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ARE PUBLIC FACILITIES DIFFERENT FROM PRIVATE ONES?: ADOPTING A NEW STANDARD OF REVIEW FOR THE DORMANT COMMERCE CLAUSE

*Bradford C. Mank**

I. INTRODUCTION

ON September 26, 2006, the Supreme Court granted certiorari in *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority* to decide the important issue of whether local governments may require that all waste in their jurisdiction be sent to a publicly-owned waste facility and thereby discriminate equally against both local and out-of-state private firms.¹ Although the Constitution's Commerce Clause only expressly grants Congress the authority to regulate interstate commerce, the Supreme Court has developed a dormant Commerce Clause doctrine ("DCCD") that interprets the Clause to grant federal courts an implied authority to invalidate state or local laws that discriminate against out-of-state goods or firms.² In applying this doctrine, the Court has adopted an overly broad per se test that invalidates any state or local law that theoretically discriminates against out-of-state firms, even if there is no evidence that the law has actual discriminatory effects and even if the law discriminates similarly against most in-state firms.³ The Court's simplistic, free-market approach to the DCCD fails to balance the local benefits of these laws and undermines the Constitution's federalist values.⁴ In deciding *United Haulers*, the Court hopefully will adopt a pragmatic approach that is more sensitive to the needs of local governments struggling with serious waste issues.

In 1994, the Supreme Court in *C&A Carbone v. Town of Clarkstown* held that a local government "flow control" ordinance, requiring all solid

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1. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 35 (2006) (mem.).

2. See *infra* note 25 and accompanying text.

3. See *infra* notes 44, 56-57 and accompanying text.

4. See *infra* notes 34, 114, 303 and accompanying text.

waste in its jurisdiction to be sent to a single privately operated transfer station, constituted per se discrimination against out-of-state businesses seeking to haul or dispose of that waste and therefore violated the DCCD; this was the case even though the only challenger to the law was a *local* business.⁵ The Court did not directly address whether a state or local government could enact a similar flow control scheme if the government itself owned the waste facility.

In 2006, the Second and Sixth Circuits split over whether municipalities or states may enact flow control ordinances that force waste haulers within their political jurisdiction to send all waste to government facilities and prohibit the export of waste to out-of-state disposal sites but that discriminate equally against in-state and out-of-state private firms. In *United Haulers Association Inc. v. Oneida-Herkimer Solid Waste Management Authority* (“*United Haulers II*”), the Second Circuit held that a flow control ordinance requiring all solid waste to be sent to county-owned processing sites does not discriminate against out-of-state businesses because private in-state businesses are equally excluded.⁶ The Second Circuit further held under the *Pike* balancing test⁷ that the benefits of the public flow control scheme outweighed the burdens of its complete prohibition on export of waste to other states.⁸ In *National Solid Waste Management Association v. Daviess County*, however, the Sixth Circuit held that public facilities are subject to the same non-discrimination analysis used in *Carbone* and specifically rejected the Second Circuit’s reasoning in its earlier *United Haulers I* decision.⁹ The Sixth Circuit argued that the majority opinion in *Carbone* rejected any distinction between publicly and privately-owned landfills but instead focused on whether a “flow control” ordinance discriminated against out-of state interests either by preventing out-of-state firms from participating or by hoarding waste so that it could not be sent to other states.¹⁰ The Sixth Circuit contended that only the four concurring and dissenting justices in *Carbone* made the distinction between private and public operation of waste facilities.¹¹ In light of the clear split between the Second and Sixth Circuits, it is not surprising that the Supreme Court granted certiorari to resolve the issue of whether public waste facilities are different.

Because the per se discrimination test is overly broad, it is time for the Court to re-think its *Carbone* decision. The split in the circuits regarding whether flow control ordinances focusing exclusively on publicly-owned

5. *C&A Carbone v. Town of Clarkson*, 511 U.S. 383, 386, 394 (1994).

6. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 438 F.3d 150, 157-60 (2d Cir. 2006) (“*United Haulers II*”), *cert. granted*, 127 S. Ct. 35, 35 (2006).

7. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see infra* notes 49, 64-65 and accompanying text.

8. *United Haulers II*, 438 F.3d at 160-63.

9. *Nat’l Solid Waste Mgmt. Ass’n v. Daviess County*, 434 F.3d 898, 904, 906-07, 909-12 (6th Cir.), *reh’g en banc denied*, 446 F.3d 647 (2006), *petition for cert. filed*, 2006 WL 2619953 (June 28, 2006) (No. 06-359).

10. *Id.* at 909-12.

11. *Id.* at 911-12.

waste facilities are different from those that discriminate among privately operated ones may finally lead the Court to refine, re-think or even overrule its *Carbone* decision. One of the justices in the five-member majority in the *Carbone* decision, Justice Thomas, has subsequently changed his approach to Commerce Clause jurisprudence.¹² In a 2005 Commerce Clause decision, *American Trucking Association v. Michigan Public Service Commission*, Justice Thomas, in his concurring opinion, stated that “[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense and has proved virtually unworkable in application,’ and, consequently, cannot serve as a basis for striking down a state statute.”¹³ Another member of the *Carbone* majority, Justice Scalia, has also argued that the Court should abolish the DCCD, but he appears to give greater weight to *stare decisis* than Justice Thomas and thus is less likely to repudiate *Carbone*.¹⁴

Whether the Supreme Court adopts the Second or Sixth Circuit’s approach has enormous practical significance. Although state protectionist programs are generally inefficient, flow control ordinances are economically efficient in many cases, because they provide incentives for local governments to build necessary facilities such as recycling facilities or incinerators.¹⁵ In *United Haulers II*, numerous municipal, county, regional and state waste associations and authorities throughout the nation¹⁶ joined amici briefs supporting the flow control ordinance at issue in that case.¹⁷ By contrast, the private waste industry favors the Sixth Circuit’s approach, subjecting publicly owned facilities to the same *per se* discrimination test as private firms.¹⁸ Although private industry argues that the flow control ordinances often increase the cost to consumers of waste

12. Environmental Policy Alert, *Industry May Ask High Court to Resolve Split on ‘Flow Control’ Laws*, (March 1, 2006), Inside Washington Publishers, available at <http://www.insideEPA.com>, subscription required, also available at LEXIS, All News database.

13. *Am. Trucking Ass’n v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 439 (Thomas, J., concurring in the judgment) (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) and *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 68 (2003) (Thomas, J., concurring in part and dissenting in part)).

14. *Intel Containers Int’l Corp. v. Huddleston*, 507 U.S. 60, 78-79 (1993) (Scalia, J., concurring in part and concurring in the judgment) (“On *stare decisis* grounds, however, I will enforce a self-executing, “negative” Commerce Clause in two circumstances: (1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court.”); see *infra* notes 38, 307-08 and accompanying text.

15. See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 427-29 (1994) (Souter, J., dissenting); Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191, 1253-79 (1998); Maxwell L. Stearns, *A Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine*, 45 WM. AND MARY L. REV. 1, 88 (2003).

16. Including Daviess County, Kentucky, which subsequently lost in the Sixth Circuit.

17. Brief for Bristol Resource Recovery Facility Operating Committee et al. as Amici Curiae Supporting Appellees, *United Haulers II*, 438 F.3d 150 (2d Cir. 2006) (No. 05-2024-cv) [hereinafter *Amici Curiae Brief*]; *Environmental Policy Alert*, *supra* note 12 (reporting municipalities strongly favor Second Circuit’s approach to public waste facilities and flow control ordinances).

18. *Environmental Policy Alert*, *supra* note 12 (reporting private industry strongly favors Sixth Circuit’s approach to public waste facilities and flow control ordinances).

disposal compared to a free market,¹⁹ the Second Circuit in its *United Haulers II* decision, persuasively argued that the costs are outweighed by the benefits, such as continuity of service, increased recycling, and diminished risk of liability for public governments.²⁰

The Supreme Court should adopt the Second Circuit's approach in its *United Haulers* decisions as the first step in curbing the Court's overuse of the per se test and reformulating the *Pike* test to make it more workable. Whenever a law does not discriminate between local and foreign private firms, courts should apply the more deferential *Pike* review standard, not the per se standard, to determine whether the law imposes more than incidental burdens on interstate commerce and whether the law's benefits significantly outweigh any burdens to foreign interests. Additionally, going beyond the analysis in the *United Haulers* decisions, courts should examine whether the law is purposefully protectionist.²¹ Furthermore, when the burdens of local ordinances fall much more heavily on local customers or taxpayers than out-of-state interests, courts should not apply a per se discrimination test but should instead establish a rebuttable presumption that the law is valid under the *Pike* test.²² Without overruling *Carbone*, the Supreme Court in *United Haulers* could give more flexibility to local governments where a law does not favor local private firms at the expense of out-of-state firms by using a combination of three tests: first, the *Pike* test as it was applied in the *United Haulers* decisions; second, a purposefully protectionist standard; and, third, a local burdens test.

II. THE DCCD AND FLOW CONTROL ORDINANCES

Part A will review the DCCD. Part B will discuss flow control ordinances. Part C will examine the *Carbone* decision.²³

A. DCCD

The Commerce Clause expressly provides that "Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."²⁴ Additionally, the Supreme Court has interpreted the Clause to imply "dormant" limitations that empower federal courts to invalidate state or local laws that burden the flow of interstate commerce, even where Congress has not adopted regulations.²⁵ The DCCD "prohibits economic protectionism—that is, regula-

19. *Id.*

20. *United Haulers II*, 438 F.3d at 161-63.

21. *See infra* note 330 and accompanying text.

22. *See infra* note 302 and accompanying text.

23. C&A *Carbone v. Town of Clarkstown*, 511 U.S. 383, 383 (1994).

24. U.S. CONST. art. I, § 8, cl. 3.

25. *See, e.g., Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179-80 (1995); Bradford C. Mank, *Prudential Standing and the Dormant Commerce Clause: Why the "Zone of Interests" Test Should Not Apply to Constitutional Cases*, 48 ARIZ. L. REV. 23, 26 (2006).

tory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”²⁶ Because it is an implied doctrine based on Congress’s presumed intent to prohibit economic protectionism by states, Congress can override the DCCD if it enacts clear legislation that authorizes local governments to adopt discriminatory measures, although Congress seldom overturns court decisions in this area.²⁷ Since 1976, the Court has invoked the doctrine far more frequently than it had in previous years, excluding tax cases.²⁸

There are three main arguments for the DCCD. First, there is a strong structural argument that local protectionist laws are contrary to the Constitution’s implied framework of political union and cooperation among states.²⁹ Second, some justify the DCCD by arguing that the framers of the Constitution intended the Commerce Clause to promote free markets by eliminating protectionist trade barriers,³⁰ yet several commentators argue the framers did not intend to create a national free market above all considerations of state sovereignty.³¹ Third, some argue that the DCCD serves the representative process goal of preventing elected officials in one jurisdiction from imposing burdens on people in other jurisdictions who did not elect them.³² The process approach, however, is difficult to apply because a law may benefit some outsider groups, but harm other foreign interests so that weighing its overall impact can be complicated.³³

26. *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992).

27. *Carbone*, 511 U.S. at 408-10 (O’Connor, J., concurring) (“It is within Congress’ power to authorize local imposition of flow control.”).

28. Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1, 43-44 (2003) (finding from “1953 through 1975, the Supreme Court decided only eight [DCCD] cases involving state regulations other than tax measures,” but the Court decided ten cases between 1976 and 1981, and ten cases between 1986 and 1989).

29. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) (stating the 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”); Robert R. M. Verchick, *The Commerce Clause, Environmental Justice, and the Interstate Garbage Wars*, 70 S. CAL. L. REV. 1239, 1269 (1997).

30. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997); James D. Fox, Note, *State Benefits Under the Pike Balancing Test of the Dormant Commerce Clause: Putative or Actual?*, 1 AVE MARIA L. REV. 175, 182-83 (2003); see *infra* notes 135-36 and accompanying text.

31. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-5, at 1057 (3d ed. 2000) (“[T]he negative implications of the Commerce Clause derive principally from a political theory of union, not from an economic theory of free trade.”); Thomas K. Anson & P.M. Schenkkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 TEX. L. REV. 71, 78-80 (1980); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 429-35 (1982); Verchick, *supra* note 29, at 1270; see *infra* notes 176-77 and accompanying text.

32. *S. Pac. Co. v. Arizona*, 325 U.S. 761, 766-68, 767 n.2 (1945) (“[T]he Court has often recognized that to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.”); Verchick, *supra* note 29, at 1250-55; but see Catherine Gage O’Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 625-26 (1997) (arguing courts only “sporadic[ally]” invoke process theory for DCCD).

33. See Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 252-56 (1995); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1160-67 (1986).

Many judges and commentators have criticized the DCCD for undermining federalist principles by giving courts too much discretionary power to strike down state and local laws that may have only a limited effect on interstate commerce but significant local benefits.³⁴ State officials generally believe that the Court's DCCD is unduly restrictive and stifles innovative state laws.³⁵ Justice Scalia has criticized the doctrine as "arbitrary, conclusory, and irreconcilable with the constitutional text"³⁶ and has argued that the Court should abolish the doctrine, because it is more appropriate for Congress to make legislative judgments about when state laws are too discriminatory.³⁷ Justice Thomas has expressed similar views and appears to be more willing to repudiate the Court's precedent in this area.³⁸

1. *Market Participant or Market Regulator?*

The DCCD prohibits state and local governments from using their market regulatory authority to discriminate against out-of-state firms.³⁹ If a local government is acting as a market participant rather than a market regulator, however, its actions are exempt from the Commerce Clause.⁴⁰ The Supreme Court has explained that the market participant distinction "differentiates between a State's acting in its distinctive governmental capacity, and a State's acting in the more general capacity of a market participant; only the former is subject to the limitations of the Commerce Clause."⁴¹ For instance, a local government can, as a market participant, subsidize an activity such as garbage collection, even if private competitors are at a disadvantage, because it is not using its regulatory authority to prevent competition from private firms, including foreign ones.⁴²

2. *The Two-Part DCCD Test*

If a local government is acting as a market regulator, the Court, since 1978, has used a two-part test to determine whether a law violates the

34. See, e.g., *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 207-08 (1994) (Scalia, J., concurring) (criticizing the "expansive view of the Commerce Clause [that] calls into question a wide variety of state laws that have hitherto been thought permissible"); Lincoln L. Davies, Note, *If You Give the Court a Commerce Clause: An Environmental Justice Critique of Supreme Court Interstate Waste Jurisprudence*, 11 *FORDHAM ENVTL. LAW J.* 207, 248-52 (1999) (same).

35. DOUGLAS T. KENDALL ET AL., *REDEFINING FEDERALISM: LISTENING TO THE STATES IN SHAPING "OUR FEDERALISM"*, 82, 90 (Douglas T. Kendall ed., 2004).

36. *Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 260 n.3 (1987) (Scalia, J., concurring in part and dissenting in part).

37. See *id.* at 259-65.

38. S. Mohsin Reza, Comment, *DaimlerChrysler v. Cuno: An Escape from the Dormant Commerce Clause Quagmire?*, 40 *U. RICH. L. REV.* 1229, 1251-52 (2006).

39. *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 98 (1994).

40. *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-39 (1980).

41. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 277 (1988).

42. *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1288-89, 1291 (2d Cir. 1995).

DCCD.⁴³ First, a court applies a “virtually per se rule of invalidity” to laws that facially, purposefully or effectively discriminate against interstate commerce.⁴⁴ The Court has defined discrimination against interstate commerce as the “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”⁴⁵ According to the *Carbone* decision, “The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.”⁴⁶ The Court presumes that all discriminatory local laws are invalid unless a local government can prove no nondiscriminatory alternative exists to achieve an important local purpose unrelated to economic protectionism.⁴⁷ In its only case upholding a discriminatory statute, the Court in *Maine v. Taylor* held that the State of Maine could prohibit the importation of out-of-state baitfish as the only practicable means to prevent contamination of its rivers by parasites and alien fish species.⁴⁸

Second, “where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental,” a court applies the *Pike* balancing test to determine whether a law’s burdens on interstate commerce are “clearly excessive in relation to the putative local benefits.”⁴⁹ A court is much more likely to sustain a regulation under the *Pike* test than under the per se rule.⁵⁰ A fundamental problem with the Court’s DCCD is that it has failed to establish a clear approach for cases that fit within the per se category or are reviewed under the *Pike* standard, although the choice of the test is outcome determinative.⁵¹

3. The Per Se Test for Discriminatory Laws

The Court applies the per se review test to three different types of discrimination.⁵² First, the easiest example of invalid discrimination is a law that facially discriminates by “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”⁵³ Second, a court will invalidate a facially neutral law if it was en-

43. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); Verchick, *supra* note 29, at 1249.

44. *City of Philadelphia*, 437 U.S. at 624; Mank, *supra* note 25, at 26-27.

45. *Or. Waste Sys., Inc. v. Dep’t of Env’t. Quality*, 511 U.S. 93, 99 (1994); O’Grady, *supra* note 32, at 578, 582-87.

46. *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994).

47. *See id.*; *KENDALL ET AL.*, *supra* note 35, at 81.

48. *Maine v. Taylor*, 477 U.S. 131, 148, 151 (1986); Mank, *supra* note 25, at 28.

49. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); Mank, *supra* note 25, at 27; *see infra* notes 65, 253, 260 and accompanying text.

50. O’Grady, *supra* note 32, at 573-75.

51. Stanley E. Cox, *Garbage In, Garbage Out: Court Confusion About the Dormant Commerce Clause*, 50 OKLA. L. REV. 155, 156-57, 170 (1997).

52. Mank, *supra* note 25, at 27; O’Grady, *supra* note 32, at 578-82.

53. *Or. Waste Sys., Inc. v. Dep’t of Env’t. Quality*, 511 U.S. 93, 99 (1994); Mank, *supra* note 25, at 27; O’Grady, *supra* note 32, at 578-81.

acted by a legislative body with the purpose of economic discrimination.⁵⁴ Third, when a facially neutral law has obvious discriminatory effects, the Court has reviewed it under the per se standard.⁵⁵

The Court's application of the per se test has not always been consistent. In several cases, the Court has stated that any magnitude of the discrimination, no matter how small, makes a law invalid under the DCCD.⁵⁶ In other cases, however, the Court has taken into account the amount of discrimination.⁵⁷ The Supreme Court has continued to assess whether discriminatory taxes that theoretically favor local firms actually harm out-of-state firms by examining whether the in-state and out-of-state firms or goods compete in the same market.⁵⁸

During the 1980s and 1990s, the Court expanded its discrimination analysis to strike down laws that have only attenuated, incidental, or even theoretical impacts on interstate commerce and actually place greater burdens on local residents.⁵⁹ Because it includes three different types of discrimination, the Court's definition of discrimination in DCCD cases is far broader than the definition of discrimination in Equal Protection cases, which only prohibit laws with discriminatory purposes or intentions but not ones with discriminatory effects.⁶⁰ Accordingly, a far greater number of state and local laws are subject to judicial scrutiny under the DCCD than under other constitutional doctrines.⁶¹

Professor Verchick has argued that the Court should abandon the per se doctrine and instead weigh a law's relative burdens and benefits on local residents and interstate commerce.⁶² The Court, however, may be unwilling to completely abandon the per se test, which rests on almost

54. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) ("A finding that state legislation constitutes 'economic protectionism' may be made on the basis of . . . discriminatory purpose . . ."); Mank, *supra* note 25, at 27; Julian Cyril Zebot, Note, *Awakening a Sleeping Dog: An Examination of the Confusion in Ascertainning Purposeful Discrimination Against Interstate Commerce*, 86 MINN. L. REV. 1063, 1076-84 (2002) ("A statute is per se invalid if it discriminates against interstate commerce on its face, in its purpose, or in its effect.") (discussing cases).

55. See *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 275-76, 278-79 (1988) (invalidating reciprocal tax credit because it "in effect, tax[es] a product made by [Indiana] manufacturers at a rate higher than the same product made by Ohio manufacturers"); Mank, *supra* note 25, at 27; O'Grady, *supra* note 32, at 581-82.

56. *Associated Indus. v. Lohman*, 511 U.S. 641, 649-50 (1994); *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992); O'Grady, *supra* note 32, at 586.

57. *Barclays Bank v. Franchise Tax Bd.*, 512 U.S. 298, 312-13 (1994); O'Grady, *supra* note 32, at 586 n.55.

58. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997); *Alaska v. Arctic Maid*, 366 U.S. 199, 204-05 (1961); McGreal, *supra* note 15, at 1216-22.

59. *Heinzerling*, *supra* note 33, at 221, 242-56; O'Grady, *supra* note 32, at 575-76, 582-87; Klein, *supra* note 28, at 48-52 (finding "that indeed the Court is expanding its view of discriminatory purpose" in DCCD cases); C. M. A. McCauliff, *The Environment Held in Trust for Future Generations or the Dormant Commerce Clause Held Hostage to the Invisible Hand of the Market?*, 40 VILL. L. REV. 645, 658-59 (1995).

60. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977).

61. Verchick, *supra* note 29, at 1283-86; Jennifer L. Larsen, Comment, *Discrimination in the Dormant Commerce Clause*, 49 S.D. L. REV. 844, 854-57, 865-66 (2003-2004).

62. See Verchick, *supra* note 29, at 1304-09; see *infra* notes 63, 298, 402-03 and accompanying text.

thirty years of precedent and is arguably easier to apply than a balancing test. This Article proposes that courts should narrow their application of the per se test to cases where a law discriminates between in-state and out-of-state competitors.⁶³

4. *The Pike Balancing Test*

If a law is not facially, purposefully, or effectively discriminatory against out-of-state interests, a court applies the *Pike* balancing test.⁶⁴ The *Pike* decision stated that “where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”⁶⁵ In the *Carbone* decision, the Court implicitly narrowed the range of cases in which it applies the *Pike* test.⁶⁶ Lower federal courts, however, have continued to apply the *Pike* test in many cases because the Court has not explicitly changed the test.⁶⁷

The *Pike* Court provided only a vague explanation of how courts should apply its balancing test. For example, the Court never explained how courts should weigh “putative local benefits.”⁶⁸ The Court stated:

If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.⁶⁹

In *City of Philadelphia v. New Jersey*, the Court explained that “incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people.”⁷⁰

The Court has conceded that it is frequently unclear whether a local law with alleged discriminatory purposes or effects should be analyzed under the per se or the *Pike* test.⁷¹ As discussed in Part IV, the Court should reformulate the *Pike* test by: (1) following the *United Haulers* decisions whenever a law does not discriminate between local and foreign private firms; (2) examining whether the law is purposefully protectionist; and (3) establishing a rebuttable presumption that the law is valid under

63. McGreal, *supra* note 15, at 1216-22.

64. *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994); Mank, *supra* note 25, at 28.

65. *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142 (1970); Paula C. Murray & David B. Spence, *Fair Weather Federalism and America's Waste Disposal Crisis*, 27 HARV. ENVTL. L. REV. 71, 77 (2003).

66. Cox, *supra* note 51, at 180-88 (arguing *Carbone* majority would have applied the per se test to the facts in *Pike*).

67. Fox, *supra* note 30, at 198-204.

68. *Id.* at 188-90.

69. *Pike*, 397 U.S. at 142; Murray & Spence, *supra* note 65, at 77.

70. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978).

71. *Brown-Forman Distillers Corp. v. N.Y. Liquor Auth.*, 476 U.S. 573, 579 (1986); Cox, *supra* note 51, at 170; Klein, *supra* note 28, at 43 (“These tests have engendered confusion.”); Mank, *supra* note 25, at 28-29.

the *Pike* test when the burdens of local ordinances fall much more heavily on local rather than out-of-state interests.⁷²

B. SOLID WASTE PROBLEMS AND FLOW CONTROL SOLUTIONS

Since 1960, there has been a significant increase in the amount of household municipal solid waste ("MSW") in the United States.⁷³ During the 1980s, there was widespread concern that there would soon be a shortage of disposal space.⁷⁴ By 1994, more than twenty states had enacted statutes authorizing local or regional flow control ordinances.⁷⁵

Congress, at least indirectly, encouraged local governments to adopt flow control measures. In the Resource Conservation and Recovery Act of 1976 ("RCRA"),⁷⁶ as amended by the Hazardous and Solid Waste Amendments of 1984 ("HSWA"),⁷⁷ Congress declared that "the collection and disposal of solid wastes should continue to be primarily the function of state, regional, and local agencies"⁷⁸ RCRA encouraged local governments to develop local, regional, and state plans to ensure the safe disposal of MSW, stating that "disposal of solid waste . . . without careful planning and management [was] a danger to human health and the environment."⁷⁹ Although the statute does not explicitly promote the use of flow control, Justice O'Connor's concurring opinion in *Carbone*

72. See *infra* Pt. IV.

73. The U.S. Environmental Protection Agency ("EPA") defines municipal solid waste ("MSW") as nonhazardous household waste as well as some household hazardous waste; "MSW—more commonly known as trash or garbage—consists of everyday items such as product packaging, grass clippings, furniture, clothing, bottles, food scraps, newspapers, appliances, paint, and batteries." See U.S. ENVTL. PROT. AGENCY, MUNICIPAL SOLID WASTE—BASIC FACTS, available at <http://www.epa.gov/garbage/facts.htm> [hereinafter EPA, BASIC FACTS]. In 1960, the average American generated 2.7 pounds of MSW per day, for a total of 88.1 million tons; by 2003, the average American created about 4.5 pounds of MSW per day, for a total of 236.2 million tons in 2003. *Id.*; Mank, *supra* note 25, at 29.

74. Klein, *supra* note 28, at 8-9.

75. See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 406 (1994) (O'Connor, J., concurring); Mank, *supra* note 25, at 31.

76. 42 U.S.C. §§ 6901-6992k (2000).

77. Pub. L. No. 98-616, 98 Stat. 3221 (1984).

78. 42 U.S.C. § 6901(a)(4); see *id.* (giving states and local governments the primary role in managing nonhazardous waste); 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, 187-95 (1993) (arguing RCRA and federalist principles give local governments a primary role in solid waste management).

79. 42 U.S.C. § 6901(b)(2); see *id.* § 6941 (providing 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. 1491-94, at 40 (1976), as reprinted in 1976 U.S.C.C.A.N. 6238, 6278 (urging cooperation between federal and state governments in developing solid waste plans); Solid Waste Disposal Facility Criteria, 56 Fed. Reg. 50,978 (Oct. 9, 1991) (codified at 40 C.F.R. 256 (1993)) (detailing guidelines for solid waste planning); Natasha Ernst, *Flow Control Ordinances in a Post-Carbone World*, 13 PENN. ST. ENVTL. L. REV. 53, 53 (2004); Laura Gabrysch, Casenote, *Constitutional Law—Dormant Commerce Clause—Flow Control Ordinances That Require Disposal of Trash at a Designated Facility Violate the Dormant Commerce Clause*, 26 ST. MARY'S L.J. 563, 589-90 (1995).

acknowledged that RCRA's planning provisions and some of its legislative history suggests that Congress anticipated that states and local governments would use such mechanisms to finance facilities to handle increased waste loads.⁸⁰

Complying with RCRA's expensive requirements was a major factor in leading many local governments to adopt comprehensive waste programs, including flow control laws, to recycle or incinerate waste in addition to disposing it in landfills.⁸¹ In order of priority, RCRA encourages waste reduction, recycling, and incineration over dumping waste in landfills.⁸² Additionally, HSWA required the Environmental Protection Agency ("EPA") to issue more stringent environmental rules for operating MSW landfills, forcing many older landfills to close.⁸³ New MSW landfills are larger and safer but more expensive than the older landfills that they replaced.⁸⁴

Flow control ordinances requiring all generators or haulers of local waste to take it exclusively to designated facilities for processing or disposal are designed to provide governments with adequate revenues to pay for expensive new landfills, recycling programs, or incinerators by guaranteeing them a minimum volume of waste to process.⁸⁵ Tipping fees are often higher at incinerators and broad recycling facilities, because they handle more difficult and expensive waste, while private competitors focus on cheap and easy to recycle materials such as cardboard.⁸⁶ Without

80. See *Carbone*, 511 U.S. at 408-10 (O'Connor, J., concurring) ("I agree with *amicus* NABL that these references [in RCRA and its legislative history] indicate that Congress expected local governments to implement some form of flow control."); see also 42 U.S.C. § 6942 (b) (1988) (requiring EPA Administrator to develop guidelines for state plans that address present and future waste needs to plan appropriate facilities); *id.* § 6941; H.R. Rep. No. 94-1491, at 10 (1976), as reprinted in 1976 U.S.C.C.A.N. 6238, 6248 (stating that "resource recovery facilities cannot be built unless they are guaranteed a supply of discarded material"); H. R. Rep. No. 94-1491, at 34 (1976) ("This prohibition [on state or local laws prohibiting long-term contracts] is not to be construed to affect state planning which may require all discarded materials to be transported to a particular location.") (emphasis added); Gabrysch, *supra* note 79, at 590-91.

81. Ernst, *supra* note 79, at 53-54, 64-71; McCauliff, *supra* note 59, at 650, 656-57.

82. Gabrysch, *supra* note 79, at 589 n.103 (citing OFFICE OF SOLID WASTE, U.S. ENVTL. PROTECTION AGENCY, *THE SOLID WASTE DILEMMA: AN AGENDA FOR ACTION* 17 (1988)).

83. 42 U.S.C. § 6942(b); Murray & Spence, *supra* note 65, at 74; Jeff Bailey, *Waste Yes, Want Not: Rumors of a Shortage of Dump Space Were Greatly Exaggerated*, N.Y. TIMES, Aug. 12, 2005, at c1. If states did not adopt a Subtitle D permit program to enforce the EPA's rules, the EPA could enforce its own criteria. 42 U.S.C. § 6945(c)(2)(A); Mank, *supra* note 25, at 30.

84. The number of landfills in the United States has decreased from 8,000 in 1988 to 1,767 in 2002, but the total capacity of landfills has remained relatively constant, because new landfills are much larger on average than older landfills. See EPA, *BASIC FACTS*, *supra* note 73; Murray & Spence, *supra* note 65, at 74-75, 84. Larger landfills are typically more expensive overall, but their cost of disposing a ton of waste is usually much lower. Bailey, *supra* note 82, at c1 ("A 10,000-ton-a-year dump would cost \$83 a ton to operate, estimates Solid Waste Digest, while a 300,000-ton-a-year site's cost would be \$14 a ton."); Mank, *supra* note 25, at 30.

85. Ernst, *supra* note 79, at 53-54; Jason M. King, Note, *Standing in Garbage: Flow Control and the Problem of Consumer Standing*, 32 GA. L. REV. 1227, 1227 (1998).

86. McCauliff, *supra* note 59, at 649 n.11, 650-51, 653, 673.

flow control ordinances, private firms are able to “skim” cheap and inexpensive waste, but the public is often left with the bill for the remaining more expensive waste.⁸⁷

Additionally, flow control ordinances usually seek to reduce future municipal liabilities, to promote the public health and safety, and to meet state waste reduction goals by encouraging less waste production and greater use of recycling.⁸⁸ Although MSW regulated under RCRA’s Subtitle IV is less dangerous than hazardous waste regulated under Subtitle III,⁸⁹ MSW landfills include many household products that contain dangerous wastes.⁹⁰ Waste reduction programs, such as recycling and incineration in flow control ordinances provide important public benefits by reducing the total toxicity of waste and improving the environment.⁹¹

C. CARBONE: THE SUPREME COURT STRIKES DOWN A FLOW CONTROL ORDINANCE

1. *Majority Opinion*

In *C & A Carbone, Inc. v. Town of Clarkstown*, a local waste operator challenged a Clarkstown (“the Town”) flow control ordinance, Local Law 9, requiring all non-recyclable, non-hazardous solid waste generated within the Town or generated outside the Town and brought into the Town to be processed at a designated transfer station before it could be shipped outside the Town.⁹² In 1989, Clarkstown entered into a consent decree with the New York State Department of Environmental Conservation in which the Town agreed to close its landfill, which had a history of environmental violations, and build a new solid waste transfer station on the same site.⁹³ The Town signed an agreement with a local private contractor requiring the contractor to construct the station and operate it

87. *Id.*

88. *Id.* at 656.

89. Subchapter III of RCRA provides for “cradle to grave” regulation of hazardous waste. See 42 U.S.C. §§ 6921-6939 (2000). Subchapter IV addresses wastes not considered to be hazardous. See *id.* §§ 6941-6949; Murray & Spence, *supra* note 65, at 74 n.14.

90. Kirsten Engel, *Reconsidering the National Market in Solid Waste: Trade-offs in Equity, Efficiency, Environmental Protection, and State Autonomy*, 73 N.C. L. REV. 1481, 1488-89 (1995)

([M]any household products—such as household cleaners, automotive products, paint thinners, and pesticides—contain toxic constituents that would force their regulation as hazardous wastes were they generated by industry. Some of the most common products found in municipal solid waste are also the most hazardous: Appliance batteries, fluorescent light bulbs, and thermometers contain mercury; steel-can solder and car batteries contain lead.);

Davies, *supra* note 34, at 262 (“Many landfills receive toxic and hazardous wastes as a part of their municipal waste stream These toxics often leak from the landfills, subsequently migrating into aquifers and drinking water supplies. Indeed, nearly twenty percent of the nation’s most toxic Superfund sites are former landfills.”).

91. McCauliff, *supra* note 59, at 656.

92. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 386-87 (1994); Mank, *supra* note 25, at 31.

93. *Carbone*, 511 U.S. at 386-87.

for five years.⁹⁴ Arguably, the privately run monopoly in *Carbone* was a quasi-public facility, because the Town was entitled to purchase the facility after the private owner enjoyed a five-year monopoly on processing waste.⁹⁵ To amortize the cost of the transfer station, the Town guaranteed a minimum waste flow of 120,000 tons per year and authorized the contractor to charge haulers who deposited waste at the station a tipping fee of \$81 per ton, a rate which exceeded the disposal cost of unsorted solid waste on the private market.⁹⁶ To effectuate the plan, the Town enacted a flow control ordinance imposing fines of up to \$1,000 and a maximum of fifteen days in jail against any hauler who took MSW from the Town without having it being processed at the station.⁹⁷

C & A Carbone, Inc. operated a recycling facility in the Town and accepted waste from both within and outside the Town, including from out-of-state sources.⁹⁸ After officials found that Carbone was shipping waste from its facility within the Town to out-of-state landfills without having it processed first at the transfer station, the Town sued Carbone in New York state court for an injunction requiring Carbone to ship waste to the designated facility.⁹⁹ The New York state courts held that the ordinance did not violate the DCCD.¹⁰⁰

The Supreme Court, in a five-to-four decision written by Justice Kennedy, joined by Justices Stevens, Scalia, Thomas, and Ginsburg, held that the ordinance was subject to the per se standard because the Town "hoarded solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility."¹⁰¹ The Town argued that its export restriction was different from the import or export bans invalidated in prior cases, because its flow control ordinance evenhandedly treated in-state and out-of-state waste and waste facilities.¹⁰² Twenty-three state attorneys general and numerous local governments filed amicus briefs in support of the Town.¹⁰³ Although the ordinance did not bar the import or export of waste, the Court found that the article of commerce at issue "is

94. *Id.* at 387.

95. *Id.* at 387, 395-400 (Appendix containing Town of Clarkstown, Local Law No. 9 of the year 1990; a local law entitled, "Solid Waste Transportation and Disposal.").

96. *Id.* at 387.

97. *Id.*

98. *Id.* at 387-88.

99. *Id.* at 388-89.

100. *Id.* at 389.

101. *Id.* at 390-92; Joi Elizabeth Peake, *South Carolina Loses a Battle in the Hazardous Waste Wars: Using the Dormant Commerce Clause to Invalidate South Carolina's Hazardous Waste Laws in Environmental Technology v. Sierra Club*, 76 N.C. L. REV. 650, 673 n.155 (1998).

102. *Carbone*, 511 U.S. at 390; Peake, *supra* note 101, at 673 n.155.

103. *Carbone*, 511 U.S. at 384. An empirical study found that the Supreme Court was more likely to rule against a local government in DCCD cases when another government filed an amicus brief supporting the local government, although this result may be due to selection effects, because a government may file an amicus brief more often in cases in which a local government may lose. Christopher R. Drahozal, *Preserving the American Common Market: State and Local Governments in the United States Supreme Court*, 7 SUP. CT. ECON. REV. 233, 267 n.117 (1999).

not so much the solid waste itself, but rather the service of processing and disposing of it.”¹⁰⁴ Because the ordinance required Carbone to send the non-recyclable portion of any out-of-state waste to the transfer station at an additional cost, the Court found that the “flow control ordinance drives up the cost for out-of-state interests to dispose of their solid waste,” although there was no evidence in the record that the law actually increased costs for out-of-state persons.¹⁰⁵ For waste originating in the Town, the Court concluded that the ordinance harmed out-of-state interests by “prevent[ing] everyone except the favored local operator from performing the initial processing step. The ordinance thus deprives out-of-state businesses of access to a local market.”¹⁰⁶ There was no evidence in the record, however, of actual harm to interstate firms.¹⁰⁷

Under the *per se* test, Clarkstown had the burden of “demonstrat[ing], under rigorous scrutiny, that it ha[d] no other means to advance a legitimate local interest.”¹⁰⁸ The Court concluded that the ordinance did not qualify for the necessity exception to the *per se* rule, because the Town had alternative, nondiscriminatory methods to advance its legitimate interest in health and safety by enacting “safety regulations” to “ensure that competitors like Carbone do not underprice the market by cutting corners on environmental safety.”¹⁰⁹ Additionally, the Town’s interest in providing sufficient revenue to amortize the cost of the facility was an insufficient justification for the ordinance’s overt discrimination against out-of-state interests, because “the town may subsidize the facility through general taxes or municipal bonds.”¹¹⁰ The Court ignored evidence suggesting that public waste facilities are frequently more environmentally sound than private facilities, which are completely driven by cost considerations.¹¹¹ Also, the Court ignored the reality that local governments adopted flow control ordinances, because taxes are politically unpopular and bonds are difficult to issue without a guaranteed minimum waste flow.¹¹²

Furthermore, rejecting the Town’s argument that its flow control ordinance helped the environment of foreign jurisdictions by preventing the Town’s garbage from being disposed of at out-of-town landfills, the majority concluded that it was inappropriate for the Town to attempt to extend “[its] police power beyond its jurisdictional bounds. States and localities may not attach restrictions to exports or imports in order to control commerce in other States.”¹¹³ The Court’s argument that a local

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

105. *Id.* at 389; Heinzerling, *supra* note 33, at 245.

106. *Carbone*, 511 U.S. at 389; Mank, *supra* note 25, at 32.

107. *Carbone*, 511 U.S. at 427 (Souter, J., dissenting).

108. *Id.* at 392.

109. *Id.* at 392-93.

110. *Id.* at 394; Mank, *supra* note 25, at 32.

111. Gabrysch, *supra* note 79, at 595-96.

112. *See infra* notes 327-29 and accompanying text.

113. *Carbone*, 511 U.S. at 393. From a policy perspective, the farther trash is moved, the greater the risk of spills and contamination. Davies, *supra* note 34, at 259.

government or state may not voluntarily consider the interest of other states is contrary to federalist values.¹¹⁴ Why should the federal courts prevent a state from voluntarily helping other states? Moreover, the Court did not address the potential liability of municipalities in some circumstances for waste, especially if it is contaminated with hazardous waste.¹¹⁵

Acknowledging that there is a distinction between laws that favor all local firms against all out-of-state competitors and the Clarkstown ordinance that favored one firm over all other local or out-of-state competitors, the Court concluded that “this difference just makes the protectionist effect of the ordinance more acute,” because several of the other local laws that the Court invalidated in the past allowed out-of-state firms to compete if they built facilities within the local jurisdiction.¹¹⁶ In contrast to laws that require local investment, “[t]he flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside.”¹¹⁷ Accordingly, the majority concluded that the fact that a flow control ordinance harms in-state firms as much as out-of-state interests, except for the chosen firm, does not preclude a court from finding that the ordinance impermissibly discriminates against interstate commerce.¹¹⁸ Because it concluded that the law was invalid under the *per se* standard, the *Carbone* majority did not analyze the ordinance under the *Pike* balancing test.¹¹⁹

114. Regan, *supra* note 33, at 1127, 1133 (providing example where “Wisconsin passes a law forbidding the sale of alcohol in Wisconsin to Illinois residents (but not Wisconsin residents) under twenty-one” to help Illinois advance its policy of prohibiting drinking by those under twenty-one as consistent with federalist values).

115. For example, municipalities can be liable under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). See 42 U.S.C.A. § 9607(a)(4) (West 2006) (stating governments and private parties may recover “response costs” for cleanup from a responsible person); Gabrysch, *supra* note 79, at 596 n.119; Eric S. Petersen & David N. Abramowitz, *Municipal Solid Waste Flow Control in the Post-Carbone World*, 22 FORDHAM URB. L.J. 361, 367-69 (1995) (arguing flow control laws can reduce municipal liability because

if the waste was delivered to a site not owned by that municipality, the government would have no control over the screening process that had been implemented and could not assure itself that the site had not been inadvertently accepting hazardous substances, thereby exposing all of its past and future customers to potential CERCLA liability).

116. *Carbone*, 511 U.S. at 392; but see Klein, *supra* note 28, at 51-52 (questioning *Carbone*’s finding that the ordinance was discriminatory even though it treated in-state and out-of-state competitors alike); Verchick, *supra* note 29, at 1274, 1285 (arguing that the *Carbone* Court should have used similar logic as in the Court’s racial discrimination and Equal Protection Clause cases where the Court asks whether the municipality intended to discriminate before applying strict scrutiny).

117. *Carbone*, 511 U.S. at 392.

118. *Id.*

119. *Id.* at 390; Mank, *supra* note 25, at 32.

2. Justice O'Connor's Concurring Opinion

Justice O'Connor, in her concurring opinion, argued that the ordinance was non-discriminatory, 'because "the garbage sorting monopoly [was] achieved at the expense of all competitors, be they local or nonlocal."¹²⁰ She maintained that the discrimination precedents relied upon by the majority involved significantly different facts. She observed:

In each of the cited cases, the challenged enactment gave a competitive advantage to local business *as a group* vis-a-vis their out-of-state or nonlocal competitors *as a group*. In effect, the regulating jurisdiction . . . drew a line around itself and treated those inside the line more favorably than those outside the line.¹²¹

Furthermore, she contended, "In considering state health and safety regulations such as Local Law 9, we have consistently recognized that the fact that interests within the regulating jurisdiction are equally affected by the challenged enactment counsels against a finding of discrimination."¹²² She argued that the law's evenhanded application was a "significant distinction," because "[t]he existence of substantial in-state interests harmed by a regulation is 'a powerful safeguard' against legislative discrimination."¹²³

She concluded, however, that the ordinance was unconstitutional under the *Pike* test, because its burdens on interstate commerce exceeded its benefits.¹²⁴ Because courts in DCCD cases should consider the impacts of the ordinance if other jurisdictions were to adopt similar legislation, she contended that the potential burdens of the Clarkstown ordinance on interstate commerce were substantial when its impact was considered with the impact of similar ordinances in the twenty states that had already adopted legislation authorizing flow control ordinances and the realistic possibility that other states would adopt similar legislation.¹²⁵ Justice O'Connor argued that courts applying the *Pike* balancing test must consider whether the local purpose "can be achieved by other means that would have a less dramatic impact on the flow of goods."¹²⁶ She agreed with the majority that the Town could have used less discriminatory means to finance the facility "by imposing taxes, by issuing municipal bonds, or even by lowering its price for processing to a level competitive with other waste processing facilities."¹²⁷ The Second Circuit in *United Haulers II* acknowledged that the ordinance at issue in that case would likely have failed under Justice O'Connor's application of the *Pike* test, but the court argued that her view was neither adopted by the majority

120. *Carbone*, 511 U.S. at 404 (O'Connor, J., concurring).

121. *Id.* at 403.

122. *Id.* at 404.

123. *Id.*

124. *Id.* at 404-05.

125. *Id.* at 406-07.

126. *Id.* at 405.

127. *Id.* at 405-06.

nor by the dissenters.¹²⁸

Justice O'Connor was the only Justice to address whether Congress in RCRA had implicitly or explicitly authorized local flow control laws. Although she "agreed with *amicus* NABL that . . . references [in RCRA and its legislative history] indicate that Congress expected local governments to implement some form of flow control," she argued that "they neither individually nor cumulatively rise to the level of the 'explicit' authorization required by our [DCCD] decisions."¹²⁹ She explained, "First, the primary focus of the references is on legal impediments imposed as a result of state—not federal—law."¹³⁰ Acknowledging that "the House Report seems to contemplate that municipalities may require waste to be brought to a particular location," she contended that this was not strong enough evidence to outweigh the DCCD because "this stronger language is not reflected in the text of the statute."¹³¹ She concluded that Congress must enact new legislation that clearly authorizes flow control measures if it wants to allow such measures.¹³² Critics of the Court's DCCD jurisprudence argued that the demand for specific congressional override authorization biases courts in favor of applying the doctrine.¹³³

3. Justice Souter's Dissenting Opinion—Public Facilities Are Different

Justice Souter's dissenting opinion, which was joined by Chief Justice Rehnquist and Justice Blackmun, argued that the ordinance was different from those that the Court had struck down in the past, because it did not discriminate between local and foreign private firms, and laws favoring public facilities are different from ones favoring local private firms.¹³⁴ According to Justice Souter, the only significant issue raised by the law under DCCD was the extent to which the law discriminated geographically.¹³⁵ He contended that the DCCD prohibits local governments from favoring local producers against their foreign competitors, but does not guarantee, as the majority wrongly claimed, access to any local market.¹³⁶ He stated,

In the words of one commentator summarizing our case law, it is laws 'adopted for the purpose of improving the competitive position of local economic actors, just because they are local, vis-a-vis their foreign competitors' that offend the Commerce Clause. . . . The Commerce Clause does not otherwise protect access to local markets.¹³⁷

128. *United Haulers II*, 438 F.3d 150 (2d Cir.), *cert. granted*, 127 S. Ct. 35 (2006).

129. *Carbone*, 511 U.S. at 409 (O'Connor, J., concurring).

130. *Id.* at 409.

131. *Id.*

132. *Id.* at 410.

133. Gabrysch, *supra* note 79, at 590-600.

134. *Carbone*, 511 U.S. at 410-30 (Souter, J., dissenting).

135. *Id.* at 425.

136. *Id.* at 416-17.

137. *Id.* at 417 (quoting Regan, *supra* note 33, at 1138).

The law clearly did not discriminate between local and out-of-state private firms in general, but there remained the issue of whether the Town could favor one operator.¹³⁸

Justice Souter contended the Court should treat laws that give public facilities a favored or monopoly position to achieve public safety and welfare goals differently from ordinances that discriminate in favor of local private firms, even if part of the rationale for the ordinance is to finance a public facility.¹³⁹ He argued that the favored facility was basically public in nature, stating, "Clarkstown's transfer station is essentially a municipal facility . . . and soon to revert entirely to municipal ownership [It] performs a municipal function that tradition as well as state and federal law recognize as the domain of local government."¹⁴⁰ While special protections for private enterprises are usually based on economic favoritism toward local interests, he contended that flow control ordinances that promote public facilities are frequently grounded in public health or welfare concerns. He stated, "The local government itself occupies a very different market position, however, being the one entity that enters the market to serve the public interest of local citizens quite apart from private interest in private gain."¹⁴¹ Furthermore, in *Garcia v. San Antonio Metropolitan Transit Authority*, the Court "recognize[d] that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position."¹⁴²

Justice Souter argued that the Court should apply the more lenient and nuanced *Pike* standard in determining whether laws favoring public facilities violate the DCCD, because there are usually good public welfare reasons for local laws favoring the use of public facilities, and there is no discrimination between in-state and out-of-state private capital.¹⁴³ Because laws favoring public facilities do not discriminate between local and out-of-state private firms, he argued that they should not be subject to the per se discrimination test.¹⁴⁴ He stated:

Because the favor does not go to local private competitors of out-of-state firms, out-of-state governments will at the least lack a motive to favor their own firms in order to equalize the positions of private competitors. While a preference in favor of the government may incidentally function as local favoritism as well, a more particularized inquiry is necessary before a court can say whether such a law does in fact smack too strongly of economic protectionism.¹⁴⁵

138. *Id.* at 416.

139. *Id.* at 412-14, 428-29.

140. *Id.* at 419.

141. *Id.* at 420-21.

142. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985).

143. *Carbone*, 511 U.S. at 418-24 (Souter, J., dissenting).

144. *Id.*

145. *Id.* at 422.

Agreeing with Justice O'Connor, he contended that the Court should apply the *Pike* balancing test to Local Law 9 rather than the per se test used by the majority.¹⁴⁶

Unlike Justice O'Connor, however, the dissenters concluded that the local law did not violate the *Pike* test.¹⁴⁷ The dissenters acknowledged that the Clarkstown transfer station was more expensive than Carbone's facility, but that fact alone did not make the local law violate the DCCD, which bars only discrimination against out-of-state interests and does not require the most economically efficient solution.¹⁴⁸ Similarly, the fact that the facility is a monopoly does not automatically make it violate the Clause, even if monopolies are often illegal under statutory law.¹⁴⁹ Moreover, Justice Souter argued that the majority opinion failed to address the fact that the Court, in antitrust cases, has frequently allowed local governments to establish exclusive franchises, which are effectively local monopolies, in a number of areas, including public utilities, cable television operators, sports promoters, ambulance and taxicab services, and, most notably, trash collectors and processors, even though such franchises clearly have at least incidental impacts on interstate commerce.¹⁵⁰

Justice Souter argued that the flow control ordinance was constitutional under the Clause because most of the economic costs were borne by local residents rather than out-of-state interests.¹⁵¹ There was no evidence that an out-of-state facility wanted to or could handle the Town's waste and thus there was no evidence of any burden on interstate commerce.¹⁵² Justice Souter maintained that the Court has invalidated local laws in prior cases only when they increased the cost of local goods to out-of-state markets.¹⁵³ Additionally, unlike the majority or Justice O'Connor, the dissenters argued that because the burdens of the ordinance fell mainly on local residents, "protection of the public fisc is a legitimate local benefit directly advanced by the ordinance."¹⁵⁴ Furthermore, the dissenters suggested that the ordinance was more equitable for taxpayers. They stated:

The ordinance does, of course, protect taxpayers, including those who already support the transfer station by patronizing it, from ending up with the tab for making provision for large-volume trash producers like Carbone, who would rely on the municipal facility when that was advantageous but opt out whenever the transfer station's

146. *Id.* at 422-24.

147. *Id.* at 422-23, 430.

148. *Id.* at 424.

149. *Id.* at 424-25.

150. *See id.* at 424 n.13 (observing that challenges to flow control ordinances have failed where "defendants have availed themselves of the state action exception to the antitrust laws").

151. *Id.* at 425-28.

152. *Id.* at 427-28.

153. *Id.* at 425.

154. *Id.* at 429.

price rose above the market price.¹⁵⁵

Additionally, Justice Souter contended that the flow control law had a benefit beyond financing. He stated, "In proportioning each resident's burden to the amount of trash generated, the ordinance has the added virtue of providing a direct and measurable deterrent to the generation of unnecessary waste in the first place."¹⁵⁶ Since the Town's residents bore the additional costs of running a public landfill and little harm accrued to out-of-state interests, the dissenters contended that the ordinance was constitutional under the *Pike* test.¹⁵⁷

4. *A Critique of Carbone*

The *Carbone* decision should not have applied a strict per se discrimination analysis when there was no evidence of discrimination or actual harm to out-of-state firms.¹⁵⁸ The ordinance treated waste the same whether it was locally generated or not, whether the hauler was local or not, and regardless of where the waste would ultimately be disposed.¹⁵⁹ There was simply no geographic origin discrimination in the case and no evidence that Clarkstown was trying to favor local private firms at the expense of foreign firms.¹⁶⁰ The majority contended that the law was discriminatory in effect, because "[t]he flow control ordinance has the same design and effect" as local processing laws requiring local inspection or production of goods that effectively barred out-of-state goods.¹⁶¹ Justice Souter effectively rebutted the majority's discrimination argument by demonstrating that the precedent cited by the majority opinion involved different factual circumstances where there was evidence that the invalidated law was intended to discriminate against out-of-state private firms and to favor local private firms.¹⁶² The *Carbone* majority could not show any evidence that foreign private firms were economically disadvantaged compared to in-state firms.¹⁶³ The *Carbone* majority erred in applying the traditional economic-discrimination model, applicable to cases of local governments favoring local firms over out-of-state firms, to the quite different problem of flow control ordinances that simply seek to finance public waste facilities for the public good.

Justice O'Connor's concern that the national waste market would be harmed if many jurisdictions adopted similar legislation is a legitimate point to raise,¹⁶⁴ but flow control ordinances that do not discriminate between local private firms and foreign firms are likely to have net societal

155. *Id.*

156. *Id.*

157. *Id.* at 425-30.

158. O'Grady, *supra* note 32, at 604.

159. *Id.* at 603; Larsen, *supra* note 61, at 856.

160. Heinzerling, *supra* note 32, at 230; O'Grady, *supra* note 32, at 604.

161. *Carbone*, 511 U.S. at 392; O'Grady, *supra* note 32, at 604.

162. *Carbone*, 511 U.S. at 426 (Souter, J., dissenting); O'Grady, *supra* note 32, at 604.

163. O'Grady, *supra* note 32, at 605-06.

164. *Carbone*, 511 U.S. at 406-07 (O'Connor, J., concurring).

benefits and will not harm foreign interests. Because local residents bear most of the costs of flow control ordinances, there is little harm to foreign jurisdictions.¹⁶⁵ Furthermore, there may be a net benefit to foreign jurisdictions, because of a reduction in harmful waste.¹⁶⁶ The majority wrongly refused to consider the ordinance's benefits to the national environment.¹⁶⁷ In a federalist system, a state or local government should be able to consider the positive benefits, as well as the detrimental effects, of a law to other jurisdictions.¹⁶⁸

Both the majority and Justice O'Connor underestimated the positive benefits of flow control ordinances. The primary motivation that local governments have in enacting flow control ordinances is to promote the public health and address environmental concerns by providing sufficient waste facilities to meet local needs.¹⁶⁹ Clarkstown and several amici argued "that as landfill space diminishes and environmental cleanup costs escalate, measures like flow control become necessary to ensure the safe handling and proper treatment of solid waste."¹⁷⁰ In a consent decree, the New York State Department of Environmental Conservation required that Clarkstown build the facility to replace an old, environmentally unsuitable landfill after citing the Town for dumping in violation of environmental laws.¹⁷¹ Accordingly, although Clarkstown was concerned with how it would pay for the facility, the Town's main motive was serving public needs rather than harming out-of-state competition.

Furthermore, Justice Souter and many commentators have criticized *Carbone* for going beyond the prevention of discrimination against out-of-state competitors, a core value of the DCCD, to a promotion of free-market competition comparable to the Court's infamous 1905 decision in *Lochner v. New York*, which invalidated a law limiting working hours because the Court found that the Due Process Clause implicitly constitutionalized a free-market philosophy.¹⁷² The *Carbone* Court's holding is based on the free-market rationale that the law violates the DCCD because it "deprive[s] competitors, including out-of-state firms, of access to

165. *Id.* at 429 (Souter, J., dissenting).

166. *Id.* at 392-93.

167. *Id.*

168. See *supra* notes 114-15 and *infra* note 409 and accompanying text.

169. Gabrysch, *supra* note 79, at 587-91.

170. *Carbone*, 511 U.S. at 392-93.

171. *Id.* at 412 (Souter, J., dissenting).

172. *Id.* at 424-25 ("No more than the Fourteenth Amendment, the Commerce Clause 'does not enact Mr. Herbert Spencer's Social Statics . . . [or] embody a particular economic theory, whether of paternalism . . . or of *laissez faire*.'" (quoting *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)); see Heinzerling, *supra* note 33, at 230-31, 268-70 (comparing *Carbone* to *Lochner* in an effort to promote markets); McCauliff, *supra* note 59, at 661-64, 673-85 (criticizing *Carbone*'s market-based discrimination test); *The Supreme Court, 1993 Term: Leading Cases*, 108 HARV. L. REV. 139, 149, 153 (1994) (same) [hereinafter *Supreme Court, 1993 Term*]; see generally *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating a work hour limit because the legislation violated freedom of contract implicit in the Due Process Clause); McGreal, *supra* note 15, at 1230-37 (arguing Supreme Court's DCCD cases are similar to free market approach in *Lochner*).

a local market.”¹⁷³ Under the *Carbone* Court’s rationale, any time a state assumes monopoly control of any activity, including core state activities such as operating prisons or providing law enforcement, that theoretically could be provided by private markets, then the law is potentially unconstitutional under the DCCD, but such a broad reading of the DCCD would potentially swallow state sovereignty, federalism, and the Tenth Amendment.¹⁷⁴ The *Carbone* majority invalidated the flow control ordinance because it interfered with free access to waste markets, although there was no evidence of discrimination between in-state and out-of-state firms.¹⁷⁵ There is no historical evidence that the framers of the Constitution intended to bar non-discriminatory state laws that in some way hinder the free market and incidentally affect out-of-state interests.¹⁷⁶ While the framers intended to prevent destructive commercial protectionism, Professor Eule argues, “There was no intent, however, to inject a philosophy of laissez-faire into the constitutional fabric.”¹⁷⁷

A possible criticism of Justice Souter’s argument that public waste monopolies are different from laws favoring local private firms is that both public and private waste monopolies should be subject to the same level of scrutiny.¹⁷⁸ Even if public and private facilities are subject to the same standard, the Clarkstown ordinance was not a classic protectionist law seeking to promote a local economy at the expense of the national economy, but, as Justice Souter observed in his dissenting opinion, it imposed any additional costs primarily on the local population.¹⁷⁹ Both because the ordinance was even-handed against local and out-of-state businesses and imposed most of its costs on local residents rather than out-of-state residents, the *Carbone* Court should have applied the *Pike* standard, which is sufficient to invalidate local laws that seriously harm out-of-state interests.¹⁸⁰

173. *Carbone*, 511 U.S. at 386.

174. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

175. Heinzerling, *supra* note 33, at 269-70.

176. Anson & Schenkkan, *supra* note 31, at 78-80; Eule, *supra* note 31, at 429-35; Regan, *supra* note 33, at 1179; Verchick, *supra* note 29, at 1281-83.

177. Eule, *supra* note 31, at 435.

178. *Supreme Court, 1993 Term*, *supra* note 172, at 159.

179. *Carbone*, 511 U.S. at 426-30 (Souter, J., dissenting); Rachel D. Baker, *C & A Carbone v. Clarkstown: A Wake-Up Call for the Dormant Commerce Clause*, 5 DUKE ENVTL. L. & POL’Y F. 67, 83-86 (1995).

180. Baker, *supra* note 179, at 83-86; Verchick, *supra* note 29, at 1305-09.

III. ARE PUBLIC FACILITIES DIFFERENT FROM PRIVATE FACILITIES?: THE SPLIT BETWEEN THE SECOND CIRCUIT AND SIXTH CIRCUIT

A. *UNITED HAULERS ASSOCIATION INC. v. ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY*

1. *Background*

In *United Haulers I* and *United Haulers II*, the Second Circuit applied a deferential approach to flow control ordinances that favor public waste facilities but that do not discriminate between local private firms and foreign firms.¹⁸¹ In the two *United Haulers* decisions, the defendants, Oneida and Herkimer counties, both in New York State, (collectively, “the Counties”) enacted flow control regulations in 1990 that required all solid wastes and recyclables generated within the Counties to be delivered to one of several waste processing facilities owned by the defendant Oneida-Herkimer Solid Waste Management Authority (“the Authority”), a municipal corporation.¹⁸² The Authority charged a per-ton “tipping” fee for receiving this waste that was significantly higher than the fees charged on the open market elsewhere in New York State.¹⁸³ In 1995, the plaintiffs, United Haulers Association, Inc., a New York waste company, and several other New York waste firms filed suit in the U.S. District Court for the Northern District of New York arguing that the ordinances violated the DCCD.¹⁸⁴ The plaintiffs sought injunctive relief barring the enforcement of these ordinances, along with damages and attorneys’ fees.¹⁸⁵ The plaintiffs conceded that in-state firms did not have any unfair advantage in the bidding process for operating the defendants’ facilities.¹⁸⁶ They argued, however, that the ordinances were biased against out-of-state interests because the Authority’s most recent contract required shipment of the Counties’ waste to a landfill in New York State, and that the Authority was then constructing a New York landfill site to which all of the Counties’ landfill-bound processed wastes would be delivered beginning in 2007.¹⁸⁷ The plaintiffs contended that both of those developments burdened interstate commerce.¹⁸⁸

In 2000, the district court granted plaintiffs’ motion for summary judgment.¹⁸⁹ The district court found that the Counties’ flow control ordinances were comparable to the law invalidated in *Carbone* and caused

181. *United Haulers II*, 438 F.3d 150, 157-60 (2d Cir. 2006), *cert. granted*, 127 S. Ct. 35 (2006); *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 255-65 (2d Cir. 2001) [hereinafter *United Haulers I*].

182. *United Haulers II*, 438 F.3d at 154.

183. *Id.*

184. *Id.* at 153.

185. *Id.*

186. *Id.* at 154.

187. *Id.*

188. *Id.* at 154-55.

189. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, No. 95-CV-516, 2000 U.S. Dist. LEXIS 22331, at *21 (N.D.N.Y. Mar. 31, 2000).

per se discrimination in favor of a single, favored provider.¹⁹⁰ The district court rejected the defendants' argument that their actions were not discriminatory because they were public entities and concluded that the Counties acted the same as a private business that could force all haulers to sell to it and thereby hoard waste.¹⁹¹ The district court enjoined the flow control ordinances.¹⁹² The district court also referred the action to the magistrate judge to calculate damages, pending the defendants' appeal.¹⁹³

2. *United Haulers I*

In 2001, the Second Circuit reversed the district court's decision and held that the ordinance did not cause per se discrimination under the Commerce Clause, because "they [did] not favor local business interests and therefore are not discriminatory."¹⁹⁴ *United Haulers I* initially concluded that the Counties were acting as market regulators in "the market for waste collection and disposal," because they used coercive regulatory methods including fines, permit revocation, and imprisonment.¹⁹⁵ Rejecting the district court's assumption that flow control regulations are always subject to the rigorous per se review standard, the Second Circuit concluded that a court must analyze the specific facts concerning a particular flow control ordinance to determine whether it is a discriminatory law that falls within the per se test or whether it only has incidental burdens on commerce causing it to be analyzed under the *Pike* balancing test.¹⁹⁶ It concluded that the ordinances were non-discriminatory and should be reviewed under the *Pike* test; it further held that the district court erred in applying the per se standard and remanded the case to the district court to permit discovery so that the district judge could gather the facts necessary to apply the *Pike* test.¹⁹⁷

The Second Circuit concluded that "the district court erred in its Commerce Clause analysis by failing to recognize the distinction between private and public ownership of the favored facility" and that "[i]n doing so, the district court also effectively foreclosed the Counties' ability to show that they had no reasonable alternatives to implementing flow control laws" under the *Pike* balancing test.¹⁹⁸ The *United Haulers I* court determined that there was a "determinative" difference between the public facilities at issue in its case and the transfer station owned by a "local private contractor" in *Carbone*.¹⁹⁹ The Second Circuit maintained that the *Carbone* decision was concerned about preventing local or state gov-

190. *Id.* at *12-18.

191. *Id.* at *16-18.

192. *Id.* at *18.

193. *Id.* at *23.

194. *United Haulers I*, 261 F.3d 245, 263 (2d Cir. 2001).

195. *Id.* at 255.

196. *Id.* at 255-57.

197. *Id.* at 256-57, 264.

198. *Id.* at 257.

199. *Id.* at 258.

ernments from favoring in-state private businesses, but that the decision did not prohibit laws requiring that all waste be handled by local public facilities.²⁰⁰

The plaintiffs argued that the *Carbone* decision had not distinguished between private and public facilities, but the Second Circuit concluded that “the *Carbone* majority referenced the private character of the favored facility several times.”²⁰¹ *United Haulers I* stated:

The [*Carbone*] Court repeatedly referenced the private nature of the favored facility and repeatedly alluded to the dangers of allowing local government to favor local industry or a single local business over out-of-state competition. For example, the Court held that “the town may not employ discriminatory regulation to give [the designated facility] an advantage over *rival businesses* from out of State.”²⁰²

Similarly, the *Carbone* Court stated that “state and local governments may not use their regulatory power to favor *local enterprise* by prohibiting patronage of out-of-state competitors or their facilities.”²⁰³ The Second Circuit concluded that the Supreme Court in *Carbone* had implicitly recognized a distinction between public and private facilities but that the *Carbone* “Justices were divided over the fact of whether the favored facility was public or private, rather than on the import of that distinction.”²⁰⁴ According to the Second Circuit’s reading of the case, the *Carbone* majority treated the facility as a private one for which the Town had impermissibly discriminated in its favor over out-of-state businesses.²⁰⁵ By contrast, according to the Second Circuit, Justice O’Connor’s concurring opinion and Justice Souter’s dissenting opinion in *Carbone* treated the facility as public.²⁰⁶

Although it acknowledged that the *Carbone* majority opinion had never explicitly adopted the public-private distinction and that “its language can fairly be described as elusive on that point,” the Second Circuit concluded that the Supreme Court, in a series of prior cases in which local laws favoring “local processing” of various commodities were challenged under the DCCD, had “evidence[d] the same intent to prevent state or local governments from favoring in-state business or investment at the expense of out-of-state businesses.”²⁰⁷ For example, in *Dean Milk Co. v. City of Madison*, the Court invalidated as discriminatory a City of Madison, Wisconsin ordinance requiring all milk sold in the city to be pasteurized within five miles of the central portion of the city because the

200. *Id.* at 258-59.

201. *Id.* at 259-60.

202. *Id.* at 258 (quoting *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 394 (1994) (emphasis added by Second Circuit)).

203. *Id.* at 258-59 (quoting *Carbone*, 511 U.S. at 394 (emphasis added by Second Circuit)).

204. *Id.* at 259.

205. *Id.*

206. *Id.*

207. *Id.* at 260.

“practical effect” of the ordinance was to “erect an economic barrier protecting a major local industry against competition from without the State.”²⁰⁸ Although out-of-state businesses could build pasteurizing facilities within the five-mile radius, the Court found that the ordinance was discriminatory, because it forced out-of-state firms to invest in or near Madison.²⁰⁹ The Second Circuit interpreted *Dean* and similar cases as being concerned about local governments favoring local private firms.²¹⁰

The Second Circuit rejected the plaintiffs’ argument that the DCCD prohibited local governments from “hoarding” local resources, including waste products and services, and argued that the Clause only prohibited local laws allowing local private businesses to hoard resources, stating “that a local law discriminates against interstate commerce when it hoards local resources in a manner that favors local business, industry or investment over out-of-state competition.”²¹¹ *United Haulers I* quoted the following language from the majority in *Carbone*, “Put another way, the offending local laws hoard a local resource—be it meat, shrimp, . . . milk [or garbage]—for the benefit of local businesses that treat it.”²¹² The Second Circuit also argued that public-favored facilities were less likely to be protectionist and were “less likely to give rise to retaliation and jealousy from neighboring states” than private-favored facilities.²¹³ It stated:

Moreover, ordinances that favor a public facility to the detriment of all private actors are equipped with a built-in check: municipal legislators are accountable to citizens, many of whose interests are likely to be aligned to some degree with the interests of private business, either as owners, employees or investors.²¹⁴

Furthermore, the primary burden of the defendant Counties’ public waste facilities fell on local residents rather than out-of-state interests.²¹⁵ Because “a flow control ordinance governing the processing of waste is not discriminatory under the Commerce Clause unless it favors local private business interests over out-of-state interests,” the Second Circuit concluded that “[f]low control regulations like the Oneida-Herkimer ordinances, which negatively impact all private businesses alike, regardless of whether in-state or out-of-state, in favor of a publicly owned facility, are not discriminatory under the DCCD.”²¹⁶ The Second Circuit held that the district court erred in applying the per se standard.²¹⁷

208. *Dean Milk v. City of Madison*, 340 U.S. 349, 354 (1951).

209. *Id.*; *United Haulers I*, 261 F.3d at 260.

210. *United Haulers I*, 261 F.3d at 260-61.

211. *Id.* at 261.

212. *Id.* (quoting *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383, 392 (1994) (emphasis added by Second Circuit)).

213. *Id.*

214. *Id.*

215. *Id.* at 261-62.

216. *Id.* at 263.

217. *Id.*

In an opinion concurring in the result and the majority opinion, Judge Calabresi stated, “Waste disposal is both typically and traditionally a local government function. With respect to such functions, the opinion’s analysis of the significance of public ownership under *Carbone* seems to me quite right. Whether the same analysis would apply to activities that are not traditionally governmental is not before us.”²¹⁸

The Second Circuit remanded the case to the district court to decide whether the requirement imposed an “undue burden” on interstate commerce under the *Pike* test.²¹⁹ The Second Circuit strongly suggested that it thought the defendant Counties would win under the *Pike* standard, stating that “[t]he local interests that are served by consolidating garbage service in the hands of the town—safety, sanitation, reliable garbage service, cheaper service to residents—would in any event outweigh any arguable burdens placed on interstate commerce.”²²⁰ The Second Circuit, however, did not reach the merits of the case under *Pike*, stating, “We will follow our own advice, however, and resist the temptation to rule as a matter of law prior to adequate discovery and further argument by the parties, which will undoubtedly assist the district court in this fact-intensive determination.”²²¹ The court held that the district court must consider a facility’s public ownership when it applied the *Pike* test, stating:

We do hold . . . that although it does not, in and of itself, give a municipality free reign to place burdens on the free flow of commerce between the states, the fact that a municipality is acting within its traditional purview must factor into the district court’s determination of whether the local interests are substantially outweighed by the burdens on interstate commerce.²²²

The plaintiffs sought certiorari from the Supreme Court to review *United Haulers I*, but the Court declined to hear the case, perhaps because it was not yet a final decision pending the remand to the district court.²²³

Although it did not establish a categorical rule for public facilities, *United Haulers I* suggested that the Second Circuit preferred applying the more deferential *Pike* test to public waste facilities as long as they “negatively impact all private businesses alike, regardless of whether in-state or out-of-state.”²²⁴ Its strongest argument was that in almost all cases in which the Court invalidated a local law as violating the DCCD, the law favored local private firms over out-of-state private firms; therefore, an ordinance that treats both types of businesses the same is quite different

218. *Id.* at 264 (Calabresi, J., concurring) (citation omitted).

219. *Id.*

220. *Id.* (quoting *USA Recycling, Inc. v. Town of Babylon, N.Y.*, 66 F.3d 1272, 1295 (2d Cir. 1995)).

221. *Id.*

222. *Id.*

223. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 534 U.S. 1082 (2002).

224. *United Haulers I*, 261 F.3d at 263.

and deserves a more deferential type of review.²²⁵ *United Haulers I*'s weakest argument was that the Court's decisions were only concerned with local private firms "hoarding" natural resources, including waste and waste services, but that a local government "hoard" those same resources is never a concern.²²⁶

3. *United Haulers II: The 2006 Second Circuit Decision*

In 2005, in an unreported decision, the district court granted the defendants' motion for summary judgment, upholding the flow control requirements under the *Pike* test, because "the challenged laws do not treat similarly situated in-state and out-of-state business interests differently," and therefore the ordinances "do not impose any cognizable burden on interstate commerce."²²⁷ In 2006, the Second Circuit affirmed the district court's decision.²²⁸ On appeal, the plaintiffs acknowledged that "the ordinances afford equal treatment to all commercial entities without regard to their location," but the plaintiffs argued that the district court erred in failing to consider whether the ordinances burden interstate commerce by "prevent[ing] goods and services from flowing across internal political boundaries."²²⁹

The Second Circuit has interpreted the *Pike* balancing test to require a challenger to prove that a challenged local law "impose[s] a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce."²³⁰ Applying its different burden test, the Second Circuit concluded that the defendants' ordinances clearly do not treat in-state private firms differently from out-of-state firms.²³¹ To the extent that it happened to choose an in-state firm to operate its facilities in its most recent contract, the court found that the Authority was simply acting as a market participant that can choose its contractual partners like any private business and was not acting as a market regulator giving legal favor to in-state businesses.²³²

The plaintiffs argued, however, that the Second Circuit's different burden test did not address the problem of a public monopoly that hoarded resources within one state.²³³ Because the "central purpose" of the Com-

225. *Id.* at 260-61 (discussing several Supreme Court cases where local law favored local private businesses over out-of-state private businesses).

226. *Id.* at 261.

227. *United Haulers II*, 438 F.3d 150, 155 (2d Cir. 2006) (quoting unreported district court decision), *cert. granted*, 127 S. Ct. 35 (2006).

228. *Id.* at 153.

229. *Id.* at 155-56.

230. *Id.* at 156-57 (quoting *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 109 (2d Cir. 2001)); *accord* *Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 500-02 (5th Cir. 2004); *but see* *U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1065-72 (8th Cir. 2000) (applying *Pike* to reject a law that imposed restrictions only on in-state competition).

231. *United Haulers II*, 438 F.3d at 156-57.

232. *Id.* at 157-60.

233. *Id.*

merce Clause is to establish national markets free from state barriers, the Second Circuit acknowledged that

there may be some force to plaintiffs' claim that the narrow class of regulations that explicitly create a prohibitory barrier to commerce for the benefit of a governmental entity operating in an area of traditional governmental concern, even if non-discriminatory, impose some differential burden on interstate commerce which should be examined under the *Pike* test.²³⁴

Perhaps because two of the three judges on the panel were different, *United Haulers II* was more forthright in acknowledging the hoarding issue than *United Haulers I*.²³⁵ *United Haulers II*, however, stated that any burden imposed by the ordinances "is blunted considerably by the absence of any suggestion that these ordinances have any practical effect other than to raise the costs of performing waste collection services within the Counties, and thus the prices paid by local consumers of those services."²³⁶

The Second Circuit concluded that the burden on interstate commerce as measured by the *Pike* test was low, because the burdens of the ordinances fall mostly on local residents rather than out-of-state interests.²³⁷ The court observed that, in its prior *USA Recycling, Inc. v. Town of Babylon*²³⁸ decision, it had upheld a town's free provision of waste hauling and disposal services even though that system effectively eliminated all private competition and "impose[d] a public monopoly encompassing the activities of waste collection, processing and disposal."²³⁹ In light of that holding, the court concluded that the partial monopoly established by the defendants' ordinances imposed only a "limited burden" on interstate commerce.²⁴⁰ The Second Circuit failed to consider, however, that the Court has distinguished between a local government acting as a market regulator and one acting as a market participant so that the means used by a government to achieve a monopoly are relevant.²⁴¹ Even if a city may use free services financed by taxes to establish a de facto monopoly, it does not follow that a city acting as a market regulator may establish a limited monopoly.

Unlike the Sixth Circuit in *Daviess County*, the Second Circuit did not consider the burden that the ordinances imposed on the movement of waste to other states as being impermissible.²⁴² The Second Circuit acknowledged that "the interstate market for waste disposal services would

234. *Id.* at 160-62.

235. Only Judge Calabresi sat in both *United Haulers* decisions. In *United Haulers II*, Judges Katzman and Wesley sat instead of Judges Meskill and Leval.

236. *United Haulers II*, 438 F.3d at 160-62.

237. *Id.*

238. 66 F.3d 1272, 1293-94 (2d Cir. 1995).

239. *United Haulers II*, 438 F.3d at 161 (citing *USA Recycling, Inc.*, 66 F.3d at 1293-94).

240. *Id.*

241. See *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92-93 (1984); *supra* notes 39-41 and accompanying text.

242. See *supra* notes 237-40 and accompanying text.

suffer if numerous jurisdictions were to impose restrictions like these on private entities that engage in trash collection."²⁴³ The *United Haulers II* court, however, argued that the Supreme Court since 1905 had "allowed municipalities to exercise the greater power of taking exclusive control of all locally generated solid waste from the moment that it is placed on the curb."²⁴⁴ In *California Reduction Co. v. Sanitary Reduction Works*²⁴⁵ and *Gardner v. Michigan*,²⁴⁶ the Court in 1905 rejected takings and due process challenges where San Francisco and Detroit had each granted exclusive rights to collect and dispose of garbage within the city to a single scavenger company, which had the right to incinerate the garbage.²⁴⁷ The Second Circuit in *USA Recycling* acknowledged that those two decisions had not addressed a Commerce Clause challenge but declined to read *Carbone* so broadly as to require the effective overruling of these two Court decisions.²⁴⁸ Because the Supreme Court and Second Circuit in prior cases had allowed local governments to monopolize waste services, the *United Haulers II* court concluded that any burden from the ordinances on commerce was permissible and not protectionist.²⁴⁹

The *United Haulers II* court interpreted the Commerce Clause as primarily concerned with two purposes. The first purpose is "safeguard[ing] the ability of commercial goods to cross state lines primarily as a means to protect the right of businesses to compete on an equal footing wherever they choose to operate."²⁵⁰ The Second Circuit presented the Commerce Clause's second purpose as enabling "states and municipalities to exercise their police powers without undue interference from the laws of neighboring jurisdictions."²⁵¹ The court concluded, "[w]here neither of these underlying purposes is implicated by a particular legislative enactment, the burden imposed on interstate commerce must be regarded as insubstantial."²⁵²

The Second Circuit determined that the burden imposed by the ordinances is "slight," and thus concluded that "the defendants need to present only a minimal showing of local benefit in order to compel a finding that this burden is not 'clearly excessive' to the benefits that the ordinances provide."²⁵³ The Second Circuit found that the ordinances provided several benefits that outweighed the slight burden imposed by the ordinance.²⁵⁴ First, although the court acknowledged that the *Carbone* decision stated that financial stability alone may not justify a local law

243. *United Haulers II*, 438 F.3d at 161.

244. *Id.* (citing *Gardner v. Michigan*, 199 U.S. 325 (1905) and *Cal. Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905)).

245. 199 U.S. at 318-24.

246. 199 U.S. at 332-33.

247. *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1292-94 (2d Cir. 1995).

248. *Id.* at 1294.

249. *United Haulers II*, 438 F.3d at 161.

250. *Id.* (citing *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949)).

251. *Id.* (citing *Healy v. Beer Inst.*, 491 U.S. 324, 336-37 (1989)).

252. *Id.*

253. *Id.*

254. *Id.*

discriminating against interstate commerce, the *United Haulers II* court concluded that courts may consider the financial advantages of non-discriminatory flow control ordinances.²⁵⁵

Additionally, the Second Circuit determined that the ordinances provided several additional benefits beyond assuring financial security. Several local governments in amici briefs had argued that publicly-owned waste facilities promote “the interest of public health and environmental protection.”²⁵⁶ The court found that “the flow control measures substantially facilitate the Counties’ goal of establishing a comprehensive waste management system that encourages waste volume reduction, recycling, and reuse and ensures the proper disposal of hazardous wastes, thereby reducing the Counties’ exposure to costly environmental tort suits.”²⁵⁷ According to the court, the flow control ordinances’ requirement that all waste in the Counties go to the Authority’s sites advances these goals by “establishing differential pricing for different categories of waste, assessing fines for non-compliance, and directing the region’s trash to landfill facilities that employ acceptable environmental practices.”²⁵⁸ Although it acknowledged that the plaintiffs might be correct that alternative methods might secure the Authority’s financial health, the court concluded that only the flow control ordinances “could address [the Counties’] liability concerns or encourage recycling across the wide range of waste products accepted by the Authority’s recycling program.”²⁵⁹ Because of all these benefits, the Second Circuit concluded that under the *Pike* test the public benefits of the ordinances outweigh any burden, stating, “We conclude that even if we were to recognize that the ordinances burden interstate commerce, we would find that the burden imposed is not clearly excessive in relation to the local benefits.”²⁶⁰ Because the plaintiffs had the burden of proving that the ordinances were unconstitutional and had failed to do so, the court determined that the ordinances “do not violate the DCCD, and therefore [the court] do[es] not decide whether the ordinances burden interstate commerce at all.”²⁶¹

B. *NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION v. DAVIESS COUNTY, KENTUCKY*

The Second Circuit’s two *United Haulers* decisions directly conflict with the Sixth Circuit’s decision in *Daviess County*.²⁶² In 2004, the defendant Daviess County, Kentucky enacted a flow control ordinance requiring all municipal solid waste collection services in the county to dispose of the

255. *Id.* at 161-62.

256. Amici Curiae Brief, *supra* note 17, at 7-9; *supra* note 170 and accompanying text.

257. *United Haulers II*, 438 F.3d at 162.

258. *Id.*

259. *Id.* at 162-63.

260. *Id.* at 150.

261. *Id.* at 163.

262. Nat’l Solid Waste Mgmt. Ass’n v. Daviess County, 434 F.3d 898, 909-11 (6th Cir.), *reh’g en banc denied*, 446 F.3d 647 (6th Cir. 2006), *petition for cert. filed*, 2006 WL 2619953 (June 28, 2006) (No. 06-359).

waste they collected at the Daviess County Landfill or Transfer Station.²⁶³ This Ordinance was comparable to the ordinances at issue in *United Haulers*. The plaintiff, a trade association representing several waste collection, transportation, and disposal firms in the county, filed suit in the United States District Court for the Western District of Kentucky, arguing that the Ordinance violated the DCCD by prohibiting firms from exporting waste to out-of-state sites, including ones owned by some of its members.²⁶⁴ In 2004, the district court granted plaintiff's motion for summary judgment, denied defendant's motion for summary judgment, issued a declaratory judgment that the Ordinance was unconstitutional, and issued a permanent injunction barring the defendant from enforcing the terms of the Ordinance.²⁶⁵

The Sixth Circuit affirmed the district court's decision.²⁶⁶ The Sixth Circuit found that the Ordinance facially discriminated against out-of-state interests by prohibiting the plaintiff's members from using other in-state and out-of-state facilities.²⁶⁷ Although it concurred with the defendant in that the Ordinance did not discriminate against out-of-state waste collectors, who, like in-state collectors, may haul waste to the court's facilities, the court concluded that the Ordinance "discriminates against out-of-state waste disposal facilities."²⁶⁸ Rejecting the defendant's argument that its waste disposal facilities were different from the waste transfer station at issue in *Carbone* because the waste was no longer in commerce once it is disposed of, the Sixth Circuit determined that the Ordinance violated the Commerce Clause by preventing out-of-state firms from providing the service of disposing of the waste, which is often of more commercial value than the waste itself.²⁶⁹

The Sixth Circuit specifically refused to adopt *United Haulers I's* "public-private ownership" distinction.²⁷⁰ The Sixth Circuit only addressed *United Haulers I*, but the Sixth Circuit's reasoning applies equally to the subsequent *United Haulers II*, which was decided twenty-three days later. Because its prior precedents found "DCCD violations in cases where the facility was publicly owned," the Sixth Circuit stated that its rules of precedent precluded it from adopting the Second Circuit's private-public distinction.²⁷¹

Furthermore, the Sixth Circuit "respectfully disagree[d] with the Second Circuit on the proposition that *Carbone* lends support for the public-private distinction drawn by that court."²⁷² The Sixth Circuit argued that the primary concern in *Carbone* was that the challenged ordinance "'de-

263. *Id.* at 900-01.

264. *Id.* at 901.

265. *Id.* at 900.

266. *Id.*

267. *Id.* at 905.

268. *Id.*

269. *Id.* at 905-06.

270. *Id.* at 909-10.

271. *Id.* at 910.

272. *Id.*

prives *out-of-state businesses of access to a local market*” and not that the local beneficiary was a private or public firm.²⁷³ The *Daviess County* court argued that the focus of the *Carbone* court’s DCCD analysis “was on the economic harm to out-of-state actors and the local market” resulting from the ordinance’s “‘bar[ring] the import of the processing service.’”²⁷⁴ Accordingly, the Sixth Circuit concluded that “the crux of the inquiry is whether the local ordinance burdens interstate commerce, not whether the local entity benefited by the ordinance is publicly owned.”²⁷⁵ Even *United Haulers I* had quoted the seminal language in the Supreme Court’s 1949 decision in *H.P. Hood & Sons v. Du Mond* that the purpose of the Commerce Clause “is that every farmer and craftsmen shall be encouraged to produce by the certainty that he will have free access to every market in the Nation.”²⁷⁶ The Sixth Circuit maintained that the “free access” principle required courts to focus on a law’s impact on out-of-state markets rather than whether the local beneficiary of a challenged law happened to be a private or public entity.²⁷⁷

The *Daviess County* court argued that the Second Circuit had mistakenly assumed that the *Carbone* Court’s references to “‘rival businesses’” and “‘local enterprise’” must refer to private businesses, but the Sixth Circuit contended that

[a] municipality can be considered a local business in competition with out-of-state businesses, and a municipality can participate in local enterprise. While the Supreme Court expressed concerns about aiding local enterprise at the expense of rival businesses, these concerns remain regardless of whether the municipality owns the favored business.²⁷⁸

According to the *Daviess County* court, the *Carbone* Court’s central concern was that the ordinance in that case “squelch[ed] competition altogether, leaving no room for outside investment” and not whether the favored firm was public or private.²⁷⁹ The Sixth Circuit reasoned that the majority opinion in *Carbone* never accepted the public-private decision urged by Justice O’Connor’s concurring opinion or Justice Souter’s dissenting opinion.²⁸⁰ Justice Souter’s dissenting opinion explicitly stated, “the majority ignores this distinction between public and private enterprise.”²⁸¹

273. *Id.* at 910-11 (quoting *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (emphasis supplied by Sixth Circuit)).

274. *Id.* at 911 (quoting *Carbone*, 511 U.S. at 392).

275. *Id.*

276. *Id.*; *United Haulers I*, 261 F.3d 245, 254 (2d Cir. 2001) (quoting *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 539 (1949)).

277. *Daviess County*, 434 F.3d at 910-11.

278. *Id.* at 911.

279. *Id.*

280. *Id.* at 911-12.

281. *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 420 (1994) (Souter, J., dissenting).

The *Daviess County* court determined that the majority opinion in *Carbone* treated the waste transfer facility as owned in fact by the municipality, because the Town would acquire the facility for one dollar after the private firm operated it for five years.²⁸² The *Carbone* Court stated, “The object of this arrangement was to amortize the cost of the transfer station: The town would finance *its* new facility with the income generated by the tipping fees.”²⁸³ Furthermore, the *Carbone* Court made several other references to the facility’s public ownership when it characterized it as a “town-sponsored facility” and as “[the Town’s] project.”²⁸⁴ The Sixth Circuit concluded, “The [*Carbone*] majority did not find that the ordinance discriminated against interstate commerce because the waste transfer facility was privately owned, and we find that the Supreme Court implicitly rejected the public-private distinction.”²⁸⁵

The Sixth Circuit agreed with the *United Haulers I* court’s statement that “[t]he common thread in the Court’s [DCCD] jurisprudence . . . is that a local law discriminates against interstate commerce when it hoards local resources in a manner that favors local business, industry or investment over out-of-state competition.”²⁸⁶ But the *Daviess County* court found that Daviess County was “acting as a local business in the local industry of waste disposal.”²⁸⁷ Rejecting *United Haulers I* private-public distinction, the Sixth Circuit determined that Daviess County’s ordinance placed it “in a dual role: as a local business selling waste disposal services, and as a local government hoarding ‘waste, and the demand to get rid of it, for the benefit’ of this business.”²⁸⁸ The *Daviess County* court concluded that “[t]he fact that Defendant acts as both a business and a government, as opposed to just a government, does not cloak its facially protectionist activity from the appropriate scrutiny under the Commerce Clause.”²⁸⁹ Accordingly, the Sixth Circuit affirmed the district court’s decision that the Ordinance violated the DCCD and its permanent injunction against the Ordinance.

C. ANALYSIS OF *UNITED HAULERS* AND *DAVIESS COUNTY*

The *Daviess County* decision made a strong argument that the *Carbone* majority opinion would not apply a different standard to public facilities and that the *Carbone* majority would likely have invalidated the Daviess County flow control ordinance.²⁹⁰ *Carbone*, however, applied the per se test too broadly. Although lower courts may not overrule *Carbone*, there are good reasons to read that case as narrowly as possible, because the

282. *Daviess County*, 434 F.3d at 912.

283. *Id.* (quoting *Carbone*, 511 U.S. at 387 (emphasis supplied by Sixth Circuit)).

284. *Id.* (quoting *Carbone*, 511 U.S. at 393-94).

285. *Id.*

286. *Id.* (quoting *United Haulers I*, 261 F.3d 245, 261 (2d Cir. 2001)).

287. *Id.*

288. *Id.* (quoting *Carbone*, 511 U.S. at 392).

289. *Id.*

290. See *supra* notes 270-81, 288 and accompanying text.

per se approach fails to consider whether a local law has minimal effects on interstate commerce. The Supreme Court at times has recognized that the per se test should apply only to cases where a law discriminates between in-state and out-of-state competitors.²⁹¹ In *General Motors Corp. v. Tracy*, the Court stated that “the dormant Commerce Clause’s fundamental objective [is] preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors.”²⁹²

Even if public waste monopolies should be subject to the same standard as private firms,²⁹³ the Second Circuit, in *United Haulers I* and *II*, effectively demonstrated that flow control laws that do not discriminate between local firms and foreign firms should be analyzed under the *Pike* test, because they are evenhanded.²⁹⁴ Because the flow control ordinances at issue did not confer preferential advantages on local competitors, courts should not apply the per se discrimination test to laws favoring public facilities. In applying the *Pike* test, the *United Haulers II* decision made a convincing argument that the ordinances placed only a minimal burden on interstate commerce, that they provided several important benefits, and that no alternative could achieve all of those benefits.²⁹⁵ If a law primarily burdens local residents, there is no actual evidence of harm to foreign firms, and there are significant public benefits from the law for which there are no alternatives, courts should follow *United Haulers II* and hold that such a law is constitutional under the DCCD.²⁹⁶

IV. A MODIFIED THREE PART TEST FOR PUBLIC FACILITIES

A. NARROWING THE PER SE TEST

The per se test used by the Court since its 1978 decision in *City of Philadelphia* is too inflexible in rejecting any local law that theoretically discriminates against out-of-state commerce.²⁹⁷ According to Professor O’Grady:

[A] “discriminatory” state statute would theoretically include any statute that benefits, even slightly, economic players within a state to the detriment of their out-of-state competitors. It is irrelevant to the question of discrimination whether the statute was designed to effect a legitimate, non-protectionist purpose, and it is irrelevant if the de-

291. McGreal, *supra* note 15, at 1217-22; *supra* notes 5, 44-45, 53 and accompanying text.

292. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997).

293. *Supreme Court, 1993 Term, supra* note 172, at 159.

294. *See supra* notes 197-200, 230-33 and accompanying text.

295. *See supra* notes 259-61 and accompanying text.

296. *See supra* notes 237-61 and accompanying text.

297. O’Grady, *supra* note 32, at 627-29 (arguing that a per se discrimination test is too broad); Verchick, *supra* note 29, at 1249 (same).

gree of discrimination is minimal.²⁹⁸

In *Carbone*, the challenger was a local business and there was no evidence of harm to out-of-state interests, but the majority presumed that the ordinance was discriminatory and did not consider the law's actual burden on interstate commerce.²⁹⁹ The Court's overly broad per se discrimination test contributes to the incoherence of its DCCD, because the Court inevitably selectively applies a test that in theory could invalidate a wide range of state and local laws.³⁰⁰ The Court occasionally has recognized that the per se test should apply only to cases where a law discriminates between in-state and out-of-state competitors.³⁰¹ The Court should reformulate the *Pike* test by: (1) following the *United Haulers* decisions whenever a law does not discriminate between local and foreign private firms; (2) examining whether the law is purposefully protectionist; and (3) establishing a rebuttable presumption that the law is valid under the *Pike* test when the burdens of local ordinances fall much more heavily on local customers or taxpayers than on out-of-state interests.³⁰²

The Court's overuse of the per se test undermines federalist values by ignoring the benefits of state and local laws.³⁰³ An irony is that three members of the *Carbone* majority—Justices Scalia, Kennedy and Thomas—are avowed federalists who have often emphasized the importance of preserving traditional state authority; Justice O'Connor, who concurred in *Carbone*, has similar federalist views.³⁰⁴ Professor Fallon has argued that Justices O'Connor and Kennedy have often joined expansive DCCD decisions, because their "substantive conservatism. . . draws them to view the Commerce Clause as embodying antiregulatory, procompetitive ideals."³⁰⁵ The collection and disposal of waste is a traditional local government function, but neither the *Carbone* majority nor Justice O'Connor ever discussed the Court's federalist precedent in *California Reduction* and *Gardner*, both of which approved local waste mo-

298. O'Grady, *supra* note 32, at 627-28.

299. See *supra* notes 47, 105-14 and accompanying text.

300. Heinzerling, *supra* note 33, at 257-64; O'Grady, *supra* note 32, at 583-84.

301. McGreal, *supra* note 15, at 1217-22; *supra* notes 56-60 and accompanying text.

302. See *infra text following* note 330.

303. O'Grady, *supra* note 32, at 628-29.

304. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs* (SWANCC), 531 U.S. 159, 174 (2001) (emphasizing limits of Congress' authority under the Commerce Clause to regulate matters that are within traditional areas of local or state government responsibility; Justices O'Connor, Scalia, Kennedy and Thomas joined the majority opinion); *United States v. Morrison*, 529 U.S. 598 (2000) (same); *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (same; Justices Scalia and Thomas joined the majority opinion; Justice Kennedy, joined by Justice O'Connor, concurred and expressed similar views); *Lopez*, 514 U.S. at 576-83 (Kennedy, J., concurring) (same); Paul Boudreaux, *Federalism and the Contrivances of Public Law*, 77 ST. JOHN'S L. REV. 523, 543-47, 552-55, 563, 590 (2003) (discussing and criticizing the Rehnquist Court's use of "tradition" to restrict congressional authority under the Commerce Clause); Bradford C. Mank, *Can Congress Regulate Intrastate Endangered Species Under the Commerce Clause? The Split in the Circuits over Whether the Regulated Activity Is Private Commercial Development or the Taking of Protected Species*, 69 BROOK. L. REV. 923, 929, 950-51 (2004) (same).

305. Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 470-71 (2002).

nopolies, although neither case involved the Commerce Clause.³⁰⁶ Even more ironic is that Justices Scalia and Thomas believe that the Court's DCCD is a mistake that the Court should abandon, but they voted in favor of the expansive per se test in *Carbone*.³⁰⁷ In the near future, Justice Thomas is more likely than Justice Scalia to repudiate the Court's precedent in this area.³⁰⁸ With the recent arrival of Chief Justice Roberts and Justice Alito, there is some hope that the Court could reconsider its broad use of the per se doctrine in light of giving states more flexibility in managing waste issues.

In considering a facility's public benefits, courts should weigh likely congressional policy in the area. As Justice O'Connor acknowledged in her concurring opinion in *Carbone*, several provisions in RCRA and its legislative history implied that Congress thought local communities would use flow control measures to finance the recycling and incineration facilities that the statute clearly encouraged local and state governments to build.³⁰⁹ Also, a court should realistically consider the advantages that public facilities provide in serving congressional goals. Public waste facilities typically promote RCRA's preference for waste reduction, recycling, and incineration over cheaper, but less environmentally sound landfills.³¹⁰ Realistically, most public waste facilities will not be built unless flow control laws provide a guaranteed minimum amount of waste.³¹¹

When local laws favoring public or quasi-public facilities discriminate equally against in-state and out-of-state private firms, such as the Clarkstown facility, the Court should apply the *Pike* test or perhaps a purposeful discrimination test or local burdens test, which is discussed below. Justice Souter, in his dissenting opinion in *Carbone* and the two *United Haulers* decisions, made a strong case for not applying the per se test to local laws that favor public facilities but do not discriminate between local and out-of-state private firms.³¹² Local laws that favor public facilities are more likely to promote public values such as public health and the environment than laws that simply promote local private firms.³¹³

B. A REFORMULATED PIKE TEST

There has been disagreement among Supreme Court Justices about when and how to apply the *Pike* test. In his concurring opinion in *West Lynn Creamery*, Justice Scalia observed: "Once one gets beyond facial discrimination our negative-Commerce-Clause jurisprudence becomes

306. See *supra* notes 174-77 and accompanying text.

307. See *supra* notes 13-14 and accompanying text.

308. See *id.*; see also *supra* note 38 and accompanying text.

309. See *C & A Carbone v. Town of Clarkstown*, 511 U.S. 338, 408-10 (1994) (O'Connor, J., concurring); Diederich, *supra* note 78, at 186-95 (arguing that the RCRA gives local governments a primary role in solid waste management); *supra* note 80 and accompanying text.

310. See *supra* note 82 and accompanying text.

311. See *supra* note 85 and accompanying text.

312. *United Haulers I*, 261 F.3d 245, 260-61 (2d Cir. 2001).

313. *Id.*

(and long has been) a 'quagmire.'"³¹⁴ Justice Scalia has argued that the *Pike* test provides no guidance for how judges should balance competing local and national interests so that the balancing is like "judging whether a particular line is longer than a particular rock is heavy."³¹⁵ Some commentators have proposed alternative balancing approaches that are more refined.³¹⁶ There is a split among the circuits regarding whether a court will "apply the ad hoc balancing scheme to all evenhanded statutes or merely to those that result in disparate treatment between in-state and out-of-state interests."³¹⁷

In many of the cases in which a court has applied the *Pike* test and invalidated a law, including *Pike* itself, the court was arguably striking down the law because it had a discriminatory purpose.³¹⁸ Justice Souter has argued that the Court does not "balance" competing local and interstate interests when it applies the *Pike* test:

[a]lthough this analysis of competing interests has sometimes been called a 'balancing test,' it is not so much an open-ended weighing of an ordinance's pros and cons, as an assessment of whether an ordinance discriminates in practice or otherwise unjustifiably operates to isolate a State's economy from the national common market.³¹⁹

In *General Motors Corp. v. Tracy*, the Court acknowledged that "several cases that have purported to apply the undue burden test (including *Pike* itself) arguably turned in whole or in part on the discriminatory character of the challenged state regulations . . ."³²⁰ Courts might be consider a law's possible discriminatory motives when they apply the *Pike* test, because this issue is arguably easier for a court to weigh than an open-ended

314. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (1994) (Scalia, J., concurring) (citing *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)); Mank, *supra* note 25, at 61.

315. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring); ERWIN CHEREMINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 5.3.5, at 424 (2d ed. 2002) ("[*Pike* balancing] has been criticized for being unpredictable and arbitrary."); Mank, *supra* note 25, at 29, 61 (same).

316. Fox, *supra* note 30, at 209-13 (proposing rational basis test); Michael A. Lawrence, *Towards a More Coherent Dormant Commercial Clause: A Proposed Unitary Framework*, 21 HARV. J.L. PUB. POL'Y 395, 400, 420-29 (1998) (proposing a "Unitary Framework").

317. Peter C. Felmlly, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 ME. L. REV. 467, 483 & n.130 (2003) (citing cases); Fox, *supra* note 30, at 178 (circuits have split on applying *Pike*); see also O'Grady, *supra* note 32, at 632-33

(Although the Supreme Court and the majority of lower courts apply *Pike*'s flexible balancing test to all local legislation, a minority of circuit courts have adopted the position advanced in this Article that the only burdens suitable for analysis under the balancing test are burdens that actually "discriminate" against interstate commerce.)

318. Fox, *supra* note 30, at 179, 189; Mank, *supra* note 25, at 29, 61-62; Regan, *supra* note 33, at 1212-20.

319. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 423 (1994) (Souter, J., dissenting); Lawrence, *supra* note 316, at 428-29 (discussing criticism of *Pike* balancing test by Justice Souter); Mank, *supra* note 25, at 29, 61; Regan, *supra* note 33, at 1092 (arguing *Pike* test is concerned with preventing purposeful economic protectionism).

320. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 300 n.12 (1997); Mank, *supra* note 25, at 61.

balancing test.³²¹

In light of federalist principles that encourage states to act as laboratories to test new ways to solve social problems,³²² courts should apply the *Pike* test in a deferential manner unless a significant purpose of the law is aimed at protecting local private interests at the expense of foreign competition or unless most of the law's burdens fall on foreign residents or firms. For example, the *Pike* Court indicated that courts applying its test should consider the availability of alternatives that have less of an impact on interstate commerce, stating that whether a burden on interstate commerce would be tolerated depends on the "nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."³²³ There is a strong argument that courts should apply a more deferential approach to alternatives for nondiscriminatory laws rather than subjecting them to the strict per se test.³²⁴ If the Supreme Court considers recycling to be less effective than a ban on the sale of plastic nonreturnable milk containers,³²⁵ courts should also consider that many states have adopted flow control ordinances, because it is unrealistic to fund expensive recycling or incineration facilities without a minimum guaranteed volume of waste.³²⁶

In applying the *Pike* test, courts should defer to the means selected by local governments if they are based on local political or social realities rather than on an effort to squelch foreign firms. For example, although it was theoretically correct that Clarkstown could have financed the project through taxes or bonds, the *Carbone* decision and Justice O'Connor's concurring opinion failed to consider the substantial political obstacles and costs in using taxes or bonds rather than a flow control ordinance for financing the project. The *Carbone* majority and Justice O'Connor's concurring opinion mentioned the use of bonds to finance these facilities, but it is difficult to justify a long-term bond to build an expensive facility without a guaranteed minimum volume of waste.³²⁷ For instance, in *SSC*

321. Regan, *supra* note 33, at 1092, 1093-95 (arguing Court should not use a balancing test in applying *Pike* test but "should be concerned only with preventing purposeful protectionism."); Verchick, *supra* note 29, at 1269-70 (same); *supra* note 318 and accompanying text.

322. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985) ("The science of government . . . is the science of experiment"); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); see generally William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355 (1994) (explaining that the Commerce Clause is a "natural laboratory" for federalism).

323. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); Fox, *supra* note 30, at 204-05.

324. CHEMERINSKY, *supra* note 315, § 5.3.5, at 420 ("The Court never has invalidated a nondiscriminatory state law on the ground that the goal could be achieved through a means that is less burdensome on interstate commerce."); Fox, *supra* note 30, at 204-06.

325. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473-74 (1981).

326. *Supra* note 85 and accompanying text.

327. See *Diederich*, *supra* note 78, at 190-91, 223-24; McCauliff, *supra* note 59, at 650, 656-57.

Corp. v. Town of Smithtown, “the towns financed construction of the incinerator through tax-free bonds issued by the New York State Environmental Facilities Corporation, a public authority,” but the bonds were “secured primarily by a twenty-five year contractual obligation of Smithtown and Huntington to reimburse Ogden for the construction and operation costs of the incinerator.”³²⁸ Without a flow control ordinance, the towns could not have signed the long term contract with the private operator necessary to secure the bond funding. Without a flow control ordinance guaranteeing a minimum flow, the only practical way to pay for expensive public waste facilities is through taxes, but taxes for such facilities are often politically unpopular and unrealistic.³²⁹ The free collection or disposal of waste through taxation should not be the only option left to local governments given the understandable reluctance of local voters to impose heavy tax burdens on themselves. The *Carbone* majority should have applied the *Pike* test rather than the per se test considering the fact that over twenty states had enacted laws authorizing local or regional flow control ordinances as evidence that this method was strongly preferred by many states as the only practical means to build needed waste facilities.³³⁰

In light of all the problems with the Court’s application of the *Pike* test, the *United Haulers* decisions provide a first step in limiting the Supreme Court’s overuse of the per se test and reformulating the *Pike* test to make it more workable. Whenever a law does not discriminate between local and foreign private firms, courts should follow the *United Haulers* decisions and apply the more deferential *Pike* review standard, not the per se standard, to determine if the law imposes more than incidental burdens on interstate commerce and whether the law’s benefits significantly outweigh any burdens to foreign interests. Additionally, to help guide its application of the *Pike* test, courts should consider whether the local government had a discriminatory purpose in mind, as opposed to legitimate health and safety concerns, and whether the local burdens are greater or smaller than the burdens on interstate commerce.

C. A DISCRIMINATORY PURPOSE TEST

Some justices and commentators have argued that the Court should reformulate the DCCD to examine whether a local law is purposefully protectionist, not simply incidentally discriminatory in effect, because the Court’s primary focus in DCCD cases has been on invalidating laws that

328. *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 507 (2d Cir. 1995).

329. *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383, 428-29 (1994) (Souter, J., dissenting) (observing “[w]aste disposal with minimal environmental damage requires serious capital investment . . . and there are limits on any municipality’s ability to incur debt or to finance facilities out of tax revenues”); McCauliff, *supra* note 59, at 663, 672-73 (arguing that it is difficult to convince voters to pay taxes for waste facilities).

330. *See supra* notes 75, 311 and accompanying text.

seek to advantage local firms at the expense of foreign competition.³³¹ Justice Souter in his *Carbone* dissent argued that all or almost all of the Court's prior cases invalidating local laws under the DCCD involved purposeful discrimination.³³² He argued, "With perhaps one exception, the laws invalidated in those cases were patently discriminatory, differentiating by their very terms between in-state and out-of-state (or local and nonlocal) processors."³³³ The purposeful discrimination approach was the standard in earlier Court decisions, including *Dean* and *Hood*, both of which carefully considered the local government's health and safety rationale for the challenged law, though both ultimately concluded that the laws were invalid because they had the underlying purpose of favoring local producers of milk.³³⁴ In 1994, the same year that it decided *Carbone*, the Court in *West Lynn Creamery* stated that recent cases "have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects."³³⁵ The *West Lynn Creamery* decision demonstrates that the Court can consider a local law's purposes and effects without repudiating its precedent. In *Camps Newfound/Owatonna v. Town of Harrison*, Justice Scalia, who was joined by Chief Justice Rehnquist and Justices Thomas and Ginsburg, argued in his dissenting opinion that even a facially discriminatory law could be valid under the Clause if it were enacted for an appropriate purpose, stating, "The most remarkable thing about today's judgment is that it is rendered without inquiry into whether the purposes of the tax exemption justify its favoritism. . . . Facially discriminatory or not, the exemption is [not] an artifice of economic protectionism."³³⁶

The Court should abandon the rigid per se approach of *Carbone*, and reformulate the *Pike* test to include consideration of a law's likely motives, as well as its relative benefits and burdens.

According to Professor O'Grady,

331. O'Grady, *supra* note 32, at 575, 587-03 (arguing that the primary DCCD concern should be the "long-recognized prohibition against resident economic protectionism"); Regan, *supra* note 33, at 1092-95 (same); Verchick, *supra* note 29, at 1269-70 (same); *but see* Winkfield F. Twyman, Jr., *Beyond Purpose: Addressing State Discrimination in Interstate Commerce*, 46 S.C. L. REV. 381, 419-21, 428 (1995) (rejecting purposeful discrimination approach of Professor Regan and arguing that the Court in DCCD cases "should approach all commercial activity with an inquiry about the real discrimination in effect").

332. *Carbone*, 511 U.S. at 414-15.

333. *Id.* (Souter, J., dissenting). In a footnote, Justice Souter discussed whether *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) was patently discriminatory. *Carbone*, 511 U.S. at 415 n.2.

334. *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951) (striking down a city ordinance banning the local sale of milk that had not been pasteurized and bottled within five miles of the city center); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535, 538-39 (1949) (stating the rule against purposeful economic favoritism but acknowledging that states may "impose even burdensome regulations in the interest of local health and safety"); Verchick, *supra* note 29, at 1269-70, 1272, 1310 n.185, 1306-09 (stating *Dean* and *Hood* examined law's purpose).

335. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994).

336. *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 602-03 (1997) (Scalia, J., dissenting) (emphasis in original); KENDALL ET AL., *supra* note 35, at 88-89.

Reviewing a statute for economic protectionism differs from a discrimination-focused review in three fundamental respects: (1) a protectionism determination does not require a court to engage in the precise comparisons of similarly situated classifications demanded by a discrimination review, (2) a review for protectionism focuses directly on legislative purpose, (3) a review for protectionism permits a reviewing court to consider the magnitude of a statute's impact on interstate commerce.³³⁷

Thus, a court using a protectionist test, instead of the *per se* test, can consider a law's motives and actual impact on interstate commerce.

In light of federalist principles respectful of state autonomy, some commentators would place the burden on the challenger to prove that a law that has an apparently legitimate, nondiscriminatory purpose actually has an underlying discriminatory purpose to advantage local private firms at the expense of foreign competition.³³⁸ Protectionist behavior would be defined as "the imposition of tariffs, embargoes, quotas, and the like, for the purpose of protecting local producers (farmers, manufacturers, laborers) against foreign competition."³³⁹ A law having protectionist effects would not automatically be considered discriminatory. Professor Regan has argued, "Protectionist effect does not make a statute protectionist . . . nor does protectionist effect have any constitutional significance in itself. The Court both is and should be concerned with purpose. Protectionist effect is significant evidence on the issue of protectionist purpose; but it is just that, evidence and no more."³⁴⁰ He further argues that it is much easier for a judge to determine a law's purpose than to apply the *Pike* balancing test.³⁴¹ A court would examine whether protectionist motivations by the legislature more likely than not "contributed substantially" to the adoption of the challenged law or any important component of the law.³⁴²

A significant argument against using a purpose or motive based test for the DCCD is that the Court has avoided explicitly considering these issues because of the complex evidentiary issues involved and an unwillingness to publicly accuse officials of such behavior.³⁴³ However, the Court

337. O'Grady, *supra* note 32, at 589-603.

338. Lawrence, *supra* note 316, at 416, 422; O'Grady, *supra* note 32, at 634; Regan, *supra* note 33, at 1095, 1148.

339. Regan, *supra* note 33, at 1112.

340. *Id.* at 1095.

341. *Id.* at 1143-54; *see also* O'Grady, *supra* note 32, at 597-98 (arguing that a DCCD review of "protectionist concerns is often an uncomplicated task").

342. Regan, *supra* note 33, at 1148-51 ("the court should strike down a state law if and only if it finds by a preponderance of the evidence that protectionist purpose on the part of the legislators contributed substantially to the adoption of the law or any feature of the law."); O'Grady, *supra* note 32, at 599 ("Thus, state legislation will be 'protectionist' under the definition of protectionism offered here if the record indicates that it was substantially motivated by the need to protect resident economic interests, or, if in an attempt to address legitimate concerns, the state isolates itself from the national economy in a way that affects interstate commerce.").

343. O'Grady, *supra* note 32, at 594-98 (listing objections to motive review, but arguing for motive review); Regan, *supra* note 33, at 1285-86 (same).

has in fact implicitly considered motive, sometimes by questioning the local government's expressed rationale for a law.³⁴⁴ When it claims to be balancing under *Pike*, the Court is often considering motive or purpose.³⁴⁵

Most flow control ordinances are not purposefully discriminatory. The usual objections to import or export restrictions do not apply to flow control ordinances. One might argue that flow control ordinances that require waste to be sent to only in-state facilities are purposefully protectionist, because they embargo the flow of waste to out-of-state facilities and isolate the flow control jurisdiction from the national market.³⁴⁶ Protectionist laws that isolate a state from national markets usually are implicitly hostile to other jurisdictions.³⁴⁷ By contrast, flow control ordinances that discriminate equally against local and of out-of-state private firms do not provoke hostility and retaliation from other states.³⁴⁸ It is notable that twenty-three state attorneys general filed amicus briefs supporting Clarkstown in the *Carbone* case, but not a single state supported Carbone's challenge.³⁴⁹

For public waste facilities, there is usually no attempt "to advantage local actors at the expense of their foreign competitors."³⁵⁰ Indeed, the primary burden of most flow control laws falls on local residents.³⁵¹ Instead, local governments are attempting to address a flaw in the waste market that hinders the construction of expensive incinerators or recycling facilities without the guarantee of a minimum waste flow.³⁵² For flow control ordinances requiring the use of public waste facilities, the purpose is to promote the public health and safety by permitting comprehensive waste reduction, recycling, and incineration of waste to avoid disposing of it in landfills, which are major goals of the RCRA.³⁵³ Furthermore, since interstate waste disposal generally causes harm because waste is sent to poorer, more rural and polluted states, flow control ordinances actually benefit other jurisdictions by reducing harmful waste in those states.³⁵⁴ Accordingly, flow control ordinances that discriminate

344. Regan, *supra* note 33, at 1224-25, 1285-86; see *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 352-53 (1977) (questioning law's "ostensible consumer protection purpose").

345. Regan, *supra* note 33, at 1286.

346. O'Grady, *supra* note 32, at 588, 607-08.

347. *Id.* at 593.

348. *United Haulers I*, 261 F.3d 245, 261 (2d Cir. 2001).

349. See *supra* note 103 and accompanying text.

350. Regan, *supra* note 33, at 1095.

351. See *supra* notes 151, 165 and *infra* note 392 and accompanying text.

352. See *supra* notes 85-86 and accompanying text.

353. See *supra* notes 81, 88-91 and accompanying text.

354. *Fort Gratiot Sanitary Landfill v. Mich. Dept. of Natural Res.*, 504 U.S. 353, 372-73 (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."); Engel, *supra* note 90, at 1493-94 & app. (presenting empirical data that states that are net waste importers are poorer, more rural and more polluted than net exporting states); Verchick, *supra* note 29, at 1247-48, 1294-97 (discussing policy implications of Engel's empirical findings).

equally against local and of out-of-state private firms are not purposefully discriminatory to foreign jurisdictions.

Flow control ordinances that require the use of public facilities are similar to laws requiring refundable deposits on beverage containers in that they seek to protect the environment rather than to advantage local firms at the expense of foreign firms. In *American Can Co. v. Oregon Liquor Control Commission*, the Oregon Court of Appeals upheld the constitutionality of an Oregon statute that required a specified refundable deposit on beverage containers to reduce litter and solid waste disposal.³⁵⁵ Out-of-state container makers argued that the two-cent refund for standardized containers advantaged local bottlers, but the court found that the scheme gave an advantage to manufacturers who were closer to retail outlets regardless of whether they were in-state or out-of-state for the legitimate reason of facilitating the redemption of the containers rather than for discriminatory purposes.³⁵⁶ Applying the *Pike* test, the Oregon court concluded that the law served the legitimate purpose of reducing environmental waste, which was consistent with federal environmental statutes, that it was non-discriminatory, that it imposed only incidental burdens on interstate commerce, and, therefore, that the law was constitutional.³⁵⁷ Under a proper federalist system, federal courts should allow a state such as Oregon to adopt legislation with the predominant purpose of serving important public goals such as preserving the environment, even if there are some incidental burdens on interstate commerce.³⁵⁸ The *American Can* court stated, “[The Commerce Clause] was not meant to usurp the police power of the states which was reserved under the Tenth Amendment.”³⁵⁹ Flow control ordinances that require the use of public facilities are similar in that their predominant purpose is to serve environmental goals rather than advantage local firms at the expense of foreign firms.

In *Minnesota v. Clover Leaf Creamery Co.*, the Supreme Court upheld a Minnesota statute prohibiting the sale of milk in plastic non-returnable containers to serve environmental and energy conservation purposes.³⁶⁰ Applying the *Pike* test, the Court held that the statute did not violate the Commerce Clause, because it did not discriminate against out-of-state sellers, the incidental burden imposed on interstate commerce because Minnesota’s requirements were different from other states was relatively minor and was not clearly excessive in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems, and no approach with a lesser im-

355. *Am. Can. Co. v. Or. Liquor Control Comm’n*, 517 P.2d 691, 702-03 (Or. Ct. App. 1973).

356. *Id.* at 703.

357. *Id.* at 696-703; Regan, *supra* note 33, at 1116-19; Verchick, *supra* note 29, at 1269 n.169.

358. Regan, *supra* note 33, at 1118-19.

359. *Am. Can.*, 517 P.2d at 696.

360. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).

pact on interstate activities was available.³⁶¹ The Court found the Minnesota statute valid even though it imposed some incidental burdens on foreign producers for whom it was cheaper to make plastic non-returnable containers than to change its production methods for a single market.³⁶² The Court implied that a state may incidentally harm foreign businesses as long as the primary goal is to advance a legitimate state purpose and any harm to interstate commerce is not a significant purpose of the law.³⁶³ The Court focused on the statute's primary purpose of promoting conservation and reducing waste and did not actually balance its costs and benefits, despite referring to balancing under the *Pike* test.³⁶⁴ Applying a deferential rational basis review of the law, the Court stated that it was not its role "to decide on the wisdom and utility of legislation," or to "substitute [its] evaluation of legislative facts for that of the legislature."³⁶⁵ If the Supreme Court in evaluating alternatives can consider that recycling is less effective than a ban on the sale of plastic non-returnable milk containers,³⁶⁶ courts should also consider that many states have adopted flow control ordinances, because it is unrealistic to fund expensive recycling or incineration facilities without a minimum guaranteed volume of waste.

If a tax or law is evenhanded, the Court has rejected DCCD challenges even if most of the burden falls on foreign residents or firms.³⁶⁷ In *Commonwealth Edison Co. v. Montana*, the Court upheld a severance tax on coal that made no distinction between in-state and out-of-state coal even though ninety percent of Montana's coal is sent to out-of-state buyers and hence ninety percent of the burden of the tax falls on foreign purchasers.³⁶⁸ In a 2005 decision, *American Trucking Ass'n v. Michigan Public Service Commission*, the Court held that a Michigan law imposing a flat \$100 fee upon all trucks engaged in intrastate commercial hauling transactions did not facially discriminate against interstate or out-of-state activities or enterprises, because it applied evenhandedly to all carriers making domestic journeys, even though it imposed a higher burden per mile on the average out-of-state truck than the average in-state truck.³⁶⁹ In light of cases where the Court has upheld neutral laws that in fact place heavier burdens on foreign interests, a flow control ordinance that neutrally discriminates against all in-state and out-of-state private firms should not be subject to the per se test, unless there is evidence of an actual purpose to discriminate against foreign firms.

361. *Id.* at 471-74.

362. *Id.*

363. Regan, *supra* note 33, at 1127-28.

364. *Id.* at 1240-41.

365. *Clover Leaf*, 449 U.S. at 469-70; Fox, *supra* note 30, at 194-95.

366. *See, e.g., Clover Leaf*, 449 U.S. at 473-74.

367. *Id.* at 1165-74.

368. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617-29 (1981).

369. *Am. Trucking Ass'n v. Mich. Pub. Serv. Comm'n*, 125 S. Ct. 2419, 2421-26 (2005).

D. PRESUME THAT A LOCAL ORDINANCE IS VALID IF LOCAL
CITIZENS BEAR MOST OF THE BURDENS

Another possible test that is generally consistent with the *Pike* test is whether local citizens bear most of the burdens of a local ordinance. In his *Carbone* dissent, Justice Souter argued that the Court has implicitly applied a standard of presumptively invalidating laws that primarily burden foreigners; therefore, the Court should also treat laws that primarily burden local residents as presumptively valid.³⁷⁰ For example, the Court's decision in *South-Central Timber Development, Inc. v. Wunnicke*,³⁷¹ which invalidated an Alaska law requiring that timber sold by the State of Alaska be processed by in-state mills, emphasized that the law was discriminatory because its "burden falls principally upon those without the state."³⁷² Justice Souter explained, "Requiring that Alaskan timber be milled in that State prior to export would add the value of the milling service to the Alaskan economy at the expense of some other State, but would not burden the Alaskans who adopted such a law."³⁷³ He contended that the Court has focused on laws that increase the price of exported goods, because a law whose burden falls "'principally upon those without the state . . . is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state."³⁷⁴ He maintained, "The Commerce Clause was not passed to save the citizens of Clarkstown from themselves."³⁷⁵ Thus, a local burdens test would satisfy the concern of "process protection" advocates that people should not be burdened by laws over which they have no political influence or vote.³⁷⁶ Professor Verchick argues that from the 1930s until the 1980s "the Court examined the burdens on outsiders compared to insiders," but that the Court stopped doing this as it adopted the free market approach to the DCCD exemplified by *Carbone*.³⁷⁷ Thus, adopting a local burdens test would in many ways return the Court to long standing precedent.

Similarly, Professor Gergen has argued that that the focus of courts in DCCD cases should be on "state laws of disutility," which he defines as

370. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 411, 417, 422, 424-29 (1994) (Souter, J., dissenting).

371. 467 U.S. 82 (1984).

372. *Id.* at 92.

373. *Carbone*, 511 U.S. at 425 (Souter, J., dissenting) (citing *cf. S.-Cent. Timber*, 467 U.S. at 92).

374. *Id.* at 426 (quoting *S.-Cent. Timber*, 467 U.S. at 92).

375. *Id.* at 430; Cox, *supra* note 51, at 185.

376. Commentators have disagreed about whether a process protection rationale does or should underlie the DCCD. Compare Verchick, *supra* note 29, at 1251-58, 1265-66 (arguing process protection rationale both does and should underlie the DCCD), with O'Grady, *supra* note 32, at 623-26 ("Exclusive reliance on a process-based analysis to evaluate local legislation is problematic because it is not always a consistent or reliable indicator of either protectionist or discriminatory local legislation."); Regan, *supra* note 33, at 1161-67 (rejecting a process-based analysis as overly broad and insensitive to state autonomy in a federalist system).

377. Verchick, *supra* note 29, at 1266.

“laws that enrich states but at greater expense to out-of-staters or the nation.”³⁷⁸ Additionally, other commentators have argued that laws that primarily burden out-of-region interests are presumptively discriminatory unless the government can provide a sufficient justification.³⁷⁹ Thus, if courts and commentators agree that laws that primarily burden foreigners are suspect under the Clause, then laws whose primary burden falls on in-state residents should generally receive favorable review under the *Pike* test. A local burdens test addresses the fundamental purpose of the DCCD, which is to prevent protectionist legislation that imposes barriers and burdens on foreign interests and interstate commerce to the benefit of selfish local interests.³⁸⁰

The Court has considered who bears the primary burden of a regulation in deciding its validity under the DCCD.³⁸¹ For example, in *City of Philadelphia v. New Jersey*, the Court found that New Jersey’s law banning out-of-state waste from its landfills violated the DCCD, because the law was “an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey’s remaining landfill sites.”³⁸² In *Sporhase v. Nebraska ex rel. Douglas*, the Court considered the restrictions that Nebraska imposed on its own citizens in using groundwater in evaluating the constitutionality of the state’s restrictions on interstate transfers of groundwater.³⁸³ The Court observed that “a state that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State. An exemption for interstate transfers would be inconsistent with the ideal of evenhandedness in regulation.”³⁸⁴ The *Sporhase* decision explained, “For Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other.”³⁸⁵ The Supreme Court has upheld discrimina-

378. Mark P. Gergen, *Territoriality and the Perils of Formalism*, 86 MICH. L. REV. 1735, 1740-41 (1988).

379. Lawrence, *supra* note 316, at 417, 423-26; O’Grady, *supra* note 32, at 600.

380. O’Grady, *supra* note 32, at 626-27 (arguing that the primary purpose of the DCCD is to prevent economic protectionism); Regan, *supra* note 33, at 1092, 1113-14, 1165.

381. In *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 581 (1997), the Court stated that “[a] State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.” *See id.* at 580-81 (invalidating, under the Commerce Clause, a discriminatory real property tax exemption, because it “functionally serves as an export tariff that targets out-of-state consumers by taxing the businesses that principally serve them.”). *See Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984) (invalidating manufacturing tax exemption which discriminated against out-of-state manufacturers).

382. *City of Phila. v. New Jersey*, 437 U.S. 617, 629 (1978); Regan, *supra* note 33, at 1121.

383. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 955-56 (1982). Although recognizing that some state restrictions on the export of groundwater are valid, the Court invalidated the Nebraska statute because it contained a reciprocity provision that required other states to make a reciprocity agreement with Nebraska to obtain its groundwater. *Id.* at 956-58.

384. *Id.* at 955-56.

385. *Id.* at 956.

tory taxes that theoretically favor local firms if they do not actually harm out-of-state firms, because they compete in a different market.³⁸⁶ Under a local burdens analysis, the flow control ordinances at issue in *Carbone*, *United Haulers*, and *Daviess County* would all be presumptively constitutional, because local residents bear most of the costs of the respective ordinance and the laws all seek to advance legitimate public health concerns.³⁸⁷

Because the *Pike* test already considers or balances a law's impacts on interstate commerce and local commerce, a local burdens test is generally consistent with the *Pike* standard. One possible difference is that a local burdens test would be easier to apply, because it focuses on one factor, whereas the *Pike* test balances or considers at least two factors. In most circumstances where the majority of a law's local burdens fall on local residents, the law will usually have minimal burdens on interstate commerce and thus would pass the *Pike* test. The local burdens test could be used as a complement to the *Pike* test to give judges a simple rule when laws are presumptively valid under the *Pike* standard. Because the most important purpose of the DCCD is to protect out-of-state interests from parochial discrimination,³⁸⁸ it makes little sense to invalidate legislation that primarily burdens local interests. The classic example of economic protectionism is a law that explicitly favors local private firms at the expense of foreign private firms.³⁸⁹

The purpose of flow control ordinances is to reduce the amount of local waste and ensure its proper recycling or treatment, and such controls are generally not intended to harm foreign interests.³⁹⁰ The *Carbone* Court failed to recognize that there is a difference between laws that impose a ban or tariff on importing foreign waste into a local jurisdiction, which is a burden on foreign importers, and a flow control ordinance that requires a minimum amount of waste to go to designated landfills to finance needed waste facilities. For a flow control ordinance, the predominant motive is ensuring sufficient waste so local communities can afford to invest in recycling facilities or incinerators that, under RCRA's criteria, are environmentally superior to simply land-filling waste.³⁹¹ Local communities bear the primary costs of paying extra tipping fees to operate these facilities and do so by choice rather than selecting cheaper but more environmentally harmful alternatives such as landfills.³⁹²

386. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298-99 (1997); *Alaska v. Arctic Maid*, 366 U.S. 199, 204-05 (1961); McGreal, *supra* note 15, at 1217-22.

387. Verchick, *supra* note 29, at 1265-66 (arguing that the burdens in *Carbone* were local and not discriminatory under the DCCD).

388. Regan, *supra* note 33, at 1165 ("The states may not single out foreigners for disadvantageous treatment just because of their foreignness.").

389. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 416-17 (1994) (Souter, J., dissenting); Regan, *supra* note 33, at 1138.

390. *Id.*; *supra* Pt. II.B.

391. Diederich, *supra* note 78, at 223-24.

392. O'Grady, *supra* note 32, at 607 (arguing that flow control ordinances clearly place heaviest burden on local residents); *supra* note 85-87 and accompanying text.

On balance, flow control ordinances can actually protect the environment of other states by preventing the need for waste to be sent to out-of-state landfills. The *Carbone* majority argued that it was inappropriate for Clarkstown to consider the environment of foreign jurisdictions, because such concerns inappropriately extended the “town’s police power beyond its jurisdictional bounds,”³⁹³ but this argument is specious. There is nothing in the Commerce Clause that should prevent a state or local government from taking actions that benefit other states, unless Congress explicitly prohibits such actions for other reasons.³⁹⁴ Concern for other states is fully consistent with federalist principles. In light of its earlier waste cases prohibiting import bans, *Carbone* is an anomalous decision, because there was no actual evidence of harm to foreign markets and the burdens primarily fell on local residents.³⁹⁵ While import bans are discriminatory and allow states to “hoard” landfill space at the expense of foreign interests, the export restrictions imposed by flow control ordinances reduce a harmful product and thereby are beneficial to foreign jurisdictions that no longer have to landfill the waste now subject to flow control restrictions.³⁹⁶

There will be some cases where it is more difficult to weigh the extent of local versus national burdens. For example, a tariff typically burdens both local consumers and foreign firms to benefit local private firms.³⁹⁷ Because a tariff is purposeful discrimination and usually imposes significant burdens on foreign firms, tariffs should be presumptively invalid. In a close case, a court could err on the side of invalidating a challenged law, because it would likely have a significant burden on interstate commerce.³⁹⁸ Erring on the side of invalidating laws that are at least moderately burdensome to interstate trade or foreign interests is consistent with the *Pike* test.

E. A COMBINATION TEST

To avoid overly broad use of the per se test, whenever a publicly-owned facility discriminates equally against in-state and out-of-state businesses, courts should follow the *United Haulers* decisions and presumptively apply the *Pike* test. Additionally, when they apply the *Pike* test, courts should explicitly consider issues of discriminatory purpose and the relative local burden when they assess a local law’s burdens on interstate commerce and when they weigh whether the law’s benefits outweigh the burdens.

393. *Carbone*, 511 U.S. at 393. From a policy perspective, the farther trash is moved, the greater the risk of spills and contamination. Davies, *supra* note 34, at 259.

394. Regan, *supra* note 33, at 1127, 1133 (providing an example where “Wisconsin passes a law forbidding the sale of alcohol in Wisconsin to Illinois residents (but not Wisconsin residents) under twenty-one” to help Illinois advance its policy of prohibiting drinking by those under twenty-one as consistent with federalist values).

395. See *supra* notes 151-54, 165 and accompanying text.

396. Diederich, *supra* note 78, at 221-26.

397. Heinzerling, *supra* note 33, at 253.

398. Cox, *supra* note 51, at 172; O’Grady, *supra* note 32, at 601-02.

V. CONCLUSION

When it decides *United Haulers*, the Supreme Court should re-think *Carbone's* overly broad definition of discrimination. The Court is unlikely to radically change its approach to the DCCD. Based on its precedent, the Court is likely to continue to use both the per se test and the *Pike* test. A first step toward change would be for the Court to adopt the *United Haulers* decisions' presumptive use of the *Pike* test where public facilities have an effective monopoly, but are non-discriminatory in how they treat local and out-of-state private firms. The Supreme Court at times has recognized that the per se test should apply only to cases where a law discriminates between in-state and out-of-state competitors.³⁹⁹

The Court should supplement the *Pike* test by also considering the purposeful discrimination and the local burden tests.⁴⁰⁰ For instance, the Court could ask whether the local government in building the public facility had the general purpose of serving the public interest or really intended, as in many of the Court's milk cases from the last century, to promote local interests at the expense of out-of-state competitors.⁴⁰¹ Finally, the Court could determine whether the law's burdens fall primarily on local residents.⁴⁰² These changes would enable the Court to establish a DCCD that is more realistic in evaluating local laws' actual benefits to society and burdens on interstate commerce than the current per se test that assumes that any law that theoretically hinders the free market is automatically unconstitutional.⁴⁰³

In applying the *Pike* balancing test, the Court should adopt certain rebuttable presumptions to help it decide a DCCD case. First, a law that does not discriminate between local and foreign private firms is presumptively non-discriminatory and should be reviewed under the *Pike* test. Second, if a substantial majority of the law's burdens fall on local residents, there should be a presumption of non-discrimination and that the law is not "hoarding" resources from other states.

Justice O'Connor's concern in *Carbone* that the national market in waste would be harmed if many jurisdictions adopted similar legislation is a legitimate point to raise,⁴⁰⁴ but flow control ordinances that do not discriminate between local private firms and foreign firms are likely to have net societal benefits and will not harm foreign interests on the whole. Although state protectionist programs are generally inefficient, flow control ordinances are economically efficient in many cases, because they provide incentives for local governments to build necessary facilities such as incinerators and recycling facilities.⁴⁰⁵ Because local residents bear

399. McGreal, *supra* note 15, at 1217-22; *supra* notes 291-92 and accompanying text.

400. *See supra* notes 72, 387-89 and accompanying text.

401. *See supra* notes 208-10 and accompanying text.

402. *See supra* notes 378-80 and accompanying text.

403. *See supra* notes 293-96 and accompanying text.

404. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 406-07 (1994) (O'Connor, J., concurring).

405. *See supra* note 15 and accompanying text.

most of the costs of flow control ordinances, there is little harm to foreign jurisdictions.⁴⁰⁶ Furthermore, there may be a net benefit to foreign jurisdictions because of a reduction in harmful waste, especially to poor, rural, heavily polluted states.⁴⁰⁷ The *Carbone* majority wrongly refused to consider the ordinance's benefits to the national environment.⁴⁰⁸ In a federalist system, a state or local government should be able to consider the positive benefits of a law to other jurisdictions.⁴⁰⁹ Both Justice Souter, in his dissenting opinion in *Carbone*, and the Second Circuit, in the two *United Haulers* decisions, made strong arguments that the public flow control ordinances at issue were non-discriminatory between local and foreign private firms, conferred many social benefits, and imposed costs mainly on local residents rather than on out-of-state interests.⁴¹⁰ Thus, under a modified *Pike* balancing test that considers whether a law discriminates between local and foreign private firms and assesses the relative local benefits and burdens of a law, the flow control ordinances in *Carbone*, *United Haulers* and *Daviess County* should be constitutional. The Supreme Court should affirm the Second Circuit's decision in *United Haulers II*.

406. *Carbone*, 511 U.S. at 429 (Souter, J., dissenting).

407. *Id.* at 393.

408. *See supra* notes 166-68 and accompanying text.

409. *See supra* notes 168 and accompanying text.

410. *See supra* notes 6-8 and accompanying text.

