

1996

The Second Circuit Upholds Waste Management Systems in the Wake of *Carbone v. Clarkson*: The Decisions in *USA Recycling, Inc. v. Town of Babylon* and *SSC Corp. v. Smithson*

Colin A. Fieman

Scolara, Shulman, Cohen, Lawler & Burstein

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>

 Part of the [Water Law Commons](#)

Recommended Citation

Colin A. Fieman, *The Second Circuit Upholds Waste Management Systems in the Wake of Carbone v. Clarkson: The Decisions in USA Recycling, Inc. v. Town of Babylon and SSC Corp. v. Smithson*, 23 Fordham Urb. L.J. 767 (1996).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol23/iss3/7>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

The Second Circuit Upholds Waste Management Systems in the Wake of
Carbone v. Clarkson: The Decisions in USA Recycling, Inc. v. Town of
Babylon and SSC Corp. v. Smithson

Cover Page Footnote

None.

THE SECOND CIRCUIT UPHOLDS WASTE MANAGEMENT SYSTEMS IN THE WAKE OF *CARBONE v. CLARKSTOWN*: THE DECISIONS IN *USA RECYCLING, INC. v. TOWN OF BABYLON* AND *SSC CORP. v. SMITHTOWN*

Colin A. Fieman*

Introduction

In *C. & A. Carbone, Inc. v. Town of Clarkstown*,¹ the United States Supreme Court held that a Clarkstown, New York ordinance which controlled the flow of "solid waste" (i.e. garbage) within the town violated the "dormant" commerce clause of the federal constitution.² Since then, trash haulers, landfill operators and interstate transportation companies have challenged waste management systems across the country, including those located on Long Island and in New York's Onondaga, Oneida and Herkimer counties, claiming that the costs and restrictions imposed by the systems burden interstate commerce.³ Because the decision in *Carbone* was

* B.A., Haverford College, 1986; J.D., Columbia University School of Law, 1990. The author is a member of the litigation department of the Syracuse law firm of Scolaro, Shulman, Cohen, Lawler & Burstein, P.C.

1. — U.S. —, 114 S.Ct. 1677 (1994).

2. The commerce clause provides that "Congress shall have Power . . . To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes . . ." U.S. Const. art. I, § 8, cl. 3. The Supreme Court has stated that "[a]lthough the Clause thus speaks in terms of powers bestowed upon Congress, the Court has long recognized that it also limits the power of the States to erect barriers against interstate trade." *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 35 (1980) (citations omitted). Thus, the commerce clause not only authorizes congressional action but has a "dormant" aspect which restricts permissible state regulation even in the absence of conflicting federal regulation. *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979).

3. *Raite Rubbish Removal Corp. v. Onondaga County, et al.*, No. 94-CV-1630 (N.D.N.Y. filed Dec. 19, 1994); *United Haulers Ass'n, Inc., et al. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, No. 95-CV-0516 (N.D.N.Y. filed April 14, 1995). See also: *Atlantic Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders of Atlantic County*, 48 F.3d 701 (3d Cir. 1995); *National Solid Waste Mgmt. Ass'n v. Williams*, 877 F. Supp. 1367 (D.Minn. 1995); *Southcentral Pennsylvania Waste Haulers Ass'n v. Bedford-Fulton-Huntingdon Solid Waste Auth.*, 877 F. Supp. 935 (M.D.Pa. 1994).

Legislation that has been languishing in Congress for at least a year would provide retroactive congressional authorization for existing local flow control systems (with some exceptions) and preempt future commerce clause challenges to those systems based on the *Carbone* decision. See S. 534, 104th Cong., 2d Sess. (1995); H.R. 1180, 104th Cong., 2d Sess. (1995). As of this writing, however, the latest attempt by Con-

cast in unusually broad terms, efforts by many communities to devise safe and practical waste management systems and enormous public investments in waste processing facilities are now highly vulnerable to commerce clause challenges.⁴

In two recent decisions, however, the United States Court of Appeals for the Second Circuit construed *Carbone* narrowly and upheld two Long Island municipal flow control systems. In *USA Recycling, Inc. v. Town of Babylon*⁵ and *SSC Corp. v. Smithtown*,⁶ the Second Circuit distinguished the Long Island systems from the facts in *Carbone* and, in doing this, largely reconciled *Carbone* with the Supreme Court's earlier commerce clause jurisprudence. The *Babylon* and *Smithtown* decisions may prove to provide a long-term blueprint for building waste management systems which will pass constitutional muster. At the very least, the decisions have already had a significant impact on recent litigation involving other New York waste management systems.⁷

Part I of this Article analyzes the Supreme Court's holding in *Carbone* and the issues left unresolved by the decision. Part II discusses how the Second Circuit addressed the constitutionality of the waste management systems at issue in *Babylon* and *Smithtown*

gress to pass flow control legislation has failed and the ultimate enactment of federal flow control authorization is very uncertain. See *House Dumps Trash-Control Bill*, SYRACUSE POST-STANDARD, Feb. 1, 1996, at B3.

4. See Petersen & Abramowitz, *Municipal Solid Waste Flow Control in the Post-Carbone World*, 22 FORDHAM URB. L.J. 361 (1995). As the Second Circuit summarized in *SSC Corp. v. Smithtown*:

Not long ago, municipalities took out the trash simply by hauling it to a local dump. But as landfills have reached the bursting point, and as environmental regulations have burgeoned, local governments have been forced to make significant investments and become more innovative in safely and legally disposing of trash. These investments and innovations include the multifarious transfer stations, recycling centers, and incinerators that have mushroomed through the land in the past decade.

66 F.3d 502, 505 (2d Cir. 1995). Whatever one's opinion of the choices a particular community has made (for example, the wisdom of using incinerators as an alternative to land filling is hotly debated), there can be no doubt that states and municipalities can no longer rely on indiscriminate dumping, if only because of potential liability. See, e.g., Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9657; Resource Conservation and Recovery Act, 42 U.S.C. § 6941 *et seq.*

5. 66 F.3d 1272 (2d Cir. 1995).

6. 66 F.3d 502 (2d Cir. 1995), *cert. denied*, — U.S. —, 116 S.Ct. 911 (1996).

7. In November, 1995, *Raite Rubbish Removal Corp. v. Onondaga County et al.*, No. 94-CV-1630 (N.D.N.Y. filed Dec. 19, 1994), a case involving a commerce clause challenge to a waste management system centered in Syracuse, New York, was settled when the plaintiff entered into a stipulation of discontinuance with prejudice. The *Babylon* and *Smithtown* decisions were cited in the stipulation as one of the reasons for the plaintiff's decision to end the litigation.

in light of the *Carbone* decision and traditional commerce clause jurisprudence. Finally, Part III discusses the implications of the Second Circuit's decisions for other waste management systems. This Article concludes that although the Second Circuit has made considerable progress in clarifying the law in this area, it has left questions about the constitutionality of flow control unanswered.

I. The Supreme Court's Decision in *Carbone v. Clarkstown*

In *Carbone*, the Town of Clarkstown had arranged for a private contractor to construct a "transfer station," or trash sorting and processing facility, at a cost to the contractor of approximately \$1.4 million.⁸ In exchange for paying for the station's construction, Clarkstown gave the contractor permission to operate the facility for five years.⁹ The town guaranteed that it would provide a minimum of 120,000 tons per year for processing at a "tipping fee" of \$81 per ton.¹⁰ The town further guaranteed that it would compensate the contractor for any shortfall in the guaranteed tonnage.¹¹ At the end of five years, Clarkstown had the option of purchasing the station for one dollar.¹²

The success of the town's financing scheme depended upon its ability to meet the minimum guaranteed tonnage, a problem, the Supreme Court noted, "compounded by the fact that the tipping fee of \$81 per ton exceeded the disposal cost of unsorted solid waste on the private market."¹³ In response, the town passed an ordinance requiring delivery of all non-hazardous solid waste within its borders to the new transfer station.¹⁴ The ordinance prescribed fines and even imprisonment for noncompliance.¹⁵

The lead plaintiff in the case, C & A Carbone, Inc., operated a recycling center in Clarkstown and processed waste which originated in both Clarkstown and outside New York State.¹⁶ Carbone claimed that by requiring him to send the non-recyclable por-

8. 114 S.Ct. at 1680.

9. *Id.*

10. *Id.* In the waste management industry, a "tipping fee" is the fee charged by a waste processing facility to waste haulers for unloading waste at the facility. The phrase refers to the fact that most garbage is unloaded from collection trucks by tipping the back of the truck over a landfill or unloading pit.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Carbone*, 114 S.Ct. at 1680.

15. *See id.* at 1687.

16. *Id.* at 1680-81.

tion of the waste he processed to the town's chosen facility, the town's ordinance "drives up the cost for out-of-state interests to dispose of their solid waste."¹⁷ In addition, with respect to waste which originated in Clarkstown, Carbone claimed the ordinance prevented everyone but the "favored local operator" from processing waste, thereby depriving "out-of-state businesses of access to a local market."¹⁸

The Court held that the ordinance was unconstitutional.¹⁹ As a general matter, governmental action falls within the purview of the commerce clause if it burdens or impedes the free flow of interstate commerce.²⁰ Clarkstown's ordinance impeded interstate commerce because it effectively hoarded local resources, waste processing and disposal services, by exclusively allocating the provision of those services to a local operator.²¹

The Court supported its decision by citing its long-standing principle that regulations which discriminate against interstate commerce are subject to a "virtually per se rule of invalidity."²² The fact that both local waste processors (other than the favored operator) and out-of-state businesses were excluded from the market did not decrease the burden the town had placed on interstate commerce.²³ If a regulation is discriminatory either on its face or in effect, it will pass constitutional muster only if the regulator can

17. *Id.* at 1681.

18. *Id.* While this latter claim was an important factor in the Court's decision, it is not clear how Carbone had standing to assert it. Certainly, Carbone had standing to raise a commerce clause claim if it could show that it lost out-of-state customers as a result of inflated disposal costs arising from Clarkstown's ordinance which rendered Carbone less competitive with processing facilities elsewhere. It is not clear, however, how Carbone could rely on the claim that out-of-state processors were denied access to the local market, since it was a local operation and was not entitled to assert the rights of third parties or generalized grievances. See *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979).

19. *Carbone*, 114 S.Ct. at 1684.

20. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937).

21. *Carbone*, 114 S.Ct. at 1682.

22. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (holding that state law banning importation of out-of-state waste violated commerce clause). The Court has defined "discrimination" for commerce clause purposes as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Dep't. of Environmental Quality*, — U.S. —, 114 S.Ct. 1345, 1350 (1994).

23. *Id.* In this regard, the Court referred to its decision in *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), in which it held unconstitutional a city ordinance requiring all milk sold in the city to be pasteurized within five miles of the city limits. There, the Court had found that it was "immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." *Id.* at 354 n.4.

demonstrate under rigorous scrutiny that there are no other means for achieving the legitimate local interest.²⁴ Clarkstown's avowed purpose for establishing flow control was to ensure that waste within its borders was "made safe" before it entered the stream of commerce.²⁵ The Court, however, postulated that "any number of nondiscriminatory alternatives for addressing health and environmental problems," such as uniform safety regulations, were available to the town.²⁶ The town also advanced the interest it had in using flow control to finance a new transfer station that would ultimately belong to the town, but the Court concluded that "revenue generation is not a local interest that can justify discrimination against interstate commerce."²⁷

At first glance, the decision in *Carbone* may seem unremarkable, but the Court's analysis of the paltry record on appeal raises more issues than it resolves. The first of these issues is whether the majority concluded that Clarkstown's designated transfer station was a purely private facility and, if it did, whether this was the primary reason Clarkstown's ordinance was discriminatory. The majority stated that Clarkstown's ordinance was "just one more instance of local processing requirements that we have long held invalid" because they hoard a resource "for the benefit of local businesses."²⁸ Yet, as Justice Souter pointed out in dissent, the "one proprietor is essentially an agent of the municipal government, which (unlike *Carbone* or other private trash processors), must ensure the removal of waste according to acceptable standards of public health."²⁹

24. *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (holding that the state's ban on the import of bait fish was permissible because there was no non-discriminatory alternative for ensuring that local fish stock would not be infected by harmful parasite). In *Taylor*, the Court stated that a discriminatory regulation may be permissible if it serves a legitimate local purpose and "this purpose could not be served as well by available nondiscriminatory means." *Id.* (emphasis added). In *Carbone*, however, the Court cited *Taylor* for the proposition that a discriminatory measure was invalid unless "the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Carbone*, 114 S.Ct. at 1683 (emphasis added).

25. *Carbone*, 114 S.Ct. at 1681.

26. *Id.* at 1683.

27. *Id.* at 1684. In the Court's opinion, the town could have resorted to taxes or municipal bonds to finance its project, a point which was particularly significant in the Second Circuit's commerce clause analysis. See *infra* notes 37-41, 64 and accompanying text.

28. *Carbone*, 114 S.Ct. at 1682.

29. *Id.* at 1695 (Souter, J., dissenting).

As Justice Souter suggests, unlike cases where a local processing requirement is enacted simply to profit local businesses, Clarkstown's ordinance served an essential municipal function.³⁰ Moreover, as the Second Circuit noted in *Babylon*, nothing of obvious constitutional significance turns on whether a traditional municipal service is performed by the municipality itself or by its agent, so long as locals and non-locals are subject to the same regulation.³¹ If this is true, Clarkstown's ordinance is not as obviously a protectionist processing requirement as the majority in *Carbone* asserted. By failing to address the possible differences between Clarkstown's ordinance and purely protectionist regulation, the majority opinion suggests that *any* local regulatory scheme which limits waste processing or disposal options effectively "hoards" a local resource and therefore burdens interstate commerce.

The majority's rationale for concluding that Clarkstown's method of financing the new transfer station was impermissible is also unclear. The majority stated that "having elected to use the open market to earn revenues for its project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of state."³² In other words, even if the transfer station served a public purpose, the town could not regulate the market in a manner which inequitably redistributed some of the cost of that facility to non-local businesses. It is not at all clear, however, that the regulation had that effect. Common sense suggests that the bulk of Clarkstown's waste processing cost increases would be borne by Clarkstown waste generators, who would ultimately absorb costs passed on to them by haulers. Moreover, the commerce clause is not necessarily violated if out-of-state businesses which choose to dispose of waste in Clarkstown are required to pay increased costs, provided local residents and businesses pay the same heightened cost. After all, the commerce clause does not protect particular businesses from regulation, only from protectionist regulation.³³ At the very least, the *Carbone* ma-

30. In contrast, the majority cited cases where the regulations at issue were plainly designed to benefit local business interests. *Id.* at 1682. The Court cited: *Minnesota v. Barber*, 136 U.S. 313 (1890) (striking down requirement that meat sold in state be examined by state inspectors); *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984) (striking down Alaska regulation requiring timber cut on state land to be processed in Alaska).

31. *USA Recycling v. Town of Babylon*, 66 F.3d 1272, 1282-83 (2d Cir. 1995).

32. *Carbone*, 114 S.Ct. at 1684.

33. See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978) (the commerce clause is not violated by regulations which do not create barriers against inter-

jority's failure to fully explicate the interstate burdens and discriminatory cost allocation which it perceived in the Clarkstown system invites confusion about the intended scope of its decision.

II. The Second Circuit's Application of *Carbone*

A. *USA Recycling v. Town of Babylon*

The Second Circuit confronted complex factual questions in *Babylon*³⁴ and *Smithtown*³⁵ which were complicated by the unsettled constitutional issues. In *Babylon*, the town had constructed a trash incinerator as the centerpiece of its local waste management system.³⁶ Taxes and bonds financed the construction of the incinerator.³⁷ The incinerator itself was owned by the town's development agency and leased to a private operator, to which the town paid a service fee for running the facility.³⁸ To ensure the financial viability of the incinerator, the town needed to deliver a minimum of 225,000 tons of garbage to it each year.³⁹ To do this, Babylon created improvement districts and prohibited individual businesses from hiring garbage haulers.⁴⁰ At the same time, the town levied a \$1500 "flat tax" on commercial property, plus a "user fee" for each cubic yard of garbage generated on each parcel above a fixed base amount.⁴¹ The town then solicited bids from both local and out-of-state haulers to collect non-recyclable commercial waste and ultimately awarded its commercial waste hauling contract to a local company, Babylon Source Separation Commercial, Inc. ("BSSCI").⁴² The town licensed BSSCI to dispose of 96,000 tons of waste per year at the incinerator for free, and required it to pay a tipping fee set by the town for any waste above that amount.⁴³

state dealers, prohibit the flow of interstate goods, "or distinguish between in-state and out-of-state companies").

34. 66 F.3d 1272 (2d Cir. 1995).

35. 66 F.3d 502 (2d Cir. 1995).

36. *Babylon*, 66 F.3d at 1276.

37. *Id.*

38. *Id.* at 1277.

39. *Id.* at 1278.

40. *Id.* The Second Circuit noted that the town's residential waste districts were established pursuant to New York Town Law § 54 (suburban town "special improvements") and § 198 ("powers of town boards with respect to improvement districts"). *Id.* at 1279 n.7. For reasons which are not clear, however, only the town's commercial districts were challenged by the plaintiffs and the court did not comment on the legal underpinnings for the commercial districts. *Id.* at 1278 n.7.

41. *Babylon*, 66 F.3d at 1276.

42. *Id.* at 1277.

43. *Id.* at 1279.

A number of plaintiffs challenged this waste management system, including local waste collection companies, an interstate waste transport company, and an out-of-state disposal facility.⁴⁴ The plaintiffs primarily claimed that, like the "favored status" bestowed on the transfer station operator in *Carbone*, Babylon had discriminated against interstate commerce by awarding exclusive collection rights to BSSCI.⁴⁵

The Second Circuit disagreed. At the outset, the court stated that it:

reject[s] the plaintiffs' contention that the *Carbone* decision fashioned from the 'dormant' Commerce Clause a new, and unprecedentedly sweeping, limitation on local government authority to provide basic sanitation services to local residents and businesses, on an exclusive basis and financed by tax dollars.⁴⁶

With this introduction, the court first addressed whether Babylon's system constituted regulation at all. The town had argued that its system was not subject to commerce clause scrutiny because it was purchasing collection services, thus acting as a market participant and not a market regulator.⁴⁷ Pursuant to the "market participant doctrine," a state or municipality which purchases or sells goods or services can buy and sell on the same terms that a private business can, including selecting its business partners and dictating the manner in which its contracts are met.⁴⁸ While these terms may prevent out-of-state companies from qualifying for municipal projects or fully participating in the local market, they do not violate the commerce clause because "[n]othing in the purpose animating the Commerce Clause prohibits a State [or local government], in the

44. *Id.* at 1279-80. The case was decided on appeal from an order granting the plaintiffs a preliminary injunction. The district court was evidently so persuaded that *Carbone* had precluded municipal flow control that it granted the injunction even though it had found that the plaintiffs would not suffer irreparable harm from that control. *Id.*

45. *Id.* at 1279.

46. *Babylon*, 66 F.3d at 1276.

47. *Id.* at 1282.

48. For example, the Supreme Court held in *White v. Massachusetts Council of Construction Employees, Inc.*, 460 U.S. 204 (1983), that Boston could require that half of the work force on construction projects funded by the city consist of Boston residents. *See also*: *South Central Timber v. Wunnicke*, 467 U.S. 82 (1984) (Alaska, although participating in market to sell timber, could not impose requirements on "downstream" timber processing market); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (state could confine sale of cement from state owned plant to state residents); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (state could subsidize recycling of in-state abandoned cars as participant in scrap metal market).

absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."⁴⁹

The *Babylon* court found that the town had exercised regulatory powers which were unavailable to an ordinary participant in the market by denying licenses to all garbage haulers but the one hired by the town, and penalizing haulers who collect garbage without a license.⁵⁰ But, while Babylon was acting as a market regulator, the court went on to hold that its regulation was not discriminatory.⁵¹ In doing this, the court contrasted the Babylon transfer station with that in *Carbone*. While *Carbone* involved a private operation whose elevated costs were borne by the businesses required to purchase its services,⁵² Babylon was not merely requiring haulers to buy services from a local facility, but instead, eliminating the local garbage collection market entirely and substituting a municipal system funded by assessments and taxes.⁵³ The Second Circuit concluded that although a regulation that benefits some trash processors and burdens others may violate the commerce clause, a regulation that drives private processors out of the market entirely does not violate the commerce clause, provided local and out-of-state businesses are equally excluded.⁵⁴ While the latter is more severe, its severity is uniform.

The case was complicated by the fact that after Babylon "eliminated" the local collection market, it awarded an exclusive collection contract to BSSCI, a local operator.⁵⁵ At this juncture, however, Babylon was acting as a market participant and not as a market regulator.⁵⁶ While the town had acted as a regulator at the outset when it passed its licensing provisions, its status changed to that of a market participant when it purchased collection services for its new garbage district.⁵⁷

49. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976). See also *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (state was entitled to favor its own citizens in selling cement manufactured at state-owned factory).

50. *Babylon*, 66 F.3d at 1282-83.

51. *Id.* at 1284.

52. *Id.* at 1283.

53. *Id.*

54. *Id.* at 1284-85.

55. *Id.* at 1287.

56. *Babylon*, 66 F.3d at 1287.

57. When acting as market participant, the town could either provide trash collection itself or purchase the service from a private contractor on any terms it chose. *Id.* at 1288. At one point, the court noted that Babylon had used an open bidding process to select its contractor and that it had not based its decision on geographical distinctions, thereby suggesting that even as a market participant a municipality should award its contracts on a non-discriminatory basis. *Id.* at 1290. The court had already

In short, the court determined that Babylon's waste management system was nondiscriminatory because the town had treated all haulers equally by eliminating independent collection in its new garbage district and by financing the collection system with municipal funds rather than "forced business transaction[s]."⁵⁸ As a result, Babylon did not have to meet the strict scrutiny standard which the Supreme Court applied in *Carbone*. Instead, Babylon only had to show that its system "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental"⁵⁹ Under this analysis, a court will uphold a regulation unless the burdens are "clearly excessive in relation to the putative local benefits."⁶⁰ Noting that Congress has recognized that "local governments have historically borne primary responsibility for the safe and reliable disposal of waste,"⁶¹ and that the Supreme Court has found that trash collection is a "core function of local government in the United States,"⁶² the Second Circuit found that the balance weighed in the town's favor.

B. *SSC Corp. v. Town of Smithtown*

In *Smithtown*,⁶³ the Second Circuit was presented with a somewhat different set of facts. Like Babylon, Smithtown had an incinerator but, in this case, a private company formally owned and operated the facility.⁶⁴ Smithtown had implemented two measures to ensure delivery of local waste to the incinerator. First, it enacted an ordinance that required all local waste generators and collectors

concluded, however, that when a municipality participates in the market nothing "precludes a local government from hiring a local company precisely because it is local." *Id.* at 1289.

58. *Id.* at 1283.

59. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

60. *Babylon*, 66 F.3d at 1287 (quoting *Pike*, 397 U.S. at 142).

61. *Id.* at 1293 (citing Resource Conservation and Recovery Act § 1002(a)(4) (codified at 42 U.S.C. § 6901(a)(4) (1988))).

62. *Id.* at 1285. The court cited *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905), and *Gardner v. Michigan*, 199 U.S. 325 (1905). While those cases arose from takings and due process challenges to city ordinances which awarded exclusive contracts to private "scavenger" firms, the Second Circuit concluded that the deference afforded by the Supreme Court to essential municipal services was no less appropriate under the commerce clause.

63. 66 F.3d 502 (2d Cir. 1995).

64. *Smithtown*, 66 F.3d at 506. Smithtown financed construction of the incinerator in conjunction with the Town of Huntington through an arrangement whereby bonds issued by a state authority were secured by both towns' long-term obligation to pay a service fee to the incinerator's operator, which then repaid the bonding authority. Smithtown used funds collected from a property tax and tipping fees at the incinerator to fund the service fee. *Id.* at 506 - 7.

to deliver their trash to the incinerator.⁶⁵ Smithtown enforced the ordinance through fines and imprisonment.⁶⁶ Second, the town created improvement districts and solicited bids for collection services in the districts.⁶⁷ The bid winners had to sign a standard collection contract which required them to dispose of garbage at the incinerator.⁶⁸ Smithtown awarded contracts for collection in seven of its districts to SSC.⁶⁹ SSC, however, promptly violated its contractual obligations by dumping Smithtown trash at sites which charged tipping fees lower than those charged by Smithtown and "pocketing the difference."⁷⁰ When Smithtown tried to enforce both its ordinance and contracts, SSC filed suit claiming that both violated the commerce clause.⁷¹

The Second Circuit rejected Smithtown's defense that it was acting as a market participant rather than a regulator when it enacted its ordinance.⁷² The court reasoned that government action "constitutes 'market participation' only if a private entity could have engaged in the same actions" and "[n]o private company in the open market could force others to buy its services under pain of criminal penalties."⁷³ The court went on to hold that the ordinance was discriminatory because, like the ordinance in *Carbone*, it "directs all town waste to a single local disposal facility, to the exclusion of both in-state and out-of-state competitors."⁷⁴ Presumably, in reaching this conclusion, the court relied on the fact that the facility at issue was *privately owned*, since the court had allowed Babylon's licensing regulation to stand even though it effectively required disposal at a single, local *public* facility.

Smithtown's improvement districts and contractual arrangements were another matter. Here, the court found that Smithtown was acting as a market participant for essentially the same reasons that applied in *Babylon*.⁷⁵ After eliminating the collection market

65. *Id.* at 507. Smithtown's "flow control" ordinance provides: "No person authorized to collect or transport acceptable waste within the Town of Smithtown except as a solid waste management facility designated by the Town pursuant to this section." *Id.* (citing Smithtown Code § 177-17(B) (1994)).

66. *Id.* Violation of the statute was an unclassified misdemeanor, punishable by a fine of up to \$5,000 and imprisonment of up to 60 days. *Id.*

67. *Id.* at 507.

68. *Id.* at 507-8.

69. *Id.* at 508.

70. *Smithtown*, 66 F.3d at 508.

71. *Id.*

72. *Id.* at 511-13.

73. *Id.* at 512.

74. *Id.* at 514.

75. *Id.* at 515-16. See also *supra* notes 55-57 and accompanying text.

by creating improvement districts, Smithtown allocated its tax dollars to purchase collection services from SSC and purchased those services on any terms it chose, including a requirement that SSC dispose of waste at a preferred facility.⁷⁶ Smithtown's regulations were therefore redundant, and the town was free to accomplish its waste management goals entirely through districting and contracts.

IV. Issues Arising from the Second Circuit Decisions

The results in *Babylon* and *Smithtown* seem consistent with the decision in *Carbone*, and the broad distinction in commerce clause jurisprudence between regulations which favor local business interests and those which use public resources to even-handedly provide a municipal service. Certainly, the Second Circuit's reasoning in the two cases provides significant leeway for communities to implement waste management systems. At the very least, communities which own their own disposal facilities, establish garbage districts, and eschew regulation for service contracts are likely to be on safe ground.

Many existing systems, however, are hybrids, incorporating some but not all of the elements endorsed by the Second Circuit. For example, Oneida and Herkimer counties have a joint system structured around county laws which require delivery of waste collected in their seventy-eight constituent municipalities to facilities designated by the counties. At the county level, Oneida and Herkimer have effectively created county-wide waste districts and have designated public facilities for disposal — favorable attributes under *Babylon* and *Smithtown*. At the same time, however, the system is largely financed by elevated tipping fees directly imposed on waste haulers. Moreover, some of the constituent cities and towns collect their own waste, some solicit bids and award a service contract to a single hauler, and others allow residents to choose their own hauler from those agreeing to deliver waste to the county facility and who obtain a local operating license. How each of these systems within the larger bi-county system will fare is difficult to predict. While municipalities using licensing requirements to implement flow control may be more vulnerable to challenge than those relying on self-hauling or an agent, municipalities allowing any licensed hauler to operate have greater competition in their local markets. That result is more consistent with the open-market principles underlying the commerce clause than the situation in *Babylon* where,

76. *Smithtown*, 66 F.3d at 515-16.

in the final analysis, a single local operator had cornered the market.

With so many variables in the structure of waste management systems, considerable uncertainty still exists regarding what constitutes a permissible system. Indeed, despite the Second Circuit's careful reasoning, some of that uncertainty may be attributed to shortcomings in both the *Babylon* and *Smithtown* decisions. First, the court's conclusion that Smithtown's incinerator was more like Clarkstown's transfer station than Babylon's facility is arguable.⁷⁷ Smithtown's incinerator may have been owned and operated by a private company, but it was constructed with public funds and its operating costs were at least partly met by taxes; the rest of the operating funds came from tipping fees which the court upheld as constitutional under the town's districting scheme.⁷⁸ If the critical questions in these cases are: (i) who bears the cost of the system; and (ii) whether the cost is allocated in a discriminatory manner, then the fact that Smithtown's incinerator was "privately" owned is hardly determinative.

Of course, if an equally critical question is "who profits?", there can be no doubt that it is discriminatory for a municipality to use its regulatory powers to award exclusive rights to a local processor because it deprives out-of-state processors of the opportunity to participate in the local market. This point is at the heart of the *Carbone* decision.⁷⁹ The problem, however, is that while the Second Circuit found that Smithtown's ordinance favored a single "local" operator and it therefore "facially discriminate[s]" against interstate commerce, the Smithtown facility was in fact operated by an *out-of-state* corporation.⁸⁰ Common sense suggests that Smithtown's selection contributed to, rather than burdened, interstate commerce. Consequently, while it may be tempting to distinguish permissible and impermissible systems based on whether they direct waste to "privately" or "publicly" owned facilities, the line between the two is still ill-defined. Indeed, the Second Cir-

77. See *supra* note 74 and accompanying text.

78. *Smithtown*, 66 F.3d at 505-6.

79. *Carbone*, 114 S.Ct. at 1683. Unfortunately, in *Carbone* this point was largely hypothetical since there were no facts to suggest that any out-of-state processor was interested in entering the Clarkstown market. The Supreme Court's apparent disinterest in the actual impact Clarkstown's system had on commerce may have encouraged courts to gloss over potentially complex factual questions concerning the ultimate costs and burdens of this kind of public safety and environmental regulation.

80. See *Smithtown*, 66 F.3d 506 n.10. The incinerator was owned by Ogden Martin Systems, a Delaware corporation largely based in New Jersey.

cuit's failure to focus on the ownership of the Smithtown facility suggests that the court may have concluded that a regulation that benefits any single operator is impermissible, regardless of the actual impact it may have on commerce.

Finally, while the Second Circuit emphasized that Babylon and Smithtown had relied on assessments, taxes or bonds for funding rather than (as in Clarkstown) tipping fees collected by a private operator,⁸¹ this distinction may be meaningless. Certainly, it is easy to conclude from the use of locally-generated public revenues that interstate commerce is not unduly burdened by a municipal system. It is not necessarily true, however, that a system financed by regulatory measures which impose costs directly on generators and haulers is any less equitable. Even in *Carbone*, while the Supreme Court apparently objected to the fact that a private operator exclusively benefited from the Clarkstown system,⁸² there was no claim that the system's costs were unevenly allocated between local generators or haulers and the out-of-state entities which chose to dispose of waste in Clarkstown. After all, everyone paid the same inflated tipping fee.⁸³ Provided out-of-state entities are not saddled with a disproportionate cost for doing business in a local waste market, it is difficult to understand why funneling funding through municipal coffers should make a difference.

V. Conclusion

The Second Circuit has gone a long way to focus the issues which have been brewing since the *Carbone* decision. Certainly, its decision to uphold Babylon's waste management system and the districting and contract aspects of Smithtown's system will provide some comfort to those who believe that a return to largely unregulated waste disposal invites environmental havoc. Unfortunately, *Babylon* and *Smithtown* are unlikely to serve as the last word on garbage for commerce clause purposes, and it is too soon to predict what the last word might be.

81. See *supra* notes 37-41 and 64 and accompanying text.

82. See *supra* note 21 and accompanying text.

83. See *supra* notes 10-17 and accompanying text.