to federal economic interests when applying Dormant Commerce Clause to complex airport noise cases). *But see* Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1047 (1978)

Court elevated the economic interests of one local waste processor over Clarkstown's environmental and public protection.[111] Moreover, this type of use of the Dormant Commerce Clause invites those with money and power to attack environmental regulations by bypassing the legislative process and going straight to the judiciary.[112] Carbone should have

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(arguing that modern Dormant Commerce Clause jurisprudence gives Court flexibility and sensitivity in deciding difficult cases).

111. *See Carbone*, ___ U.S. at ___, 114 S. Ct. at 1695, 128 L. Ed. 2d at 423 (Souter, J., dissenting) (explaining that town ordinance did not distinguish between two groups of private businesses but between public function and local business). Several commentators have drawn parallels between modern Dormant Commerce Clause jurisprudence and the substantive due process analysis the Court employed until the 1930s. *See* Gary C. Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361, 1420 (1979) (noting that Dormant Commerce Clause jurisprudence is similar to early substantive due process because Court substitutes its policy judgments for legislative policy judgments); Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra*, 71 OR. L. REV. 409, 431 (1992) (commenting that old economic substantive due process analysis, like modern Dormant Commerce Clause analysis, involved intrusive review of legislation and required tight fit between legislative ends and legislative means); *see also* Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 126 (asserting that Court never developed coherent Dormant Commerce Clause doctrine because it used substantive due process to strike economic regulations). Intrusive substantive due process analysis eventually fell into disfavor and the Court returned to a more textually based interpretation of the Constitution. *See* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (restating Court's return to "original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies").

112. *See Carbone*, ___ U.S. at ___, 114 S. Ct. at 1693, 128 L. Ed. 2d 399 at 421-22 (Souter, J., dissenting) (describing how Carbone's violation of town ordinance saved Carbone money but cost taxpayers "thousands in lost revenue daily"); *Ferguson*, 372 U.S. at 728-29 (observing that Court should not use subjective judgment to invalidate statute it believes harmful to particular business); *Southern Pac.*, 325 U.S. at 789 (Black, J., dissenting) (criticizing Court's invalidation of state safety law despite Congress's consideration and rejection of industry efforts to prevent passage of law); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 579 (2d ed. 1988) (scolding Court attempts to restore nonexistent natural economic order allegedly upset by legislature); Sidney M. Wolf, *The Solid Waste Crisis: Flow Control and the Commerce Clause*, 39 S.D. L. REV. 529, 531 & n.26 (1994) (noting that waste shipment is big business generating over $350 million per year for trucking industry and $400 million per year for railroad industry); Mary L. Savage, *Can a Municipality Mandate Local Trash Disposal Without Running "Afoul" of the Commerce Clause?*, ABA PREVIEW OF UNITED STATES SUPREME COURT CASES 82 (Nov. 29, 1993) (listing amici supporting Carbone as Chemical Manufacturers Association, American Automobile Manufacturers Association, American Forest & Paper Association, National Association of Manufacturers, and National Solid Wastes Management Association), *available in* LEXIS, ABA Library, Pre-vu File; Ellen Yan, *Towns' Trash-Talk: U.S. Ruling for Carters Has Long Island Scrambling*, NEWSDAY, May 22, 1994, at A7 (stating that group of private waste processors is considering court action to obtain damages and overthrow local flow control ordinances); Timothy M. Phelps, *U.S. Justices Mull Value of Garbage*, NEWSDAY, Dec. 8, 1993, at 17 (quoting Justice Anthony Kennedy's statement that "'[o]ur civilization has advanced to the point where garbage is valuable'").

objected to the flow control ordinance in town meetings and should not have been permitted to use the Dormant Commerce Clause to overturn a nondiscriminatory law enacted by a democratically elected body.[113] If the Court favors the interest of a free market over the public's interest in health, safety, and a clean environment, the Court should have deferred to Congress in making this policy determination; Congress then could have employed its constitutionally mandated Commerce Clause powers to preempt state or local flow control regulations.[114]

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113. *See Carbone*, 587 N.Y.S.2d at 682-83 (referring to public comment period prior to approval of building town's solid waste transfer station); Michael D. Diederich, Jr., *Does Garbage Have Standing?: Democracy, Flow Control and a Principled Constitutional Approach to Municipal Solid Waste Management*, 11 PACE ENVTL. L. REV. 157, 169 (1993) (contending that private waste processor should not be allowed to overturn flow control regulations passed by democratically elected local legislature); *see also* Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 687 (1981) (Rehnquist, J., dissenting) (stressing that Court overstepped boundaries of Dormant Commerce Clause doctrine by reviewing and invalidating state legislation in way that damaged state's ability to pass laws for welfare of its citizens); *Southern Pac.*, 325 U.S. at 787-88 (Black, J., dissenting) (explaining how railroad bypassed national and state legislatures and challenged state safety regulation in federal courts). *But see* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 205–06 (1980) (justifying courts' use of Dormant Commerce Clause because "[s]tate and local legislatures contain no . . . representatives of the central government, or of those persons outside the jurisdiction upon whom the impact of local laws must fall"); David Pomper, Comment, *Recycling* Philadelphia v. New Jersey*: The Dormant Commerce Clause, Postindustrial "Natural" Resources and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309, 1317 (1989) (asserting that, because Court relies on constitutional common law when applying Dormant Commerce Clause, Court should "legislate" freely).

114. *See* U.S. CONST. art. VI, cl. 2. (mandating that Constitution and federal laws "shall be the supreme Law of the Land"); *see also Carbone*, ___ U.S. at ___, 114 S. Ct. at 1694, 128 L. Ed. 2d at 422 (Souter, J., dissenting) (determining that Court should not judge "ultimate wisdom" of town ordinance); *Southern Pac.*, 325 U.S. at 788-89 (Black, J., dissenting) (commenting that Court decided public policy and acted as "super-legislature" by striking state regulation); Richard D. Friedman, *Putting the Dormancy Doctrine out of Its Misery*, 12 CARDOZO L. REV. 1745, 1755 (1991) (recognizing Congress's superior position to consider policy reasons for discriminatory state legislation); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 592–94 (stating that Dormant Commerce Clause usurps federal balance of power by taking away congressional inertia in using preemption and by subjecting state laws to judiciary, which is branch of government most hostile to state interests); *cf. Ferguson*, 372 U.S. at 728-29 (sanctioning prior Due Process Clause jurisprudence in which Court considered "wisdom and utility of legislation" to determine if it was "unwise or incompatible with some particular economic or social philosophy"). *But see Carbone*, ___ U.S. at ___, 114 S. Ct. at 1683, 128 L. Ed. 2d at 409 (stating that "[t]he Commerce Clause presumes a national market free from local legislation that discriminates in favor of local interests"); Dennis v. Higgins, 498 U.S. 439, 448 (1991) (construing free trade as constitutional right).

Instead, the Court conducted a rigid and intrusive inquiry into Clarkstown's reasons for building the solid waste transfer station.[115] For example, the Court lauded the free, unregulated market and suggested that passage of uniform safety regulations presented a better opportunity for the town to address the garbage problem.[116] However, the Court failed to consider that the private market cannot expend the types of costs

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115. *Carbone*, ___ U.S. at ___, 114 S. Ct. at 1683-84, 128 L. Ed. 2d at 409-10. The Court applied the second part of the strict scrutiny test, in which a discriminatory regulation may escape the "per se invalid" rule if the locality can prove "under rigid scrutiny" that it has no other means to advance a legitimate local interest. *Id.*; *see also Fort Gratiot*, 112 S. Ct. at 2024 (suggesting less discriminatory alternatives state should have used besides waste import ban to solve waste problem); *Hunt*, 112 S. Ct. at 2015 (suggesting alternatives that do not differentiate between in-state and out-of-state waste disposal that state should have used to reduce amount of hazardous waste coming to Alabama facilities); Edward A. Fitzgerald, *The Waste War:* Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources *and* Chemical Waste Management, Inc. v. Hunt, 13 STAN. ENVTL. L.J. 78, 80 (1994) (arguing that Court misapplied Dormant Commerce Clause in both *Fort Gratiot* and *Hunt*). Some commentators have suggested that the Court should give regulations challenged under the Dormant Commerce Clause the same deferential review given regulations challenged under the Fourteenth Amendment's Due Process Clause and the Equal Protection Clause. *See Southern Pac.*, 325 U.S. at 792 (Black, J., dissenting) (stating that Court should defer to legislative judgment when reviewing Dormant Commerce Clause challenges); Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra*, 71 OR. L. REV. 409, 431 (1992) (criticizing Court's use of intrusive review under Dormant Commerce Clause when other reviews are deferential); *see also* City of New Orleans v. Dukes, 427 U.S. 297, 303–04 (1976) (per curiam) (holding that, other than in areas of fundamental rights, Court will defer to legislative judgments regarding equal protection challenges). At least the Due Process Clause and the Equal Protection Clause are textually based in the Constitution. *See* U.S. CONST. amend. XIV, § 1 (stating that no state shall "deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law"). *See generally* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.2–15.4 (2d ed. 1986) (describing growth and decline of judicial activism under Fourteenth Amendment).

116. *Carbone*, ___ U.S. at ___, 114 S. Ct. at 1683-84, 128 L. Ed. 2d at 409–10; *see also* Hughes v. Oklahoma, 441 U.S. 322, 325–26 (1979) (elevating free market to near-constitutional status); Freeman v. Hewit, 329 U.S. 249, 252 (1946) (stating that Constitution mandates free trade); Ernest J. Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219, 222 (1957) (justifying judicial intervention under Dormant Commerce Clause because Congress is too overburdened to ensure that numerous state laws do not hinder free trade). *But see Carbone*, ___ U.S. at ___, 114 S. Ct. at 1699, 128 L. Ed. 2d at 428 (Souter, J., dissenting) (denying constitutional status for free market under either Dormant Commerce Clause or Fourteenth Amendment); Exxon Corp. v. Governor of Md., 437 U.S. 117, 127 (1978) (stating that Dormant Commerce Clause does not protect market operations or structures); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 599–601 (rejecting idea that constitutional principles such as free trade may be created when such principles are not textually supported).

needed to build a facility like Clarkstown's, but instead opts for the cheapest landfill available.[117] Additionally, in discounting the town's efforts to ensure that its citizens' garbage went to safe out-of-state landfills, the Court failed to consider the ramifications of increased liability, under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980,[118] that municipalities now face for disposal at environmentally unsound landfills.[119]

Because the Court lacks the resources to consider all aspects of complicated state legislation, it should refrain from expanding Dormant Commerce Clause jurisprudence.[120] The Court is limited to the record and

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117. *See Carbone*, ___ U.S. at ___, 114 S. Ct. at 1697, 128 L. Ed. 2d at 426 (Souter, J., dissenting) (explaining that "[t]he facility as constructed might . . . be one that private economic actors . . . would not have built"); *Fort Gratiot*, 112 S. Ct. at 2030 (Rehnquist, C.J., dissenting) (writing that "the laws of economics suggest that landfills will sprout in places where land is cheapest and population densities least"); Kelly Outten, Comment, *Waste to Energy: Environmental and Local Government Concerns*, 19 U. RICH. L. REV. 373, 381–83 (1985) (describing importance of flow control measures to finance waste processing facilities); Jerry Abramson, *Garbage is a Local Issue*, PLAIN DEALER (Cleveland), June 7, 1994, at 7B (asserting that flow control enables localities to build expensive facilities needed to comply with federal waste management guidelines).

118. 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993).

119. *See Carbone*, ___ U.S. at ___, 114 S. Ct. at 1683, 128 L. Ed. 2d at 409 (rejecting town's attempt to keep waste away from environmentally unsound landfill as unconstitutional economic regulation "beyond its jurisdictional bounds"); B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1206 (2d Cir. 1992) (holding that municipalities which arrange for disposal or treatment of solid waste containing hazardous substances are not immune from cleanup costs under CERCLA); *see also* 42 U.S.C. § 9601(14) (1988) (defining "hazardous substance" but not exempting municipal waste); *see also* James T. O'Reilly, *After the Applause Ends: Examining the Legal Issues in Municipal Solid Waste Disposal and Recycling*, 41 FED. B. NEWS & J. 106, Feb. 1994 (summarizing plight of municipalities involving CERCLA cleanups), *available in* Westlaw, JLR Database, FEDBNJ File, at *2; Buckmaster de Wolf, Comment, *Strange Things Are Afoot at the Circle K: Agency Action Against Leased Sites in Environmental Bankruptcy*, 21 B.C. ENVTL. AFF. L. REV. 145, 150 (1993) (noting that CERCLA cleanups average between $30 million and $40 million per site).

120. *See* Reeves, Inc. v. Stake, 447 U.S. 429, 439 (1980) (stating that "as a rule, the adjustment of interests in this context is a task better suited for Congress than this Court"); Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pac. R.R., 393 U.S. 129, 138-39 (1968) (stating that district court's "findings of fact" do not authorize invalidating legislative judgment); *Southern Pac.*, 325 U.S. at 792 (Black, J., dissenting) (criticizing state court trial in which railroad company offered voluminous evidence in attempt to prove state legislature was wrong); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 594 (stressing that, although judiciary always has less information than Congress, Court should particularly refrain from Dormant Commerce Clause jurisprudence because such matters always involve legislative-type decision); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 155–56 (suggesting that inquiry Court employs in Dormant Commerce Clause cases calls for detailed examination of facts that Court is not prepared to handle).

amicus curiae briefs when reviewing Dormant Commerce Clause challenges.[121] Congress, on the other hand, is better able, through hearings and administrative agencies, to gather all relevant information needed to make complicated policy decisions.[122] In recent years, Congress has studied and debated the merits of flow control regulations,[123] directing the

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121. *See Carbone*, ___ U.S. at ___, 114 S. Ct. at 1691, 128 L. Ed. 2d at 418 (O'Connor, J., concurring) (addressing arguments posed in amicus brief by National Association of Bond Lawyers (NABL)); Petitioners' Brief at 16-17, *Carbone* (No. 92-1402) (noting that NABL, but not town, argued that RCRA authorized flow control regulations); *see also Carbone*, ___ U.S. at ___, 114 S. Ct. at 1700, 128 L. Ed. 2d at 430 (Souter, J., dissenting) (pondering issues not presented in record such as whether Clarkstown's ordinance burdened out-of-town waste processing facilities or impeded trash flow from Clarkstown to out-of-state facilities); Michael D. Diederich, Jr., *Does Garbage Have Standing?: Democracy, Flow Control and a Principled Constitutional Approach to Municipal Solid Waste Management*, 11 PACE ENVTL. L. REV. 157, 253 (1993) (noting poor record in *Carbone* regarding import restriction and that record was insufficient for Court review); Christopher S. Marchese, *The Dormant Commerce Clause and Airport Noise: A Case for Narrow Judicial Review*, 44 BAYLOR L. REV. 645, 690–93 (1992) (stating that Court receives no public comment on Dormant Commerce Clause decisions and is limited in its review by record and amicus curiae briefs). Marchese also asserted that important national decisions should not be based on competency of counsel. *See id.* (stating that outcome of Dormant Commerce Clause cases depends on whether counsel introduces evidence or showcases factors Court will find relevant); *see also Rice*, 434 U.S. at 445 n.20 (scolding state attorney for failing to introduce specific evidence on highway safety); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 530 (1959) (finding state's evidence "far too inconclusive" to determine that less burdensome alternatives existed).

122. *See Southern Pac.*, 325 U.S. at 792 (1945) (Black, J., dissenting) (describing processes by which Congress gathered information on railroad safety); McCarroll v. Dixie Greyhound Lines, 309 U.S. 176, 189 (1940) (Black, J., dissenting) (asserting that only Congress can devise national economic policy and determine if challenged state regulations are consistent with such policy); Thomas K. Anson & P.M. Schenkkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 TEX. L. REV. 71, 84 (1980) (stating that "Congress has the superior institutional capability to gather the relevant economic information, and Congress operates on the political basis considered most appropriate for resolving normative questions"). *But see* Duckworth v. Arkansas, 314 U.S. 390, 400 (1941) (Jackson, J., concurring) (writing that Congress is too overwhelmed to consider petty, local regulations burdening interstate commerce). *See generally* Christopher S. Marchese, *The Dormant Commerce Clause and Airport Noise: A Case for Narrow Judicial Review*, 44 BAYLOR L. REV. 645, 690–93 (1992) (acknowledging Congress's superior position to make policy decisions, including enormous fact-finding capability, input from many interests, and use of administrative agencies).

123. *See, e.g.*, H.R. 1357, 103d Cong., 1st Sess. (1993) (attempting to give states control over municipal solid waste); H.R. 5311, 101st Cong., 2d Sess. (1990) (attempting to authorize states to regulate flow control); H.R. 3735, 101st Cong., 1st Sess. § 4007 (1989) (proposing legislation to vest states with authority to regulate flow control); H.R. CONF. REP. NO. 902, 102d Cong., 2d Sess. 48 (1992) (discussing flow control issue); Meeting Notice, 58 Fed. Reg. 37,477 (1993) (describing flow control and inviting comments from public on merits of flow control); *see also* Petitioners' Brief at 18-19, *Carbone* (No. 92-1401) (noting congressional and EPA attention to flow control); Patrick C. McGinley, *Trashing the*

EPA to conduct and compile a study for Congress on the merits of flow control.[124] In this study, the EPA is garnering the insights of various interests, including the garbage industry, environmentalists, government waste planners, and citizens.[125] Additionally, Congress is now pursuing legislation that would overrule *Carbone* and leave flow control measures

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Constitution: Judicial Activism, The Dormant Commerce Clause, and the Federalism Mantra, 71 OR. L. REV. 409, 450–51 (1992) (finding congressional authorization for import bans under RCRA); Ann R. Mesnikoff, Note, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home*, 76 MINN. L. REV. 1219, 1223–31 (1992) (describing extent of federal involvement in flow control issues).

124. H.R. CONF. REP. No. 902, 102d Cong., 2d Sess. 48 (1992), accompanying Independent Agencies Appropriation Act of 1993, Pub. L. 102-389, 106 Stat. 1571. Congress requested that the EPA study flow control's impacts on "(1) the protection of human health and environment, (2) the development of State and local waste management capacity, and (3) the achievement of State and local goals for source reduction, reuse, and recycling." *Id.* Congress expressed awareness of the dependence of states and localities on flow control to counter solid waste management problems. *Id.*; *see, e.g.*, ME. REV. STAT. ANN. tit. 38, § 1304-B(2) (West 1989) (empowering municipalities to enact flow control ordinances "when purpose and effect of such an ordinance is to gain management control over solid waste and enable the reclamation of resources"); DEL. CODE ANN. tit. 7, § 6406(31) (1991) (authorizing local planners to control "collection, transportation, storage and disposal of solid waste . . . to facilities owned, operated or controlled by the Authority"). The EPA requested input from the public concerning the health, safety, environmental, and economic ramifications of flow controls. Meeting Notice, 58 Fed. Reg. 37, 477-37, 479 (1993). Participation in the study could either be oral or written. *Id.*; *see also Solid Waste: EPA Flow Control Report Due Soon Could Debunk Environmental Benefits*, Daily Envt'l Rep. (BNA) (Dec. 13, 1994), (reporting completion of study and predicting its release by end of December 1994), *available in* Westlaw, BNA-DEN Database, at *1.

125. H.R. CONF. REP. No. 902, 102d Cong., 2d Sess. 48 (1992). The EPA acknowledged some conflicts concerning flow control when publicizing meeting times; for example, private waste companies feel economically threatened as localities take a stronger role in waste management. Meeting Notice, 58 Fed. Reg. 37, 477-37, 478 (1993); *see* Sidney M. Wolf, *The Solid Waste Crisis: Flow Control and the Commerce Clause*, 39 S.D. L. REV. 529, 539 (1994) (noting that private waste processors view flow control as "economic extortion" because they are forced to subsidize overly expensive waste facilities by providing waste supply). Government waste planners, on the other hand, view flow control as an essential waste management tool. *See* Respondent's Brief at 29, *Carbone* (No. 92-1402) (asserting that obtaining facilities to meet federal and local planning goals demands use of flow control); Jerry Abramson, *Garbage is a Local Issue*, PLAIN DEALER (Cleveland), June 7, 1994, at B7 (maintaining that expensive new state-of-the-art facilities cannot be built without guaranteeing underwriters and bondholders steady supply of waste to make facilities profitable). Environmentalists, like private waste companies, are skeptical of flow control. *See* Sidney M. Wolf, *The Solid Waste Crisis: Flow Control and the Commerce Clause*, 39 S.D. L. REV. 529, 530 n.15 (1994) (noting environmentalists' criticism of flow control as impractical, expensive, and not focused enough on waste reduction and recycling); *Energy and Commerce Panel Approve Broader of Two Flow Control Bills*, Nat'l Env't Daily (BNA) (Aug. 19, 1994) (noting that Sierra Club does not support congressional bill broadly authorizing flow control), *available in* Westlaw, BNA-NED Database, at *7. Flow control affects the public in both positive and negative ways. *See* Respondent's Brief at 25, *Car-*

intact.[126] If Congress passes one of these bills, the disastrous financial fallout many municipalities now face as a result of this decision will be prevented.[127]

Congress's recent legislative initiatives concerning flow control illustrate a role reversal in Dormant Commerce Clause jurisprudence: the Supreme Court now legislates and Congress reviews. The Court's increased willingness to scrutinize and invalidate state legislation is based on a doctrine that one current Justice has characterized as "arbitrary, conclusory, and irreconcilable with the constitutional text."[128] Nevertheless, the Court has continued to expand the limits of the Dormant Commerce Clause and its own corresponding power of judicial review. In *Carbone*, the Court found economic protectionism in an ordinance that

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bone (No. 92-1402) (explaining how better environmental quality provided by flow control goes hand-in-hand with higher waste-service costs).

126. *See supra* note 49 and accompanying text. A bill introduced in the 103d session was passed unanimously by the House, but fell short one vote in the Senate. *Solid Waste: Final Efforts on Interstate Transport, Municipal Flow-Control Measure Fall Short*, Daily Env't Rep. (BNA) (Oct. 14, 1994), *available in* Westlaw, BNA-DEN Database, at *1. According to Representative Oxley, chairman of the House Subcommittee on Commerce, Trade and Hazardous Materials, Congress will again take up the issue of flow control in the Spring of 1995. *See Congress: Risk Assessment, Solid Waste Issues, Superfund Top House Subcommittee Agenda*, Daily Env't Rep. (BNA) (Jan. 17, 1995) (explaining committee goal to draft flow control legislation in first 100 days of session to have ready for floor debate in May), *available in* Westlaw, BNA-DEN Database, at *2. As of January 31, 1995, the following bills authorizing municipal flow control have been introduced in the 104th Congress: H.R. 342, 104th Cong., 1st Sess. (1995); H.R. 225, 104th Cong., 1st Sess. (1995); H.R. 24, 104th Cong., 1st Sess. (1995).

127. *See Finding a Remedy to the* Carbone *Decision*, 140 CONG. REC. H5457, 5458 (daily ed. June 30, 1994) (statement of Rep. Smith) (stating that Connecticut taxpayers could lose $520 million in bonds and Mercer County, New Jersey could lose $71 million in bonds); *Introduction to the Waste Flow Control Act of 1994*, 140 CONG. REC. E1362 (daily ed. June 29, 1994) (statement of Rep. Smith) (noting that "*Carbone* decision has left state and local governments high and dry—many with outstanding debt which they have acquired in their effort to meet their waste management responsibilities"); *Statements on Introduced Bills and Joint Resolutions*, 140 CONG. REC. S7371, 7372 (daily ed. June 21, 1994) (statement of Sen. Lautenberg) (noting that New Jersey has total investment of over $2 billion in flow control infrastructure); Richard Phalon, *Bargains in Garbage*, FORBES, Aug. 15, 1994, at 104 (explaining dilemma of municipal solid waste managers). Municipal waste authorities have incurred a total of $30 billion in debt for the construction of state-of-the-art waste facilities. *Id.* The Lancaster County Authority in Pennsylvania expects operating losses of four to five million dollars in the next year. *Id.*; *see also Solid Waste: Cities Threatened with High Trash Rates*, AMERICAN POL. NETWORK (Greenwire) July 27, 1994 (stating that cities in San Diego County face rise in dumping fees from $55 per ton to $253 per ton as result of *Carbone* decision), *available in* LEXIS, NEWS Library, CURNWS File, at *1.

128. Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue, 483 U.S. 232, 260 n.3 (1987) (Scalia, J., concurring and dissenting).

burdened local citizens as much as, if not more than, nonlocals. As a result of this classification, the economic interests of one local actor were given more credence than the health and environmental interests of the local populace. Because of the Court's inability to consider local interests under the Dormant Commerce Clause, the Court should have practiced judicial abstinence and left this policy decision to Congress.

Furthermore, the majority failed to consider that RCRA leaves solid waste management under local control. The Court's failure to address federal authorization for flow control is unfortunate because this legislation reflects a process in which numerous interests were heard and much information was collected to ensure an informed decision. Although it was aware of the existence of local flow control regulations similar to that in *Carbone*, Congress was not compelled to act in response to these regulations—at least not until the Supreme Court used the Dormant Commerce Clause as a means of branching out into a policy-making, legislative role. Congress, in reviewing the Court's actions, must now act to allow states and municipalities to retain some control over their citizens' welfare and environment.

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