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ECONOMIC POLICY:

TRASH AS A COMMODITY

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In 1994, the Supreme Court, in *C&A Carbone v. Town of Clarkstown*, found that state and local laws that mandated the disposal location for trash were unconstitutional. These laws, termed "flow control" ordinances, were found to violate the "dormant commerce clause" that reserves regulation of interstate commerce to Congress unless it is specifically delegated to the states. The ensuing policy debate about whether Congress should authorize flow control has focused primarily on practical problems of specific localities or on rhetoric about competition and free enterprise.

The larger policy issues have been ignored or obscured. Taking a broader historical perspective, shifts in flow control are only the latest manifestation of a major transformation of trash into a commodity. Viewed in this light, the debate about flow control has really only been minor skirmish. Indeed, the debate has really been about the transition process, not about the process itself. Essentially, the flow control debate has presumed the larger historical shift in the transformation of trash.

The United States generated over 195,700,000 tons of municipal solid waste[1] in 1990 or 4.3 pounds of trash per person per day (U.S. Environmental Protection Agency [EPA] 1994). Twenty-five years ago most of this municipal trash was tucked into local dumps, often burned, and generally forgotten. Since then, environmental concerns, coupled with the sheer magnitude of the trash, have profoundly changed the ways we deal with trash. Trash has become a huge industry in the United States and along with the development of this industry has come a profound change not just in laws but in basic legal concepts—forms—related to trash. Trash has become a commodity.

Law has played a major role in this transformation. Structural theorists such as Balbus (1977) and Pashukanis (1980) suggest that, although legal institutions have some autonomy—hence protections of workers and the environment are possible—that autonomy is not absolute. Ultimately, they argue, legal institutions, and legal forms, will ratify and legitimate economic arrangements and transformations. "The legal form, Pashukanis argued, develops directly out of the exchange of commodities in a competitive capitalist marketplace" (Milovanovic 1988:70; Beirne and Sharlet 1982). Both legal forms, and legal content, must ultimately articulate with and be explained by "the systemic requirements of capitalism" (Balbus 1977:572).

This notion that law reflects and ratifies the economic order, even though it may not directly express the instrumental interests of individual capitalists, suggests that at times of transformation in economic forms shifts in legal forms will follow. More specifically, these theorists suggest, the economic transformation from pre-capitalist to capitalist society will be accompanied by change in legal forms that ratify the economic transformations.

Bergeron (1993) beautifully explores this hypothesis. Examining the process through which promises became property—commodities—Bergeron (6) argues that the shift from pre-capitalist to capitalist is the historical shift from an "objective" theory of value to an "exchange" theory of value in law. Since value is entirely subjective, "utilities are measurable only by their effects in the market" (20). Thus, value becomes private—there is a shift from public to private.

This shift, in turn, transforms the notion of "property" such that it become equivalent to "commodity." The modern concept of property in law presumes the existence of a market and exchange value. Bergeron explores how promises become reconceptualized in law as property—commodities—prompted or driven by the emerging economic forms. The shifts in economic forms came first, followed and ratified by shifts in legal forms. Implicitly, the shift explored by Bergeron, is an example of the general shift in the legal form to accommodate and ratify a commodity society (see also Marx 1970:59-64).

By 1996, most of this shift to understanding most of the social world as commodities has long since taken place. However, in fundamental ways the conceptual and legal transformation of trash to commodity has only occurred in the last 25 years. Put another way, neither trash itself nor the capacity to dispose of it were seen as either property or a commodity in 1970. By 1997, both have been reconceptualized *in law*. This reconceptualization is a response, reflection, and ratification to changes in the economy.

An analogy will help make this clearer and reveal the stunning extent to which these transformations alter our social consciousness: Is sewage—the stuff that runs in pipes to your septic system or the treatment plant—property? Is it a commodity? Do you think of the capacity of your septic system as property or a commodity? Would you call the capacity of the treatment plant "property?" Or a "commodity?"

We think of the capacity of the treatment plant (if we think of it at all) as a "resource" or a "community resource." Similarly, we think of the sewage as a "problem" because it seems to us to have little "objective" or "use" value. In our terms, the conceptual and legal transformation of sewage to "property" or "commodity" has not occurred, although it may in the future.[2]

In 1970 most people thought of trash the same way as we still think of sewage. The local dump was a resource. Certainly, trash was not considered property or a commodity in law. However, in the last 25 years, under the pressure of volume and environmental concerns, a trash industry has developed in the United States and, ultimately, the needs of that industry have led to seeing trash and disposal capacity as property and commodities. As predicted by structural theorists, in 1994 this shift in

the economic form was ratified in law by the U.S. Supreme Court in *C&A Carbone v. Town of Clarkstown*.

As with most basic legal change, the *Carbone* decision created a conflict and dilemma within capital such as that discussed by Chambliss (1993). More concretely, the state may "sacrifice individual capitalists' interests to long-term economic survival" of the overall capitalist system (Calavita and Pontell 1994:313). This conflict was (and still is) between those who have invested in the pre-commodity form and those who have investments and interests in the commodity form. Since the *Carbone* decision, the search for a resolution to this conflict—and a transition to the commodity form—has been sought both in Congress and the courts.

Data for this research come from many sources including government and court documents, including briefs submitted in the *Carbone* case; congressional hearings and floor debate; materials obtained from lobbyists and organizations, and from the files of several Senators and Representatives; local news accounts; and trade publications within the solid waste industry. Extensive personal interviews were conducted with congressional staff, lobbyists, officials from several interested organizations in Washington, D.C. Interviews were also conducted with representatives from various state and local solid waste organizations from around the country while they were attending several conventions in Washington, D.C. Finally, to supplement news reports and court documents, local information about Clarkstown, New York, and Regional Waste Systems in the Portland, Maine, area, was collected through personal interviews conducted with local officials, trash haulers, and disposal facility operators.

THE TRASH "CRISIS"

The environmental concerns of the early 1970's profoundly changed the nature of waste disposal. These concerns focused attention both on the huge and increasing volume of trash and the difficulty of safely disposing of it. In 1970, the Resource Recovery Act dealt with recovery of energy and materials and helped begin the move toward waste-to-energy plants and recycle/reuse programs in the United States (Blumberg and Gottlieb 1989:63).

The Resource Conservation and Recovery Act (RCRA), in 1976, responded to "deepening problems associated with municipal solid waste, primarily landfill disposal, as well as with new concerns related to hazardous waste" (Blumberg and Gottlieb 1989:64). RCRA directly involved the Federal government in permitting and regulating of waste facilities. The Environmental Protection Agency was to set standards for landfills, and to police them.

At the same time, the amount of municipal solid waste (MSW) generated in the United States continued to grow. In 1960, the U.S. generated 87.8 million tons. This increased to 121.9 million tons by 1970 and 195.7 million tons in 1990. Much of this increase was a result of increases in the amount generated per person: from 2.7 pounds per person per day in 1960 to 4.3 pounds per person per day in 1990 (EPA 1994).

When RCRA was enacted in 1976, most of the disposal facilities were municipal dumps. Few could meet the new standards. They either needed to be upgraded—an expensive proposition even when possible—or to be closed down and replaced by new facilities—also an expensive proposition. The "trash crisis" of the late 1970's and 1980's was the lack of acceptable disposal capacity.

This "crisis" deepened during the 1980's as new environmental standards, and increased closings of landfills, diminished disposal capacity. At the same time many states mandated proper management of local solid waste and set recycling and reduction goals for state and local governments. In 1987, the perceived lack of disposal capacity was still acute enough for a feature story in *U.S. News and World Report* (Budiansky) to be titled "Tons and tons of trash and no place to put it."

RCRA had required states to develop and submit solid waste management plans that ensured that solids wastes were "disposed of in an environmentally sound manner" (§6943(a)(2)) and authorizes local governments to negotiate and enter into "long-term contracts" for the supply of waste to facilities or "for the operation of such facilities" (§6943(a)(5)). In addition, RCRA authorized "institutional arrangements necessary to undertake projects … including the creation of special districts, authorities, or corporations where necessary having the power to secure the supply of waste to a project" (§6948(d)(3)(C)).

The guidelines in RCRA, implemented in state plans, created an hierarchy of waste management options which made source reduction the highest priority and landfill disposal the lowest. The Maine statute, for instance, (ME Revised Statutes, Title 38, §2101(1)) ranks options from most to least acceptable: 1. reduction; 2. reuse; 3. recycling; 4. composting; 5. "processing which reduces the volume of waste needing land disposal, including incineration;" and, 6. "land disposal of waste."

In the 1970's, Connecticut and Florida took the lead in developing new capacity, primarily through building waste-to-energy (WTE) incinerators to replace landfills. In both these states the problems were acute: sandy soil and shallow groundwater in many areas eliminated landfills as an environmentally acceptable solution.

Connecticut and Florida also pioneered the development of new mechanisms to fund construction of increasingly sophisticated and expensive disposal facilities: regional facilities and flow control. Regional facilities were designed and constructed by regional consortiums of municipalities, or by counties, directly or by contract with a private firm. The member communities also jointly funded the facilities often by issuing bonds against the future disposal fees (called "tipping fees" because the garbage trucks tip to unload) at the facility and, in the case of waste-to-energy plants, income from the electricity generated by burning the trash.

By 1994, over $20 billion worth of bonds had been issued for solid waste facilities in the United States. State and local jurisdictions "issued nearly $3 billion in solid waste bonds in 1992 alone" (Worden 1993:9).

Rather than do it themselves, some communities entered into agreements with private firms to build and operate the facilities. Usually, these localities guaranteed

the firm's income by guaranteeing the amount of trash delivered each year. The trash guaranteed income from tipping fees (and electricity, when relevant).

In Baltimore, for example, local authorities contracted with Wheelabrator, a leading company in waste-to-energy technology, to build and operate a waste-to-energy plant which processes about 2,000 tons of trash each day. The facility produces about 60 megawatts of electricity each day and recovers about 60 tons of scrap metal. Local municipalities didn't have to put up any money but they promised a steady supply of garbage at an agreed upon fee for each ton of trash (Budiansky 1987, and personal conversations).

TRASH AS PROPERTY: ENTER FLOW CONTROL

Flow control is a mechanism to ensure the supply of trash to these old and new facilities. The supply of trash ensures both the tipping fees and the trash to burn for electricity. Flow control was developed because localities decided they needed to build facilities. Initially at least, flow control accomplished two purposes: 1. it stopped trash from going to less desirable, older landfills and dumps, and, 2. it provided a mechanism to fund new facilities.

Essentially, flow control asserted that trash was *property* and asserted government *ownership* of the trash. This gave localities the right to mandate how and where it would be dumped. This development also directly effected the people and companies that transported the trash. Implied in flow control is the idea that trash haulers are carters or carriers who, although they have possession, do not have ownership. This distinction between possession and ownership, with which judges have struggled at least since Justice Choke grappled with the Carrier's Case in 1473 (Hall 1952), was hotly contested by some trash haulers from the very beginning.

Haulers argued, of course, that their taking possession of the trash from the curbside or when it was put into their dumpster, constituted taking ownership. If this is true then the hauler can decide where to dispose of the trash—it is his or her property.[3] For our purposes, the important point is that *both* views rely on the transformation of trash into a commodity—into property.

In most cases, local flow control ordinances adopted by the municipalities or county mandated that the trash be delivered to specific facilities for processing, treatment, and/or disposal. In other cases, particularly in the Western United States, municipalities exercised a less direct form of flow control by negotiating exclusive contracts with haulers that required that trash go to specified facilities. In either case, the specific facility varied by community and, sometimes, by the type of trash. Designated facilities included transfer stations, waste-to-energy (WTE) plants, materials recovery facilities (MRF's), composting facilities, and landfills.

Flow control ordinances are irrelevant when local authorities collect the trash. However, in many areas local hauling companies contract with either the community or with individual residents and businesses to collect and haul their waste. Flow control ordinances prohibit these private haulers from choosing their disposal site.

During the mid to late 1970's state and local governments began using flow controls primarily to support the development of a growing MSW capacity, particularly if it required large capital investments (i.e. funding the construction of WTE facilities). In some cases, flow control generated income to fund the closure of existing landfills. Flow controls assisted state and local governments in procuring substantial loans by ensuring that there would be enough waste to generate sufficient revenues to service facility debt as well as pay the day-to-day operation of the facility. In addition, many communities used income from tipping fees, guaranteed by flow control, to fund recycling efforts.

Bonds issued to develop new facilities were not always offered by state and local governments; in the Baltimore case, for instance, Wheelabrator obtained $191 million in industrial-revenue bonds to finance construction (Budiansky 1987, and personal conversations, 1995). These bonds ultimately were guaranteed by flow control ordinances that ensured the flow of trash to the facility. By 1995, the Public Securities Association estimate that over $20 billion of outstanding debt was underwritten by flow control in the United States (*Solid Waste Report* 1995). The Government Finance Officers Association of the United States and Canada identifies at least 327 bond-financed projects in 42 states that relied on flow control (Esser 1995).

During the last 25 years, then, trash disposal has profoundly changed. Many local facilities have been closed or are in the process of being closed and new facilities have been built. Increasingly, new facilities are regional—serving a number of municipalities—and have their funding guaranteed by some variety of flow control.

Of course, not all states and localities developed new facilities to replace closed dumps and landfills. Some simply shipped their waste elsewhere. By 1992 there was a huge interstate commerce in trash with New York and New Jersey leading the list of exporters with 3.8 and 2.6 million tons of exported solid waste, followed by Missouri with 1.1 million tons. That same year, Pennsylvania imported 4.3 million tons, Illinois 3.4 million tons, and both Ohio and Indiana imported 1.8 million tons (Environmental Industry Associations 1994). This commerce in trash played a large role in the development of the corporate trash industry.

TRASH AS COMMODITY: ENTER THE CORPORATE TRASH INDUSTRY

During the same 25 years, and for many of the same reasons, a corporate trash industry emerged in the United States. In 1970, most trash hauling was done by small local companies who took trash to local municipal dumps. By 1996, both trash hauling and disposal are dominated by a relatively small number of vertically integrated international corporations—corporations which not only haul trash but own and/or operate the trash's destination: landfills, incinerators, recycling facilities, hazardous waste facilities, etc.

The largest trash corporation is WMX Technologies (formerly and more commonly known as Waste Management, Inc.). With roots in the Chicago trash

business from the days of ethnic neighborhood haulers and the Ace Scavenger Service, the company incorporated as Waste Management in 1971. As its official history recounts (Jacobson 1993), Dean Buntrock, founder and chairman, saw the costs of disposal increasing along with the complexity of the industry amid environmental concerns and ever-increasing amounts of trash. He observed, that "the solid waste management industry is, by necessity, entering an age of professionalism" (Jacobson 1993:95).

The history of this massive corporation is rapidly becoming the modern history of trash. From its earliest days, the corporation was involved in disposal facilities—an early Chicago incinerator and landfill—as well as hauling. And its emphasis from its early days was on more-than-local facilities and planning. Today, WMX employs more that 73,000 people, owns over 18,000 garbage trucks, owns or leases over 20,000 acres of permitted landfill, operates in more than a dozen countries, and, through its subsidiaries Chemical Waste Management, Wheelabrator, and Rust, owns or leases over 20 treatment, resource recovery or disposal facilities, and 14 trash-to-energy facilities. In addition, it is heavily involved in long-distance hauling of trash (Standard and Poor 1994).[4]

Although smaller, Browning-Ferris Industries (BFI) has a similar emphasis on vertical integration and is heavily involved in landfill operations. Together, WMX and BFI are dominant forces in the waste industry in the United States. In both cases, this development has been fueled by the same environmental and economic concerns which profoundly changed the ways that local governments deal with trash.

The critical point, however, is that this development of trash corporations—particularly those which were vertically integrated to both transport and dispose of trash—increasingly turned a public function into a private industry function. With apologies to Marx, the more-than-local ownership of the *means of destruction* was the critical shift in the transformation trash into a commodity. At least symbolically, the landmark event in this transformation was the construction of the first privately owned waste-to-energy plant in Saugus, Massachusetts, in 1975. This facility was built by and is still operated by Wheelabrator Technologies, Inc. which became a WMX subsidiary in 1990 (Jacobson 1993:27).

TRASH AS COMMERCE: ENTER THE COURTS

Various state and local laws regarding the flow of trash were challenged, often by local trash companies. In 1978, the Supreme Court decided *Philadelphia v. New Jersey* in which the City of Philadelphia successfully challenged New Jersey's ban on the importation of municipal solid waste.

In *Philadelphia*, the Court, for the first time, regarded disposal capacity—landfill space in this case—as a *commodity* which could not be "hoarded" and municipal solid waste as an *article of commerce*. The Court decided that New Jersey's law violated the Commerce Clause of the Constitution essentially because it withheld landfill capacity from interstate commerce.[5] According to the Court, the law constituted "economic

protectionism" and "imposed on out-of-state commercial interests the full burden of conserving the state's remaining landfill space."

Subsequent decisions reaffirmed this view of trash as an article of commerce and both disposal capacity and the trash itself as commodities. In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources* (1994), for instance, the Court rejected a state law restricting importation of trash as discriminating against interstate commerce. The parties to the case encapsulate the issue and the legal change underway: the plaintiff was a commercial operation which argued that it had a commodity for sale—landfill capacity—and should not be restricted in marketing that commodity. Michigan, as the name of its Department implies, saw this as a community *resource.*

The effect of these cases was to open up the competitive market for disposal capacity. An analogy to disposal capacity is the rooms at your local Holiday Inn. These rooms are no longer a resource; they are, like space in the landfill, a commodity, waiting to be filled. Thus, although it is the trash that moves around, the actual competition is among the owners of various rooms—landfills or other disposal capacity. As this capacity became increasingly private—especially controlled by the trash corporations—the pressure increased to see trash handling as a purely economic issue.

Cases concerning flow control—which restricted export rather than import—were sometimes distinguished from *Philadelphia* during this period because they placed a burden on the local community rather than out-of-state businesses or consumers. In *Hybud Equipment Corp. v. City of Akron* (Ohio) (1981), for example, the Sixth Circuit court explained that Akron's flow control ordinance did not discriminate against "out-of-town people" and that the "economic costs of the Akron measure fall hardest on the people who generate and collect garbage in the City of Akron. In this case and others the courts essentially ratified the emerging legal view that trash should be understood as a commodity—as *property*—in the stream of commerce but failed to fully appreciate the implication of *capacity* as commodity rather than resource.

Those courts and justices arguing that flow control was legitimate essentially argued that these restrictions were environmental rather than economic. This resistance to the majority view can be illustrated by Chief Justice Rehnquist's dissent in *Fort Gratiot* in which he argued that the Michigan restriction was part of a "comprehensive health and safety regulation and was not designed to economically protect the State's environment" (Wolf 1994:547). Again, this line of thinking asserts that public interest may be different than purely economic—a view apparently rejected in *Philadelphia.*

In other flow control cases, however, lower courts fully grasped the significance of *Philadelphia* and invalidated the ordinances as violative of the Commerce Clause.[6] Fairbault and Martin Counties in Minnesota developed flow control ordinances to build and operate a new composting facility. The ordinances required that appropriate compostable waste be taken to the new facility. Waste Systems Corporation, which had been hauling most of these counties' trash to its Iowa

landfill, sued the counties. The tipping fee at the Iowa landfill was $30 per ton versus the $70 per ton fee at the composting facility (Wolf 1994:553-54).

The counties argued that the facility was built to comply with the RCRA hierarchy as implemented by state law and that its interest was environmental rather than economic. In 1993, the Eighth Circuit federal court rejected this argument and struck down the flow control ordinance (*Waste Systems Corp. v. County of Martin*). The court viewed flow control as clearly discriminatory and as "principally directed at protecting local government investment in a waste facility" (Wolf 1994:553). In short, the local government was seen merely as an economic participant, pursuing economic gain in a commodity market.

One direct result of the Minnesota decision is worth noting to more concretely illustrate the growing ratification of the corporate trash industry. In 1990 Springfield, Missouri, a town of 145,000, approved an

> Integrated Solid Waste Management System which included as one of its primary components a Materials Recovery and Composting Facility (MRCF) and the issuance of $17.9 million in revenue bonds for the facility and other system components. The plan also includes components for curbside collection of recyclables; the removal of recyclables and reuse of materials taken to the MRCF; a landfill for inert material which is residue from the MRCF; and a household chemical waste facility that will be used to remove household chemicals from the solid waste stream (O'Neal 1993a:444).

Springfield is in the 8th Circuit and the *Waste Systems Corp*. decision in Minnesota invalidated their flow control ordinance. Following the decision, Browning-Ferris and Waste Management together collected over 75% of the town's trash. According to a local councilman, Jim O'Neal (1993a:444), "BFI and Waste Management … bought landfills in the region and are now shipping over 300 hundred tons of solid waste some 50 to 90 miles away from Springfield" (see also O'Neal 1993b; Deaver 1993; Higgins 1993:143-44). Disposal capacity became a commodity in Springfield.

In 1993, the Supreme Court accepted a bizarre case from New York and used it as a vehicle to make its broadest statement about trash.[7] Two brothers, Angelo and Carmine Carbone claimed that the flow control ordinance of Clarkstown, New York, violated the Commerce Clause of the U.S. Constitution. From the perspective of Clarkstown, the Carbones were petty hoodlums who were receiving trash illegally from both New Jersey[8] and Clarkstown and then illegally shipping it directly to disposal facilities rather than the local transfer station in violation of the local flow control ordinance. From the perspective of the Carbones, they owned the trash in their possession and "the application of the local law as applied to them constitutes a taking of property" in violation of due process (*Town of Clarkstown v. C & A Carbone, Inc., et al*, Supreme Court, Appellate Division, Second Department of the State of New York, August 31, 1992 at 8).

The brief for the petitioners (Carbones) submitted to the Supreme Court framed these local issues in broad national terms. The first section of the argument is titled

"Flow control laws are a continuation of long-standing efforts by local jurisdictions to isolate their trash from the national economy." The brief asserts in the strongest possible terms that trash and disposal capacity are commodities—an article of commerce.

> Where trash was once an article of commerce that localities did not want, and where capacity for the disposal of trash was once an article sought to be hoarded, the opposite is now frequently true. …trash is no longer an unwanted commodity; it has instead become a valuable resource (12, 16).

The brief also refers to trash as a "raw material" (17).

On May 16, 1994, the Supreme Court affirmed the Carbone argument almost completely in an opinion closely related to the petitioners' brief (*C&A Carbone v. Town of Clarkstown*). The court held that flow control violates the dormant Commerce Clause of the Constitution by regulating or impeding interstate commerce without the express authority of Congress. Associate Justice Anthony Kennedy, writing for the Court, said, "The flow control ordinance … hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility."

The transformation of trash and disposal capacity into property was complete and wholly ratified by the Court. In essence, the Court held that localities' claims to "ownership" of trash under flow control arrangements—ordinances or contracts—is not valid while the haulers' claim that possession constitutes ownership of trash was upheld. At the same time, disposal capacity was again ratified as a commodity, able to be widely marketed in commerce and the only interests are economic.

The dissent in *Carbone* makes this shift quite clear.

> The majority ignores th[e] distinction between public and private enterprise…. [P]rivate businesses, whether local or out of state, first serve the private interests of their owners, and there is therefore only rarely a reason other than economic protectionism for favoring local businesses over their out-of-state competitors. *The local government itself occupies a very different market position, however, being the one entity that enters the market to serve the public interest of local citizens quite apart from private interest in private gain* (at 14-15, emphasis added).

This perspective, however, was not sustained. Instead, the Court reinforced and ratified the economic shift of trash and trash disposal facilities to a commodity. As suggested by the structural theorists, the legal form followed the economic form to create a continuing homology between the two.

NEGOTIATING THE TRANSITION: ENTER CONGRESS

The *Carbone* decision created a dilemma for capital. The decision effectively nullified all flow control arrangements in the United States.[9] There were, however, a lot of loose ends left around, not the least of which were the $20,000,000,000 in bonds backed by flow control arrangements. Chambliss (1993:6) argues that the

interests of capital are not unitary—"the ruling class is often divided in their interests." In this case, there was a conflict between those who had invested in the pre-commodity form—primarily municipalities and bond holders—and those who had invested in the commodity form—notably the trash corporations.

To resolve this dilemma, attention shifted to Congress. Since *Carbone* and other cases had been decided on the basis of the dormant Commerce Clause, all that was needed was an explicit grant of authority for states and localities to exercise flow control. In effect, Congress was searching for a solution which would serve the apparently contradictory interests of capital—a "win-win" solution or policy which, in this case, would protect economic interests in the pre-commodity form as well as interests in the commodity form (see Nagel 1994 and 1995).

The general solution or policy which emerged in Congress was legislation authorizing flow control authority which had been in place at the time of *Carbone*—grandfathering these local laws—while essentially eliminating any new flow control. This type of legislation would serve as a transition from pre-commodity to commodity relations by protecting economic interests in both. More concretely, grandfathering legislation allowed bondholders and municipalities to win by protecting their investments. At the same time, grandfathering legislation allowed those in the waste industry, and especially those who had invested in disposal facilities and transportation, a future open market for their services.[10]

In May, 1995, the Senate overwhelmingly passed legislation grandfathering flow control. At the end of January, 1996, the House defeated similar legislation.

Public sector organizations, including the National League of Cities, the U.S. Council of Mayors, and the National Association of Counties had been pressing for flow control legislation even before the *Carbone* case, without a great deal of success. These groups were advocating a grant of authority which they believed RCRA had implicitly expected the states to exercise: control of the trash.[11] Although they had managed to keep the issue on the table, they had found no Congressional "champions" for the cause and little industry support.

With the *Carbone* decision, however, things became more urgent. Public sector groups were concerned about protecting their investments. The National Association of Bond Lawyers, which had submitted an *Amicus* brief in *Carbone*, the Public Securities Association, and others saw the specter of solid waste bonds becoming junk. Indeed, the year following *Carbone* saw the closing of various facilities—two in Ohio alone.[12]

Joining the public and financial sectors was the trash industry. Although the trash corporations had little interest in granting states and localities authority to control trash in the future, corporations such BFI and Waste Management were interested in protecting existing flow control arrangements in place at the time of *Carbone*. Both corporations had invested in flow control arrangements; many of their waste-to-energy plants, for example, were built and operated with volume guaranteed by flow control. For instance, in 1990 Waste Management subsidiary Wheelabrator

built a 575-ton-per-day incinerator in West Deptford, New Jersey to serve Glouster County—with the trash coming to the plant under flow control laws (Mastrull 1994).

"[A]ll sides have always agreed that some sort of 'grandfather' was necessary to insure that current, or imminent planned flow control authorities were still valid," Senator Bill Richardson (D-NM) noted on the floor of the Senate in October 1994 (Congressional Record [CR] 1994:H11399), although there has been a good deal of wrangling about the exact shape and size of the "grandfather." In the process, needing the support of industry groups, public sector organizations had to back off from their insistence on broad flow control authority.[13]

By July, 1994, both BFI and Waste Management were supporting bills which allowed existing (as of the Court decision) flow control to remain in effect for a limited time and under limed circumstances. A bill supported by Waste Management even allowed the possibility of some very limited future flow control over residential trash (Schmitt, 1994).[14] Most of the other trash corporations continued to press for even more restrictive legislation.[15]

Despite a broad coalition, flow control legislation failed to pass on the last day of the 103d Congress.[16] In the 104th Congress, even narrower legislation was introduced. This was supported by the coalition as the public sector groups increasingly found themselves having to give up any hope for flow control authority in the future.

By this time it was clear that flow control was dead. The remaining question was how long it would take to be buried (or incinerated)—how the transition would be managed. On the anniversary of the *Carbone* decision, May 16, 1995, the Senate passed a flow control bill which seemed to reflect the current sentiment in Congress. The bill was introduced by Sen. Robert Smith (R-NH) in collaboration with Sen. John Chaffee (R-RI) both of whom remain outspoken opponents of flow control. Senator Smith said (CR 1995:S6384): "I oppose flow control. I think the interstate commerce clause should be protected. I do not want Congress to interfere. … [T]he free enterprise system should be allowed to work." However, he noted, that "there are special circumstances where people have incurred a tremendous amount of expense." In Smith's view, these circumstances required that Congress manage the transition.

During four days of consideration, from May 10 through May 16, the sole activity on the bill was to consider amendments covering special circumstances which might not have been clearly covered in the original grandfather, although there was at least one attempt to further restrict the grandfather by Sen. John Kyl (R-AZ) (CR 1995: S6486ff).

The narrow and parochial nature of most of the "debate" is epitomized by a North Carolina amendment that covers "any political subdivision which adopted a flow control ordinance in *November, 1991*, and designated facilities to receive municipal solid waste prior to *April 1, 1992*." This amendment was accepted without objection or debate (CR 1995:S6482, emphasis added).

The result was, in the words of BFI lobbyist Richard Goodstein, a "'crazy quilt' of different rules for different states" (*Solid Waste Report*, May 18, 1995b). The "crazy quilt" was not elegant but it was a response to the transition to a new commodity form while the commercial remnants of the old form remained. "The contradictions create conflicts and dilemmas which people try to resolve" (Chambliss 1993:15). In this case, the contradictions are financial investments in pre-commodity forms.[17]

Chaz Miller, a manager for the National Solid Waste Management Association, a staunch opponent of flow control, argues that this legislation simply tries to "save people who buy bonds from themselves"—protect investors (personal conversation, 1995). He is undoubtedly correct and his populist spin, reminiscent of William Jenning Bryan, identifies the inherent contradictions—in the name of free enterprise—commodity capitalism in the trash industry in the long run—Congress is trying to perpetuate some flow control in the short run.

The "crazy quilt" passed by the Senate stands in contrast to what happened in the House. In private conversations in 1995, House staff were contemptuous of the Senate legislation—it was shoddy and inelegant—"we think we can do better." However, for all its inelegance, the Senate pursued an essentially collaborative, consensual decisionmaking model advocated by analysts as an effective mechanism for arriving at optimal policies (e.g. see Susskind and Weinstein 1981). Senate sponsors essentially set policy parameters and, within those parameters, allowed local concerns and interests to amend the bill (even when not necessary) to ensure that it covered their local concerns.[18]

In the House, however, the bill was brought to the floor without a full committee hearing and essentially no opportunity for refinement or amendment; Representatives had no real chance to ensure that their local interests were indeed covered. As opposed to the collaborative approach taken in the Senate, the bill in the House was crafted by the Public Securities Association, Browning-Ferris, and Waste Management (Daniels 1996), with the support of the National Association of Counties, the Solid Waste Association of North America, and Ogden Projects (Bliley, CR 1996:H933). It was brought to the floor under a suspension of the rules.

This process incurred the wrath of some Representatives. For instance, Rep. Markey (D-MA), who supports flow control, strenuously objected to such a non-inclusive practice— "that is wrong" (CR 1996:H934). There was a strong feeling that the process "shut out a lot of folks" (Bonior, CR 1996:H935). More crucially, Representatives objected that people in their districts were not clearly covered—"taxpayers in Medina Country will lose, will be left out in the cold because of this bill, the way this bill is written" (Brown, CR 1996:H935). This bill "does not contain relief for many communities holding legitimate debt," another Representative complained (Lincoln, CR 1996:H937). The bill was defeated 150-271.

It would be misleading to suggest that the only reason for the defeat of the legislation was procedural.[19] As in the Senate, there is continuing opposition to any flow control, even limited grandfathering. Nonetheless, the collaborative, consensual process in the Senate helped to defuse this opposition while the process in the House served to heighten it.

For our purposes, the important observation is that these current debates in Congress, on-going today, never see trash as anything but a commodity. As part of this premise that trash is a commodity, the problem with public facilities is that they "can't compete"—"that's an article of faith around here," one staff member told me. In other words, it never occurs to anyone that public facilities might be trying to accomplish different, non-economic, goals and don't see trash and capacity as mere commodities.

Carbone and the transition being engineered in Congress clearly imply that local involvement in trash collection and disposal is over. The only question is how long the next stage of transition will take. This is seen clearly by some of those involved in the debate on both sides. Jonathan Adler, associate director of environmental studies at the Competitive Enterprise Institute, summarizes the connections (along with his preferences): "There is a way to avoid this mess in the future: Move away from municipal provision of waste disposal services. Flow control is deemed necessary because municipal facilities cannot compete" (in *Solid Waste Report*, September 29, 1994).

THE TRANSFORMATION OF TRASH

To recapitulate, twenty-five years ago trash was viewed in much the same way as we still view sewage. Trash disposal facilities were seen in much the same way as we still view sewage treatment facilities—as community resources rather than commodities in the sewage market. And trash haulers were viewed in much the same way as we still view the pipes in a sewage system.

The development of significant private disposal capacity, primarily in the form of landfills and incinerators, and especially by emerging trash corporations, shifted these views of trash. The key commodity was disposal capacity. Owners of the means of disposal increasingly competed for trash in much the same way as owners of motels compete for lodgers. Haulers increasingly became brokers of trash, travel agents to continue the metaphor, who claimed a commission on the trash they brokered.

The development of this market increasingly viewed publicly controlled disposal capacity as wholly economic enterprises competing in the same market for the same trash. The lines between public and private enterprise became blurred and extra-economic motives and purposes became less acceptable or germane.

As Balbus (1977) or Pashukanis (1980) would anticipate, the development of this new economic enterprise, and changes in understandings of property, would become reflected and ratified in law as the economic need for this ratification developed. This shift in law first and most fundamentally ratified the conception of disposal capacity as *property* and as a purely economic *commodity*. Trash, then, became the raw material for this emerging industry and hence a commodity in its own right. Finally, the assertion of private economic interest over public extra-economic interests completed the shift to a purely economically driven trash industry.

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NOTES

1. Municipal solid waste (MSW) is simply trash. It is the ordinary trash from residences, businesses and industries which is solid and not hazardous waste.

2. One can conceive of this transformation, for instance in a self-contained environment such as a spaceship or moon colony but only if it entered the stream of private commerce—capitalist organization. To my knowledge, this analogy first appears in the *Amicus* brief filed by San Diego County in the *C & A Carbone, Inc. v. Town of Clarkstown* (1994) case, quoted in McArthur (1993). My appreciation to the unknown author. There are parallels between this process with trash and the changing conceptions of water in California discussed by Barclay, Schmidt, and Hill (1980).

3. This is the position strongly advocated by the National Solid Waste Management Association (NSWMA), an organization of over 2500 companies, mostly small local waste haulers. This association, and its umbrella organization, Environmental Industry Associations, has been the most outspoken opponent of any flow control and regards all flow control ordinances as illegal taking in violation of due process compensation (Knutson 1993, and personal conversation, 1995).

4. Standard and Poor's corporate description (1994) notes that the company also "provides street sweeping services, Port-O-Let portable lavatories and related services, portable fencing and power pole services, and Modulaire mobile office services. Company is also engages in … collecting, treating and disposing of medical and infectious wastes."

5. The Commerce Clause grants Congress the power to regulate interstate commerce. This has been "interpreted by the Supreme Court to impose a limitation, by negative implication, upon the power of the states to effect interstate commerce…" (Wolf 1994:540). This is usually referred to as the "dormant" Commerce Clause doctrine. Among other things, it means that Congress *may* legally grant states the power to impose restrictions on interstate waste and impose flow control. See below.

6. Wolf (1994:533) notes that "although the courts reviewing flow control have examined different kinds of restrictive measures, the divergent outcomes seem better explained by fundamental differences in the analytic framework by which the Commerce Clause inquiry is conducted than by the variations in types of flow control regulation."

7. "One could conjecture that one of the reasons the Court chose to review this particular case was because there was so little to it, thus providing the Court with a bare canvas to deal as broadly or narrowly as it wished on flow control" (Wolf 1994:562).

8. The identities of the New Jersey haulers was never established in the case since judgments were obtained without discovery. However, Clarkstown, in its brief in opposition to the Court, names, among others, Carmine and Salvatore Franco of New Jersey and one of their companies, Sal-Car Transfer Systems. In August, 1994, the Francos were indicted for defrauding New Jersey taxpayers of $22.5 million. The *Record*, a Northern Mew Jersey newspaper, reported that "a racketeering enterprise centered at the Franco family's Hillsdale transfer station illegally carted thousands of tons of waste out of state during the early 1990's" as well as violating a state order banning them from the solid waste industry (Mooney and Sanderson, 1994). The Superintendent of the New Jersey State Police claims the Francos are connected to the Genovese/Gigante crime family, a charge which the Francos deny although they concede that the "family knows a few alleged mobsters socially" (Thompson 1995). According to an informant in Clarkstown, Carmine Franco was named after Carmine Carbone, his godfather.

9. February 16, 1995, the U.S. Appeals Court for the Third Circuit ruled on the "first post-*Carbone* appellate case and, for all practical purposes, struck down flow control. Using commodity language, the court said that the flow control system "require[s] all participants in the market to purchase the government service even when a better price can be obtained on the open market" (*Solid Waste Reports*, February 23, 1995; *Environmental Week* 1995). The next day, Moody's lowered the ratings on New Jersey solid waste bonds and said they were not investment grade. The ratings would have been lower if legislation had not been pending in Congress. The move effected $364.3 million in outstanding bonds (*Business Wire*, February 17, 1995).

10. This solution seems to qualify as a "super-optimal solution," defined by Nagel (1994:79) as "one that is simultaneously best on two separate sets of goals," and not merely a narrow win-win policy in which both sides do better than they feared. In this case, however, the sets of goals are not "liberal" and "conservative" as envisioned by Nagel.

11. From the beginning, there were dissenters in the public sector. Towns and their mayors in some areas opposed flow control laws that had been imposed on them by counties or states. One of the most outspoken opponents became Jersey City, NJ, Mayor Bret Schundler who has dismissed the concerns

about bonds and investments as "Chicken Little reasoning" (*Solid Waste Report*, May 18, 1995a).

12. A waste-to-energy plant in Columbus closed in the Fall, 1994 (*Solid Waste Report*, November 17, 1994), and a 1000-tons-per-day waste-to-energy plant in Akron closed in January, 1995, (*Solid Waste Report*, January 26, 1995; and see also Geddes 1993).

13. Environmental organizations had a low profile during most of this Congressional debate. Apparently, all parties agreed early that recylables would be excluded from flow control authority and this was reflected in all bills submitted thereafter. See, for instance, Schmitt 1994.

14. Residential trash is not really a key issue—the major focus of economic competition is commercial trash from businesses and industries.

15. The close ties between legislators and the trash industry is illustrated by Senator Richardson's restrictive amendment in September, 1994, allegedly written by BFI (*Solid Waste Report*, September 29, 1994). "After receiving a total of $15,000 in campaign contributions in 1993-94 from Browning Ferris Industries, Inc. (BFI), Sen. Kay Bailey Hutchison (R-Texas) introduced her first flow control bill on March 2—and it reflects BFI's views on the issue" (*Solid Waste Report*, March 9, 1995).

16. The Flow Control Compromise Coalition ended up as a "public-private sector coalition of more than 300 local governments, and representatives from the waste, paper, recycling, scrap, and public finance industries." The 1994 bill failed unanimous consent with the objection of Sen. Chaffee (R-RI).

17. At the same time, the Senate passed legislation which gave states some authority to regulate the importation of interstate trash. "The interstate provisions in the bill were praised by Richard Goodstein, vice president of governmental affairs for Houston-based Browning-Ferris Industries, Inc." (*Solid Waste Report*, May 18, 1995b).

18. Such an approach does not, of course, guarantee that the result is in the "public interest," whatever that may mean (Susskind and Weinstein 1981:333). The parallels between this process and that described by Guttman and Wagner's (1990) discussion of the "Asbestos Model" are striking including the sense that Congress (rather than the EPA in the asbestos dispute) serves as a "regulatory real estate agent" (91). See Fiorino, 1990, for a more extended theoretical discussion of alternative dispute resolution models.

19. The House bill was also delinked from regulation of interstate transportation of trash, an issue of particular interest to many states, especially in the north central region.

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