Trash Is Commerce—Go Directly to Washington and Muddle Along: Solid Waste Management in Tennessee and the Commerce Clause

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It all started with clean drinking water and something known as "Subtitle D," but it wound up winding its way from Washington, D.C., to Nashville to Michigan to New York before settling back in the District of Columbia. With the enactment of the Resource Conservation and Recovery Act of 1976 (RCRA)[1] and the Pollution Prevention Act of 1990,[2] the federal government began setting standards for the protection of the environment across the United States that directly impacted how Tennesseans related to two everyday parts of life: garbage and drinking water. Part of the Environmental Protection Agency's (EPA) regulations enforcing these statutes included rules setting criteria for new and expanding landfills that received municipal solid waste.[3] These new

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1. Resource Conservation Recovery Act of 1991, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6992K (2000)).

2. Pollution Prevention Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388-321.

3. 40 C.F.R. Parts §§ 257.1-258.75 (2004).

rules set a variety of requirements for protecting groundwater, including but not limited to new liners for landfills.[4] In order to protect groundwater, these rules required state and local governments in Tennessee to address issues of garbage; in more refined language, solid waste management.[5] Tennessee's state and local governments chose tools to address this most local of issues that implicated Congress's power to regulate interstate commerce.[6] This choice led Tennessee governments to seek relief from Congress so that they could implement a necessary and beneficial congressional mandate in a responsible manner.[7] This Article recounts and analyzes the development of Tennessee's first comprehensive solid waste management policy in response to a federal mandate and the frustrations of implementing that policy because of the Federal Constitution's Interstate Commerce Clause and the politics of garbage in Congress.

Tennessee was and is not alone in developing responses to managing municipal solid waste that do not run afoul of the Federal Constitution while providing adequate disposal capacity in a fiscally responsible manner.[8] In a 1995 report, the General Accounting Office (GAO) found that forty-six states had developed solid waste management plans.[9] In 1992, the United States produced 13 billion tons of total waste and municipal solid waste accounted for 200 million tons of that total.[10] By 2003, the national totals for municipal solid waste had grown to 406 million tons per year.[11] In 1989, the base year for the subsequent state legislation, Tennessee disposed of nearly 5.4 million tons of solid waste at ninety-nine permitted municipal solid waste

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4. *Id.*

5. *Id.*

6. *See, e.g.*, Solid Waste Management Act of 1991, 1991 Tenn. Pub. Acts 731 (enabling localities to manage wastes, protect health, create planning regions, and comply with federal regulation).

7. *See* Letter from Ned McWherter, Governor of Tenn., to Albert Gore, Jr., Senator from Tenn. (June 4, 1992) (on file with author); *see also* Letter from Ned McWherter, Governor of Tenn., to Harlan Mathews, Senator from Tenn. (Jan. 25, 1993) (on file with author) (urging federal interstate waste and flow legislation) [hereinafter McWherter Letter].

8. Municipal solid waste is "loosely defined as waste coming from residential, commercial, institutional, and some industrial sources. Such waste includes durable goods, nondurable goods, containers and packaging, food and yard wastes and miscellaneous inorganic wastes". WASTE MGMT. RESEARCH & EDUC. INST., MANAGING OUR WASTE: SOLID WASTE PLANNING FOR TENNESSEE (1991) [hereinafter WMREI]; *see also* TENN. CODE ANN. § 68-211-802(a)(10) (2003) (defining "municipal solid waste").

9. U.S. GEN. ACCOUNTING OFFICE, SOLID WASTE: STATE AND FEDERAL EFFORTS TO MANAGE NONHAZARDOUS WASTE 3 (1995) [hereinafter SOLID WASTE].

10. *Id.* at 2.

11. Edward W. Repa, *Interstate Movement of Municipal Solid Waste*, NAT'L SOLID WASTE MGMT. ASS'N RES. BULL. 3 (Jan. 2003).

disposal facilities.[12] For 1993, GAO found that 72% of municipal solid waste was disposed of in a landfill, 17% was recycled, and 11% was incinerated.[13] For Tennessee, 82% of such waste went to a landfill, 10% was recycled, and 8% was incinerated.[14] Taking care of this waste has been, and remains, expensive as is demonstrated by the large sums of money spent ($18 billion in estimated nationwide spending when Tennessee's legislation was enacted) on municipal solid waste management with 95% of that total being contributed by localities.[15]

This Article proceeds in four Parts. It begins with an analysis of the development of solid waste management policy in Tennessee culminating in the Solid Waste Management Act of 1991.[16] It moves to examine the fate of the flow control mechanism that Tennessee adopted under the Interstate Commerce Clause of the United States Constitution as interpreted by the United States Supreme Court. Next, flow control's demise under Commerce Clause analysis leads us to examine the failure of subsequent Congresses to pass legislation addressing the issues of interstate waste transportation and flow control. Finally, this Article concludes with an assessment of the state of Tennessee's solid waste management framework in light of the situation presented by Commerce Clause jurisprudence and congressional inaction.

I. THE DEVELOPMENT OF SOLID WASTE MANAGEMENT POLICY IN TENNESSEE

The story begins in Congress in 1976 with RCRA's provision that states develop solid waste management plans and that the EPA develop landfill criteria.[17] In 1979, the EPA issued minimum requirements for landfills and in 1988 new criteria were issued to provide further protection for the environment and human health.[18] As of October 1993, these more stringent criteria would "require (1) liners to prevent liquids from leaking into the groundwater, (2) collection systems to remove liquids that accumulate in the waste, (3) monitoring of groundwater for hazardous substances, and (4) plans for closing and then monitoring the

12. WMREI, *supra* note 8, at 3.
13. *Id.* at 9-10.
14. *Id.* at 45.
15. *Id.* at 20.
16. Solid Waste Management Act of 1991, 1991 Tenn. Pub. Acts 731.
17. *See* Resource Conservation Recovery Act of 1976, Pub. L. No. 94-580 (codified as amended in 42 U.S.C. §§ 6941-6949 (2000)).
18. *See* 40 C.F.R. § 258 (2005) (providing current Subtitle D landfill requirements).

waste sites."[19] These new requirements would affect new landfills in Tennessee and expansions of existing ones.[20]

For Tennesseans, however, our tale begins in 1988. In response to federal activity that would eventually issue forth in full-blown Subtitle D regulations from EPA, the Tennessee General Assembly created a special joint committee on hazardous and solid wastes.[21] This committee met in 1988 and 1989 and recommended legislation that the General Assembly eventually enacted as the Solid Waste Planning and Recovery Act of 1989.[22] This legislation entrusted the development of a solid waste plan for Tennessee to the State Planning Office (SPO), which at that time was a part of the Governor's Office, under the direction of Jim Hall (subsequently Chairman of the National Transportation Safety Board).[23] SPO worked with the University of Tennessee, development districts, and a variety of local officials and interest groups to develop a comprehensive state solid waste management plan. The plan that SPO developed became part of Governor Ned McWherter's 1991 legislative package and the Solid Waste Management Act of 1991 became law.[24]

Under the Solid Waste Management Act of 1991, management of solid waste in Tennessee remained a primarily local responsibility. The state's role was to provide a capacity assurance planning framework that included recycling and source reduction components.[25] The policies lying behind the state's role in the Act included enabling the state and localities to be responsible for managing their own wastes, protecting the public health, assisting local governments with compliance with the Subtitle D RCRA regulations, encouraging local governments to form multicounty planning regions to allay some of the costs of such compliance, and providing local governments with flexibility in designing management options.[26] Prior to this legislation, apart from the state's responsibility in permitting disposal and processing facilities, there was no comprehensive planning for solid waste management needs and only ad hoc management and planning at the local level. For instance, the Act's comprehensive approach required that each county

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19. *See* SOLID WASTE, *supra* note 9, at 11.
20. *Id.*
21. H.J.R. Res. 547, 96th Gen. Assem., Reg. Sess. (Tenn. 1988).
22. *See* Tennessee Solid Waste Planning and Recovery Act of 1989, 1989 Tenn. Pub. Acts 386.
23. *Id.*
24. *See* Solid Waste Management Act of 1991, 1991 Tenn. Pub. Act 731.
25. *Id.* at 736-41.
26. *Id.* at 734. GAO noted that "as a result of stricter federal and state regulations, the cost of constructing small locally owned and operated solid waste management facilities has exceeded the resources of many governmental bodies." SOLID WASTE, *supra* note 9, at 35.

develop at least a minimal collection infrastructure.[27] Before Public Chapter 451, a number of counties lacked any public collection infrastructure.[28] In 1989, twenty-five percent of Tennessee households and ten percent of its population lacked collection services.[29] Public Chapter 451 was about managing solid waste, not just landfills.[30]

The Act's planning framework proceeded in three steps: a needs assessment for each county, the formation of municipal solid waste planning regions, and the development of ten-year regional solid waste plans.[31] After examining the needs assessments, each county made a decision to either plan as a single county or as part of a multicounty region.[32] The formation of a region involved the formation of a regional board which provided representation to both counties and to cities providing disposal or collection services.[33] These regional boards would then be responsible for developing a regional plan which would assure adequate disposal capacity for the region's projected disposal needs while meeting a twenty-five percent waste reduction goal.[34] In order to assure adequate disposal capacity and to meet the reduction goal, regions were given the authority to approve permits for disposal facilities as consistent with the regional plan within the region and to implement flow control which would ban the importation of waste into the region and/or control the flow of waste within a region.[35] The formation of solid waste authorities was authorized as a possible implementation option.[36] The state also authorized or imposed tipping fee surcharges to finance the planning programs and made a variety of financial assistance options available including grants for recycling, convenience centers, and

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27. *See* 1991 Tenn. Pub. Acts 731, 740-41.

28. WMREI, *supra* note 8 ("In 1989, before Public chapter 451 was enacted, twenty-five percent of Tennessee households and ten percent of its population lacked collection services.").

29. *Id.* at 18.

30. *See* 1991 Tenn. Pub. Act 731, 734.

31. *Id.* at 736-37.

32. *Id.* at 737-38.

33. *Id.*

34. *Id.* In part the capacity assurance framework drew on the example of the Capacity Assurance Plan used for planning for hazardous wastes. *See* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9604(c)(9) (2000) (requiring states to assure adequate capacity exists to manage state hazardous wastes for twenty years). The plans did so by addressing a range of issues in addition to disposal capacity, such as source reduction, education and recycling. 1991 Tenn. Pub. Acts 731, 740-41.

35. *Id.* at 739.

36. *Id.* at 753.

planning.[37] After the Act went into effect, more than half of Tennessee's counties formed multicounty regions.[38]

Tennessee's flow control statute provided for the planning region's plan to authorize regulation of waste generated inside the planning region if certain protections for existing private facilities were met.[39] The statute also provided for the plan to authorize an out-of-region ban.[40] However, even the out-of-region ban exempted existing facilities that were already accepting out-of-region waste as long as such continued acceptance did not jeopardize the planning region's ability to give effect to its plan.[41]

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37. *Id.* at 740-41.

38. *See* Tennessee Division of Solid and Hazardous Waste Management, Solid Waste Planning Regions, http://www.state.tn.us/environment/swm/prwr/planregions.php (last visited Mar. 27, 2006).

39. TENN. CODE ANN. § 68-211-814(b)(1) (2004 & Supp. 2005). The Code provides:

> (b)(1)(A) If the commissioner approves the plan, the region or solid waste authority, if one has been formed pursuant to part 9 of this chapter, by resolution and subsequent adoption of ordinances by counties and municipalities in the region, may also regulate the flow of collected municipal solid waste generated within the region. Prior to the adoption of any resolution declaring the necessity of requiring mandatory flow of municipal solid waste, the region or authority, following one (1) or more public hearings, shall demonstrate in writing to the commissioner that it has considered the utilization of any municipal solid waste management facility in existence within the region on July 1, 1991, which meets the proposed or final federal Resource Conservation and Recovery Act (RCRA) Subtitle D regulations. The region or authority must show that its decision not to use the existing facility is based on the fact that:
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> (i) Such facility is environmentally unsound or inadequate to meet the region's ten-year capacity assurance plan;
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> (ii)(a) Costs for the use of such facility are inconsistent with comparable facilities within the state; or
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> (b) The existing facility is operating in a manner that is inconsistent with the plan; and
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> (iii) The waste subject to flow control will be sent only to a facility or facilities that meet all state and federal regulations.
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> (B) The region or authority may restrict access to any landfills and incinerators which dispose of municipal solid waste by excluding waste originating with persons or entities outside the region in order to effectuate the plan. If a facility within a region has accepted waste from a specific source outside the region prior to July 1, 1991, the region may not prohibit that facility from continuing to accept waste from that source, unless the facility's acceptance of that waste significantly impairs the region's ability to effectuate its plan.
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> (C) Appeal of final actions of the region or authority, including any determinations under subdivision (b)(1), shall be taken by an aggrieved person within thirty (30) days to any chancery court in the region or authority which took such final action.
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> (D) After the plan is approved, the region must approve any application for a permit for a solid waste disposal facility or incinerator within the region as is consistent with the region's disposal needs before any permit is issued by the commissioner pursuant to this chapter.

40. *Id.*

41. *Id.*

The ability to restrict the movement of solid waste by means of a ban or flow control represented a critical theoretical linchpin for the planning framework adopted by the state. Local governments, through their solid waste planning regions, could not assure that adequate capacity would be available throughout the ten year planning horizons if they could not shepherd or protect their scarce and expensive capacity resources (e.g., landfills with liners that comply with Subtitle D). If regions could not prevent outside waste from coming into a region, they could not guarantee adequate capacity throughout the planning horizon, since outside waste could use landfill space that the plan had allocated for local disposal needs. If regions could not control the flow of municipal solid waste within a region, then they also could not guarantee adequate capacity. Local governments would finance their disposal resources on the basis of a waste stream of a certain size and the governments needed the ability to guarantee that a necessary amount of waste remained in that stream by compelling it to remain in the region via a flow control ordinance.[42] Prior to the authority provided by this legislation, only Metropolitan Nashville/Davidson County in Tennessee had a statutorily authorized flow control mechanism.[43] During 1991, by rule-based authority, the Tennessee Department of Environment and Conservation also utilized geographic restrictions on the service area of landfills as a part of the permitting process to restrict the locales from which a landfill could draw solid waste for disposal, but even this authority was subsequently invalidated as unauthorized by the permitting statute.[44]

The out-of-region ban provision addressed capacity assurance and other concerns raised by the prospect (rather than the real occurrence) of interstate waste shipments flooding into Tennessee. As a national matter in the mid-1990s, a free market for solid waste shipments "results in some states, mostly rural and poorer ones, becoming net waste importers and other states, mostly those that are urban and wealthier, becoming net

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42. *See* SOLID WASTE, *supra* note 9, at 40.

43. *See* TENN. CODE ANN. § 7-54-103(d) (2004).

44. *See* Sanifill of Tenn., Inc. v. Tenn. Solid Waste Disposal Control Bd., 907 S.W.2d 807, 812 (Tenn. 1995). While *Sanifill* invalidated the Tennessee Solid Waste Disposal Control Board's use of service area restrictions in a landfill permit to restrict waste flows, it did not address the issue of the ability of municipal solid waste planning regions to restrict service areas as a condition of approving a facility's permit application to be consistent with the region's disposal needs pursuant to the 1991 Act. *Id.* at 807; *see also* TENN. CODE ANN. § 68-211-814(b)(1)(D) (2004 & Supp. 2005); TENN. DEP'T OF ENV'T & CONSERVATION, DIV. OF SOLID WASTE MGMT., SOLID WASTE PROGRAM: POLICY AND GUIDANCE MANUAL (Sept. 2005).

waste exporters."[45] In Tennessee, the real concern arose from long haul interstate waste originating in the paradigm states of New Jersey and New York, rather than more limited amounts from Tennessee's neighboring states.[46] Waste was shipped among forty-seven states and two-thirds of this movement was between neighboring states.[47] Since Subtitle D landfills are more expensive and siting new landfills can take years, some states have an incentive to ship their waste out of state and thus address their local disposal needs.[48] Cheaper tipping fees at Tennessee landfills could appeal to localities where tipping fees exceeded $100 per ton and a fiscal incentive for other states to use Tennessee waste capacity could exist.[49] So while the out-of-region ban element of flow control had political utility in assisting the passage of the 1991 Act, flow control was far from window dressing.[50] Flow control constituted a critical piece of the planning framework.

II. THE FATE OF FLOW CONTROL UNDER THE COMMERCE CLAUSE

The McWherter Administration was aware that its out-of-region ban and flow control proposals in the 1991 legislation raised federal

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45. 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, 1560 (1995).

46. *See, e.g.*, AL GORE, EARTH IN BALANCE 152-53 (1992) (explaining Tennessee constituent concerns regarding long haul garbage arriving from New York).

47. SOLID WASTE, *supra* note 9, at 35; *see also* JAMES E. MCCARTHY, INTERSTATE SHIPMENT OF MUNICIPAL SOLID WASTE, (Congressional Research Service No. 93-173 ENR) (1994) (providing a state by state survey of responses to the problem of interstate waste shipments).

48. *See* DEP'T OF ENVTL. QUALITY, COMMONWEALTH OF VA., COMPREHENSIVE EVALUATION OF SOLID WASTE MANAGEMENT IN THE COMMONWEALTH (2000) (analyzing expenses of Subtitle D with expenses of non-Subtitle D landfills).

49. In 1989, WMREI found the average tipping fee in Tennessee to be about $11. WMREI, *supra* note 8, at 20; *see also* SOLID WASTE, *supra* note 9, at 49 (providing for certain tipping fees in the northeast).

50. *See* 1991 Pub. Acts 731. At the time of passage, the politically sensitive issue of out-of-state waste being shipped to Tennessee was prominent in public attention. Medical Waste Tracking Act, 54 Fed. Reg. 56, 12326 (Mar. 24, 1989). Media stories involving garbage barges unable to find a port and medical waste on beaches made out-of-state waste very unpopular. *Id.* There was significant interest in finding a mechanism that would prevent landfills from taking out-of-state waste without some form of local approval. The 1991 Act had two components that were viewed as having an effect on interstate waste shipments entering Tennessee: the out-of-region ban element of flow control and inspection requirements for baled waste. *See* 1991 Tenn. Pub. Acts 731, 734. With respect to baled waste, the GAO noted that "officials in Ohio were concerned that imported waste destined for nonhazardous landfills would contain hazardous materials and that this waste could go undetected if the shipments are baled or shredded." SOLID WASTE, *supra* note 9, at 38.

constitutional issues under the Commerce Clause.[51] *City of Philadelphia v. New Jersey* made it apparent that garbage could be viewed as commerce and the dormant Commerce Clause could require Congress to authorize flow control restrictions on solid waste.[52] Of course, Congress had not enacted such legislation. Other states had attempted to regulate waste flows and had generally had poor luck in defending their attempts in federal court.[53] However, at the time the 1991 Act was making its way through the legislative process, the United States Court of Appeals for the Sixth Circuit had decided *Bill Kettlewell Excavating, Inc. v. Michigan Department of Natural Resources* and upheld the constitutionality of a waste ban in the context of a solid waste management planning approach in Michigan.[54] So at the time of the 1991 Act's passage, there was legal authority in the Sixth Circuit for concluding that flow control was constitutional. However, *Kettlewell* was appealed to the Supreme Court.

The Supreme Court reversed the Sixth Circuit in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*.[55] The Court had the choice of characterizing the Michigan statute's ban mechanism as discriminatory economic protectionism and applying the per se rule of *City of Philadelphia*, or as tailored to a legitimate local need and thus applying the balancing test of *Pike v. Bruce Church*.[56] The Court straightforwardly applied *City of Philadelphia* to the planning mechanism and concluded that since garbage was commerce, then the flow control ban was an unconstitutional infringement on interstate

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51. U.S. CONST. art. I, § 8, cl. 3 (providing that Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

52. City of Phila. v. New Jersey, 437 U.S. 617, 628-29 (1978).

53. *See* Martin E. Gold, *Solid Waste Management and the Constitution's Commerce Clause*, 25 URB. LAW. 21, 38-39 (1993); *see, e.g.*, Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 336-39, 348 (1992) (holding state fee on wastes generated out-of-state violated the Commerce Clause); Nat'l Solid Wastes Mgmt. Ass'n v. Ala. Dep't of Envtl. Mgmt., 910 F.2d 713 (11th Cir. 1990) (holding Alabama statute selectively banning wastes based on state of origin violated Commerce Clause), *modified and reh'g denied*, 924 F.2d 1001 (11th Cir. 1991); Evergreen Waste Sys., v. Metro. Serv. Dist., 820 F.2d 1482, 1483 (9th Cir. 1987) (holding an ordinance banning out-of-district waste violated the Commerce Clause); Container Corp. of Carolina v. Mecklenburg, No. 3:92CV-154-MU, 1995 WL 360185, at *12 (W.D.N.C. June 22, 1995) (invalidating county waste flow control ordinance as a Commerce Clause violation); Indus. Maint. Serv. v. Moore, 677 F. Supp. 436 (S.D.W.V. 1987). *But see* J. Filiberto Sanitation v. Dep't of Envtl. Prot., 857 F.2d 913 (3d Cir. 1988) (holding New Jersey Act requiring all county waste be deposited in a processing station did not violate the Commerce Clause), *overruled by* Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders of Atl. County, 48 F.3d 701 (3d Cir. 1995).

54. Bill Kettlewell Excavating, Inc. v. Mich. Dep't of Natural Res., 931 F.2d 413, 414-18 (6th Cir. 1991).

55. Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res., 504 U.S. 353, 367-68 (1992) (holding that waste import restrictions violated Commerce Clause).

56. *Id.* at 358; Pike v. Bruce Church, 397 U.S. 137 (1970).

commerce and congressional relief was needed.[57] A law deemed to be discriminatory or protectionist is almost always struck down by the Court.[58]

Justice Stevens' majority opinion clearly limited the issue to the waste import restrictions as applied to private landfills.[59] Michigan's comprehensive solid waste management program, health and safety issues, and the market participant exception were not relevant issues.[60] Rather, in rehearsing the *City of Philadelphia* analysis, Justice Stevens found that solid waste is commerce, the transactions are interstate in nature, and political subdivisions of the state could not burden interstate commerce any more than the state could.[61] He applied the *City of Philadelphia* standard that the state's purposes "may not be accompanied by discriminating against articles of commerce coming from outside the state unless there is some reason, apart from their origin, to treat them differently."[62]

With respect to Michigan's planning mechanism argument, Stevens found the following alternative available to the state of Michigan:

> Although accurate forecasts about the volume and composition of future waste flows may be an indispensable part of a comprehensive waste disposal plan, Michigan could obtain that objective without discriminating between in- and out-of-state waste. Michigan could, for example, limit the amount of waste that landfill operators may accept each year.[63]

However, if one is planning for local landfill capacity for locally generated wastes, it does little good to preserve a local landfill's capacity for waste for ten or twenty years by capping the amount of waste the landfill may receive if waste from outside of the affected locality is imported and consumes that capacity. The incentive is either to coerce localities into expensive public landfill operations or to encourage localities to not be responsible for waste the localities generated and to export their waste. Justice Stevens' rationale in viewing the issue as one of discrimination woodenly follows precedent but does not reveal a sensitivity to the federal environmental regulatory context which might have led the court to adopt a more flexible *Bruce Church* analysis of the restrictions as merely a burden on interstate commerce.

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57. *Fort Gratiot*, 504 U.S. at 366-67.
58. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1059-68 (3d ed. 2000).
59. *Fort Gratiot*, 504 U.S. at 359.
60. *Id.* at 358.
61. *Id.* at 359.
62. *Id.* at 360 (quoting City of Phila. v. New Jersey, 437 U.S. 617, 626-27 (1978)).
63. *Id.* at 366-67.

Chief Justice Rehnquist dissented in *Fort Gratiot* on the basis that Michigan's ban was under Commerce Clause jurisprudence an appropriate environmental, safety, and health regulation directed to legitimate local concerns.[64] Likening the Michigan case to *Maine v. Taylor*[65] and *Sporhase v. Nebraska*,[66] rather than *City of Philadelphia*[67] or *Dean Milk Co. v. Madison*,[68] Rehnquist found disposal capacity to be a public resource which local governments and states should be permitted to preserve.[69] Rehnquist concluded:

> The Court today penalizes the State of Michigan for what to all appearances are its good-faith efforts, in turn encouraging each State to ignore the waste problem in the hope that another will pick up the slack. The Court's approach fails to recognize that the latter option is one that is quite real and quite attractive for many States-and becomes even more so when the intermediate option of solving its own problems, but only its own problems, is eliminated.[70]

In *Bruce Church*, the Supreme Court set out a more flexible balancing test which involved legitimate local interests.[71] The *Bruce Church* analysis proceeds as follows:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden 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.[72]

Under this framework, if comprehensive solid waste management planning in response to federal regulatory activity[73] is viewed as merely

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64. *Id.* at 368 (Rehnquist, C.J., dissenting).
65. Maine v. Taylor, 477 U.S. 131 (1986).
66. Sporhase v. Nebraska, 458 U.S. 941 (1982).
67. City of Phila., 437 U.S. at 617.
68. Dean Milk Co. v. Madison, 340 U.S. 349 (1951).
69. *Fort Gratiot*, 504 U.S. at 368-73 (Rehnquist, C.J., dissenting).
70. *Id.* at 372-73.
71. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
72. *Id.*
73. However, it is quite clear that RCRA or EPA regulations do not specifically authorize restrictions on the movement of municipal solid waste. *See* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 409-10 (1994) (O'Connor, J., concurring) (analyzing the lack of explicit statutory authority of flow control in RCRA). The argument is only that the EPA's regulatory activity creates a context which contends for reasonably viewing restrictions on the movement of waste as a legitimate state interest rather than as economic protectionism. *See id.* at 410-30 (Souter, J., dissenting).

burdening commerce in service of a "legitimate local purpose," rather than economic protectionism, then Michigan's or Tennessee's restrictions on the movement of waste into, out of, or within planning regions, could be upheld.[74] The critical issue becomes whether preserving local waste capacity for locally generated waste is economic protectionism or a legitimate exercise of local police power on environmental policy.[75] The Supreme Court has said the former by finding the restrictions to be discriminatory, but the latter characterization arguably fits better with a regime of federal-state-local solid waste management as a matter of environmental policy.

Solid waste disposal capacity could be rationally viewed as a legitimate local resource, not unlike baitfish in *Maine*[76] or water in *Nebraska*,[77] to be carefully shepherded and so providing mechanisms for protecting it only after and through capacity assurance planning would not necessarily be economic isolationism or economic protectionism. Of course, Tennessee's or Michigan's restrictions on the movement of solid waste should receive the full *Bruce Church* balancing test analysis.[78] The mere invocation of a legitimate local interest in environmental policy, or even public health, does not immunize a solid waste management framework from the requirements of the Commerce Clause as *Dean Milk* demonstrates.[79]

Fort Gratiot left the market participant exception of *Hughes v. Alexandria Scrap Corp.*[80] untouched.[81] Under this approach, the Commerce Clause does not prohibit a state from favoring its own citizens and discriminating against outsiders when the state owns the facility and participates in the relevant market. Of course Congress may act to prevent such discrimination by a state. Since most waste disposal

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74. *See Bruce Church*, 397 U.S. at 142.

75. Arguably a variety of principles is implicated in resolving the issues of flow control and import bans. Kirsten Engel identifies four such principles: equity, efficiency, protection of health and the environment, and state autonomy. Engel, *supra* note 45, at 1486-87. Engel analyzes controls on movement of solid waste in terms of selected normative ethical stances. *Id.* at 1483. She concludes that a compact approach, not unlike that adopted in the Low-Level Radioactive Waste Policy Act of 1980, represents a better approach to these issues than the status quo or the bills Congress has considered. *Id.* at 1560.

76. *See* Maine v. Taylor, 477 U.S. 131, 151 (1986).

77. *See* Sporhase v. Nebraska, 458 U.S. 941, 946 (1982).

78. *See Bruce Church*, 397 U.S. at 142.

79. *See* Dean Milk Co. v. Madison, 340 U.S. 349, 356 (1951).

80. Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).

81. *See* Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't Natural Res., 504 U.S. 353, 355-68 (1992).

facilities are publicly owned, this remains a significant waste management policy tool.[82]

With the application of the *City of Philadelphia* test to bans and similar flow control arrangements, states and local governments have only one clearly constitutional safe harbor: the market participant exception. Under the market participant exception (and rights granted to localities under the Solid Waste Management Act of 1991), state and local governments or authorities could operate public disposal and processing facilities and discriminate against out of state or out of region waste.[83] Yet acting as a market participant under state law would not likely involve a flow control mechanism as a regulatory tool in conjunction with a publicly owned landfill.[84] However, the question arises: even if the regions could keep foreign waste out, could the regions keep waste generated inside the region from leaving the region?

Fort Gratiot clearly represented a threat to the planning mechanism of the 1991 Act.[85] The McWherter Administration proceeded to contact the entire Tennessee congressional delegation on two occasions to urge support of federal interstate waste and flow control legislation to protect Tennessee's disposal capacity.[86] In 1995, McWherter's successor, Governor Don Sundquist, joined in a letter to the chairs and ranking members of the House Commerce Committee and the Subcommittee on Environment and Hazardous Materials supporting Representative Oxley's interstate waste control legislation.[87]

However, while *Fort Gratiot* cast serious doubt on one leg of Tennessee's flow control mechanism, the out–of-region ban, another case was working its way through the federal courts that would invalidate flow control's other leg.[88] *C & A Carbone, Inc. v. Clarkstown* invalidated

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82. *See* Gold, *supra* note 53, at 29-32.

83. *Id.* at 31-32 (discussing possible limits on the market participant exception); *see also* Randall S. Abate & Mark E. Bennett, *Constitutional Limitations on Anticompetitive State and Local Solid Waste Management Schemes: A New Frontier in Environmental Regulation*, 14 YALE J. ON REG. 165, 165-193 (1997) (concerning possible antitrust liability attaching to a state's operating as a market participant).

84. *See* TRIBE, *supra* note 58, at 1085, n.30.

85. *See Fort Gratiot*, 504 U.S. at 353-68.

86. *See, e.g.*, McWherter Letter, *supra* note 7; Letter from J.W. Luna, Comm'r of Env't & Conservation, to Jim Cooper, Representative for the 4th Dist. of Tenn. (June 22, 1992) (on file with author); SOLID WASTE, *supra* note 9, at 38.

87. *Perspectives on Interstate and International Shipments of Municipal Solid Waste*, Hearing Before the Subcomm. on Environment and Hazardous Material of the H. Comm. on Energy and Commerce, 107th Cong. 8-9 (2001).

88. *Fort Gratiot*, 504 U.S. at 353-68.

intraregion flow control in New York.[89] In *Carbone*, a New York town used a flow control ordinance to guarantee a minimum waste flow to a transfer station for financing the building and operation of the station for a period of time. Since the Court believed the ordinance discriminated against interstate commerce under *City of Philadelphia* and *Dean Milk*, the Court struck down the ordinance and did not resort to the *Bruce Church* test.[90] *Carbone* alarmed local governments throughout the country which had debt service for solid waste programs that depended on flow control or which anticipated using such a mechanism to build a Subtitle D compliant landfill.[91] Tennessee would again have to look to Congress to authorize a tool that was at the heart of its planning mechanism.

In the aftermath of *Fort Gratiot* and *Carbone*, concerned state legislators asked for a formal opinion from the Tennessee Attorney General on the constitutionality of the flow control provisions of the 1991 Act.[92] Unsurprisingly, in 1995, the Tennessee Attorney General opined that the flow control provisions of the 1991 Act were unconstitutional violations of the Commerce Clause of the federal constitution.[93] This legal situation significantly limited the ability of state and local governments in Tennessee to control the waste flowing into facilities which they regulate.[94] It appears waste management constitutes a national problem for which the federal courts will require Congress to

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89. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 394 (1994) (holding "[s]tate and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities").

90. *Id.* at 391. However, characterization of a particular measure discrimination or as merely burdensome can be problematic. Justice Kennedy's majority opinion found the town's ordinance to fall clearly into the discrimination category. Yet Justice O'Connor's concurring opinion and Justice Souter's dissent did not view the ordinance in those terms. Justice O'Connor acknowledged: "Of course, there is no clear line separating these categories." *Id.* at 401 (O'Connor, J., concurring).

91. The Congressional Research Service reports that since 1980 approximately $10 billion of municipal bonds were issued to finance construction of disposal facilities and that after *Carbone* approximately $1.9 billion in eighteen bond issues have been downgraded by the rating services. James E. McCarthy, *Solid Waste Issues in the 105th Congress*, CONG. RES. SERV. IB97006 (1997), *available at* http://cnie.org/NLE/CRSreports/Waste/waste-4.cfm.

92. *See Carbone*, 511 U.S. at 383; *see also Fort Gratiot*, 504 U.S. at 353.

93. 95 Op. Att'y Gen. of Tenn. 041 (1995). The Attorney General's opinion explicitly affirmed the continued viability of the market participant exception. *Id.* However, while the opinion acknowledged the region's power to approve permit applications as consistent with the region's solid waste management plan, it did not evaluate under *Fort Gratiot* and *Carbone* the possibility of a region imposing a service area restriction as part of the region's capacity assurance plan, like that invalidated in *Sanifill*. *Id.*; *see also*, Sanifill of Tenn. v. Tenn. Solid Waste Disposal Control Bd., 907 S.W.2d 807, 812 (1995).

94. RYAN BISHOP, TENNESSEE OFFICE OF THE COMPTROLLER OF THE TREASURY, TENNESSEE'S TRASH IN THE 1990S 24-28 (1996)

provide the solution on a national level.[95] Indeed, Laurence Tribe concludes: "*Carbone* thus synthesizes the cases . . . as standing for the proposition that the dormant Commerce Clause prevents any and all state attempts to protect local interests through measures limiting access to local markets by out-of-state enterprises."[96]

One branch of the federal government required the state of Tennessee to plan for managing its solid waste. Another branch of the federal government told the state that it could not use the mechanism it had chosen through a lengthy planning process unless yet a third branch of the federal government approved of it. This is federalism at work through the 1990s into the next century.

III. FLOW CONTROL ISSUES IN CONGRESS

Tennessee was not the only state with concerns about its ability to manage its solid waste under the Commerce Clause as interpreted by the federal courts. A number of other states also had serious concerns. States responded with bans, moratoria, differential fees, and various planning and permit requirements. At least forty-one states acted by legislation or executive order to limit interstate waste shipments and about forty-one states had some form of flow control ordinance.[97] Accordingly, there was significant activity in Congress, from the 102d through the 108th Congresses, to attempt to provide relief for states on both interstate waste transportation and more local flow control issues. This activity brought together large and small states, recyclers, corporate waste haulers, governors, cities and counties, and others in a debate that eventually resulted in Congress taking no action on the matter. The case of flow control is a textbook illustration of the difficulty of passing legislation in the current interest group environment with the number of veto points our federal system has built into it.[98]

If Congress were to authorize states to restrict municipal solid waste received at public or private commercial facilities, from the states' perspective, some of the following benefits may be secured:[99]

1. States and localities would be able to plan more effectively for waste capacity needs;

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95. TRIBE, *supra* note 58, at 1067-68, 1085.
96. *Id.* at 1085.
97. SOLID WASTE, *supra* note 9, at 38, 40.
98. *See generally* JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (1984).
99. SOLID WASTE, *supra* note 9, at 42.

2. The useful life of landfills could be extended if foreign waste that had not been planned for can not consume landfill space;
3. States can be encouraged to plan for their own waste needs and avoid becoming dumping grounds for other states; and
4. States or local governments would be able to finance solid waste management systems on the basis of a secure revenue stream.

However, opponents of these restrictions argue that the restrictions wreck some of the following woes:[100]

1. Free market competition would be stifled and the resulting inefficiencies would result in higher costs to the public for disposal;
2. Areas with insufficient capacity would be required to build difficult-to-site and expensive new facilities;
3. Other consumers of disposal services could face reduced choices and higher costs if private waste haulers can not move across state lines;
4. Higher tipping fees due to 1 and 2 could encourage illegal dumping; and
5. Balkanization of the waste industry could result.[101]

These have not been significantly partisan issues in Congress.

States and their governors generally support flow control and interstate waste restrictions. They also tend to support restrictions that give states control over the imposition of the restrictions and any exceptions to the limits.[102] However, the interests of states vary. Some states that exported large quantities of solid waste have significant concerns about restrictions on the interstate movement of waste.[103] Large exporting states would oppose such restrictions, and importing states would support them.[104]

Cities and counties also generally support flow control and interstate waste restriction.[105] Their support is particularly strong for flow control which would protect their debt servicing commitments.[106] They also support restrictions that give local governments the flow control and ban authority and which do not make them dependent on their governors for an ability to act.[107]

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100. *Id.* at 42-43.

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

102. *See* National Governor's Association Policy Position, Solid Waste Facilities Policy, NGA, July 20, 2005, *available at* http://www.nga.org/portal/SHE/nga/menuitem.

103. Greg Spradley, *Congressional Bailout of Flow Control: Saving the Burning Beast*, 7 VILL. ENVTL. L.J. 263, 272-73 (1996).

104. *Id.*

105. *Id.* at 272.

106. *Id.*

107. National Governor's Association Policy Position, *supra* note 102.

The recycling industry generally opposes restrictions which would impede their ability to move recovered materials among markets.[108] However, some observers who have sympathies toward enhancing recycling efforts as part of waste reduction strategies have contended that congressional flow control legislation would constitute an unwarranted bailout of local governments for their ill-chosen financing mechanisms for solid waste facilities, particularly for incinerators.[109]

Commercial waste haulers oppose flow control on the ideological ground of the free market, but also because such restrictions could impede their ability to build large facilities that could draw from a variety of markets across various jurisdictional lines without interference from states or localities.[110] It is often troublesome enough for the private waste industry to permit and site landfills or incinerators without having to worry about either making long-term exclusive commitments to local governments or the concerns of local residents about particular wastes they may be disposing of from far away.[111]

While the basic question behind these legislative proposals is whether Congress should authorize any restrictions on waste flows, the proposed legislation approaches the topic from a variety of perspectives. Legislative proposals differ as on whether to include interstate waste provisions, what wastes to include, the extent to which existing facilities should be grandfathered into or out of any restrictions, the levels of waste over time, and the balance of power between governors and local governments in imposing restrictions.[112]

A. 102d

During the 102d Congress, the Senate considered two interstate waste measures and passed one of them.[113] As part of a RCRA reauthorization proposal, the Senate Environment Committee reported S. 976, which contained an interstate waste measure, but the bill did not

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108. Commercial recyclers were significantly exempted from the reach of flow control in the 1991 Tennessee Solid Waste Management Act. TENN. CODE ANN. § 68-211-814(b)(6) (2004).

109. *See* Spradley, *supra* note 103, at 291-93.

110. *See id.* at 275.

111. *Id.*

112. *See* James E. McCarthy, *Flow Control of Solid Waste: Issues and Options*, CONGRESSIONAL RESEARCH SERVICE REPORTS, May 16, 1995, http://cnie.org/NLE/CRS/abstract.cfm?NLEid=15920.

113. During the 102d Congress, *Fort Gratiot* had been decided, but *Carbone* had not, so interstate waste transportation was the critical issue. *See* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 383 (1994); Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res., 504 U.S. 353 (1992).

pass.[114] The Senate did approve Senator Coats' interstate waste bill, S. 2877.[115] Both measures provided authority for states to restrict the interstate movement of waste.[116] The House of Representatives did not act on either measure.[117] Governor McWherter's first letter to the Tennessee congressional delegation supported these two proposals.[118]

In the House of Representatives, Chairman Dingell of the House Committee on Energy and Commerce reported out H. R. 3865, a RCRA reauthorization measure, which included an interstate waste provision in response to *Fort Gratiot*.[119] The House measure did not pass. Tying the measure to RCRA reauthorization made enactment much more difficult.

B. 103d

A variety of flow control and interstate waste measures were introduced into the 103d Congress, and this time the legislation moved further in the process. Senator Baucus passed S. 2345 out of the Environment and Public Works Committee, which he chaired, that allowed governors to freeze imports of municipal solid waste at 1993 levels.[120] The measure also provided for "ratchets" to both decrease the exports from exporting states and to limit imports into any single importing state.[121] Host community agreements were authorized that gave local governments a voice in the process.[122] The measure passed the Senate and in an amended form passed the House on the last day of Senate session, but was not then considered on the Senate floor. The 103d Congress's efforts represent that last really significant activity aimed at passing flow control authorization. In subsequent years, a few bills would be introduced but there would be little activity except for an occasional hearing.

C. 104th

As in the 103d Congress, a variety of flow control and interstate waste measures were introduced during the 104th. Once again the Senate Environment and Public Works Committee introduced legislation,

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114. S. 976, 102d Cong. (1991).
115. S. 2877, 102d Cong. (1992).
116. S. 976; S. 2877 § 4011.
117. S. 2877, 102d Cong. (1992) (referred to H. Subcomm. on Transportation and Hazardous Materials (Dec. 2, 1992)).
118. *See* McWherter Letter, *supra* note 7.
119. *See* H.R. Rep. No. 102-839, at 66-71 (1993).
120. S. 2345, 103d Cong. (1994).
121. *Id.*
122. *Id.*

S. 534, by Senators Smith and Chafee, which would limit interstate waste shipments and authorize flow control.[123] This legislation authorized governors to limit imports of out-of-state waste with provisions for host community agreements, limited differential fees, and "ratchets."[124] S. 534 also authorized limited flow control in order to permit local governments to manage financial obligations.[125] It grandfathered in a variety of existing flow control arrangements and nullified all flow control authority after thirty years.[126] S. 534 passed the Senate, but did not move out of committee in the House. Flow control provisions were dropped from a conference report on other legislation and the House voted down a flow control provision that did not address interstate waste concerns.[127]

In March of 1995, the EPA released its *Report to Congress on Flow Control and Municipal Solid Waste*.[128] The report was not helpful to those forces interested in seeing Congress pass flow control legislation. The EPA found: "Flow controls play a limited role in the solid waste market as a whole. . . . Accordingly, there are no data showing that flow controls are essential either for the development of new solid waste capacity or for the long term achievement of State and local goals for source reduction, reuse and recycling."[129]

In examining solid waste management programs across the country, the EPA found that flow control did not play a significant role for composting and landfills, but that for incinerators and recycling, flow control was a significant factor.[130] While the EPA recognized that state and local governments use flow control to finance integrated solid waste management systems and to foster in-state capacity to manage solid waste, the EPA suggested organizational and financial alternatives to flow control mechanisms.[131] The organizational alternative essentially consisted of variations of state and local governments acting as market participants.[132] The financial alternative involved the use of fees and taxes to raise the necessary revenues.[133] This evaluation cast some doubt

123. S. 534, 104th Cong. (1995).
124. *Id.*
125. *Id.*
126. *See generally id.*
127. McCarthy, *supra* note 91.
128. *See* EPA, REPORT TO CONGRESS ON FLOW CONTROL AND MUNICIPAL SOLID WASTE, (ES-5) (1995).
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*

on the urgency claimed by some proponents for Congress to act on flow control legislation.

A 1997 study commissioned by the EPA examined the economic impacts (narrowly defined) of four forms of flow control.[134] Using S. 534 as its primary template the study examined volume restrictions on waste exports, bans on interstate waste shipments, surcharges on imported waste, and the imposition of both volume restrictions and surcharges.[135] The study limited its data to the Midwest and Northeast, which accounts for eighty percent of interstate waste by volume.[136] The study found that "policies proposed to restrict interstate waste shipments through import surcharges or volume-based restrictions reduce aggregate social welfare" and that "some policies to restrict exports may actually substantially increase interstate waste shipments as states export smaller volumes to more destinations in order to meet limits on the size of shipments to any one state."[137] Other factors that significantly influence the waste market, like the cost of incineration (or other "backstop technologies") or transportation or even price elasticities of demand, are found to "influence distributional gains and losses rather than the magnitude of interstate shipments."[138]

D. Subsequent Congresses

In the 105th Congress, Senator Dodd and Representative Frank introduced flow control legislation.[139] The Senate Environment Committee scheduled hearing on flow control and House Speaker Gingrich voiced some support for it.[140] During the 106th Congress, Representative James Greenwood (R-PA),[141] Senator Charles Robb (D-VA),[142] Senator Arlen Specter (R-PA),[143] and Senator George Voinovich (R-OH)[144] introduced flow control legislation. Hearings were held in the

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134. Eduardo Ley et al., *Spatially and Intertemporally Efficient Waste Management: The Costs of Interstate Flow Control*, Social Science Resource Network, Dec. 8, 1997, *available at* http://ssrn.com/abstract=70409.

135. *Id.* at 3.

136. *Id.* at 4.

137. *Id.* at 29.

138. *Id.*

139. *See* S. 899, 105th Cong. (1997); H.R. 942, 105th Cong. (1997); H.R. 943, 105th Cong. (1997).

140. *See* Susan D. Gould, *Gingrich: Transition to 21st Century Must Be Localized*, 29 NAT'L ASS'N. OF COUNTIES ONLINE NEWS, Mar. 17, 1997, http://www.naco.org/cnews/1997/97-03-17/newt.htm (last visited Mar. 30, 2006).

141. H.R. 1190, 106th Cong. (1999).

142. S. 533, 106th Cong. (1999).

143. S. 663, 106th Cong. (1999).

144. S. 872, 106th Cong. (1999).

Senate Environment and Public Works Committee.[145] With the 107th Congress, Representative James Greenwood (R-PA),[146] Senator Arlen Specter (R-PA),[147] and Senator George Voinovich (R-OH)[148] introduced flow control legislation. Hearings were held in the Senate Environment and Public Works Committee.[149] Again, with the 108th Congress, Representative James Greenwood (R-PA)[150] and Senator George Voinovich (R-OH)[151] introduced flow control legislation. By June 20, 2004, only the House committee had held hearings on the legislation. Finally, in the 109th Congress, Representative Jo Ann Davis (R-VA) introduced the Solid Waste Interstate Transportation Act of 2005 with eleven cosponsors.[152]

As Congress's activity over the last several years demonstrates, this type of legislative activity does not mean that flow control will become law. The large state versus small state dynamic continues to operate to prevent passage of legislation. With no anticipated consensus appearing on the horizon, the prospects for congressional action concerning flow control and interstate waste appear dim.

IV. CONCLUSIONS: COPING AND WAITING

The *Fort Gratiot* and *Carbone* decisions have come down from on high in Washington, but after a decade the sky has not yet fallen on Tennessee and its local governments.[153] State and local governments in Tennessee have continued to just muddle through with implementing the 1991 Solid Waste Management Act.[154] With the market participant exception available for keeping unwanted or unplanned for waste out of

145. *Interstate Waste and Flow Control, Hearing on S. 533, S. 633, and S. 872 Before the S. Comm. on Environment and Public Works*, 106th Cong. (1999).

146. H.R. 1213, 107th Cong. (2001).

147. S. 1194, 107th Cong. (2001).

148. S. 2034, 107th Cong. (2002).

149. *Interstate Waste and Flow Control, Hearing on S. 1194 and S. 2034 Before the S. Comm. on Environment and Public Works*, 107th Cong. (2002).

150. H.R. 1730, 108th Cong. (2003).

151. S. 431, 108th Cong. (2003).

152. H.R. 274, 109th Cong. (2005). This legislation included provisions for out of region limits and bans, host community agreements, special treatment for recyclables and a cost recovery surcharge. *Id.* For Tennessee, the issue is no longer a pressing one and the bill's cosponsors did not include a Tennessee representative. *Id.*

153. *See* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994); Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res., 504 U.S. 353 (1992). Recently the Supreme Court reaffirmed the Commerce Clause jurisprudence reflected in *Fort Gratiot* and *Carbone*. *See* Granholm v. Heald, 125 S. Ct. 1885 (2005).

154. *See* 1991 Tenn. Pub. Acts 731.

public landfills,[155] the capacity assurance mechanism from the 1991 Act continues to limp along without the out-of-region ban.[156] Notwithstanding the lack of flow control tools, the state continues to use the 1991 Act's framework and goals for managing Tennessee's solid waste. However, although Tennessee failed to achieve the twenty-five percent waste reduction goal on a statewide basis by 2002, certain localities met or exceeded that goal.[157]

With respect to keeping waste in planning regions in order to supply the necessary revenue stream to finance solid waste policy, there is no good alternative absent action by Congress to authorize such restrictions. As existing facilities close and new disposal facilities and other aspects of solid waste management infrastructure must come into being, the ability of local planning regions in Tennessee to be able to control the movement of the wastes for which they must plan will become increasingly critical.

Apart from local governments owning their own landfills or exercising a monopoly of power as solid waste authorities, there remains little for state and local governments to do but muddle along and respond to changes in waste management landscape made by commercial waste management firms. While a diversity of both public and private providers can be encouraged, if states and local governments are going to be responsible for managing their wastes, they should also be given the necessary tools to manage their wastes without being significantly frustrated by independent players. The need for this authority remains whether those players are commercial waste haulers or other sovereign states in the federal union. However, as the Supreme Court has made clear, this authority must come from Washington and, ultimately, Congress. If Congress does not act to provide states with authority to act with respect to the interstate transportation of municipal wastes and flow control, state and local governments will be hamstrung and frustrated in

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155. *See* John Turner, *The Flow Control of Solid Waste and the Commerce Clause:* Carbone *and Its Progeny*, VILL. ENVTL. L.J. 203 (1996) (providing a critical view concerning using this exception in solid waste management from the perspective of waste haulers).

156. *See* 1991 Tenn. Pub. Acts 731. The possibility remains open that planning regions under the 1991 Act might use their permit approval authority to impose waste flow restrictions in the form of a service area condition. *See* McCarthy, *supra* note 91. However, *Fort Gratiot* and *Carbone* may well invalidate such an application of title 68, chapter 211, section 814(b) of the Tennessee Code Annotated on Commerce Clause grounds. *See Carbone*, 511 U.S. at 383; *Fort Gratiot*, 504 U.S. at 353.

157. *See* OFFICE OF RESEARCH, TENNESSEE'S COMPTROLLER OF THE TREASURY, TENNESSEE'S TRASH IN A NEW CENTURY (2004); *see also* Joe Morris, *Recycling Key to Reaching Trash-Reduction Goal*, TENNESSEEAN, June 10, 2004, *available at* http://www.tennessean.com.

attempting to do the responsible thing—manage their own waste in response to federal initiatives concerning landfills and planning.