

***Conflict, Contradiction, and Flow Control:
Law Creation in the Municipal Solid Waste Industry¹***

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In May, 1994, the U.S. Supreme Court decided that state and local laws mandating the delivery of municipal solid waste to particular facilities—generally called “flow control” laws—violate the dormant Commerce Clause of the U.S. Constitution (*C&A Carbone, Inc. v. Town of Clarkstown*). The dormant commerce clause of the U.S. Constitution reserves the regulation of interstate commerce to the Federal government unless Congress specifically grants authority to the states. The *Carbone* decision meant that public disposal facilities needed to compete with one another and private facilities for trash and that their operation and financing was no longer guaranteed. If let stand, this decision would profoundly change the waste industry in the United States.

Flow control laws were a major mechanism for developing local trash disposal facilities and more than \$20 billion of existing bonds were guaranteed by these laws. There was an immediate move for Congress to authorize local flow control. Over the past three years, lobbying has been intense and the issue has been hotly debated in both the House and the Senate. It quickly became apparent that the only legislation likely to pass would be some sort of narrow “grandfather” legislation which affirmed flow control for those localities which already exercised it in May, 1994, with little or no authorization for future flow control.

In the Fall, 1994, the House passed flow control legislation but it failed in the Senate. In May, 1995, the Senate passed flow control legislation but similar legislation failed in the House on January 31, 1996. Although the issue still attracts debate, it has not come to the floor again.

In essence, the Congressional debate about flow control has been about managing the transition of trash to a commodity and the transition of trash disposal facilities from public resource to property. This transformation, ratified by the Court in *Carbone*, presented what Chambliss (1979) called “conflicts and contradictions” in the political economy. The interests of capital are not necessarily, or even often, unitary and coherent (Calavita and Pontell 1994; Zatz and Chambliss 1993). In this case, investment in the precommodity economy—most concretely investment in bonds guaranteed by flow control—conflicts with, and contradicts, the emergent market model. Managing the transition, in this context, means either protecting precommodity investment or at least balancing it against the needs of the new economic arrangements.

This paper examines the dynamics of Congressional attempts to manage the transition—the flow control debate—as a case study of law creation and more specifically as a study in managing the structural conflict and contradictions created by change. As Calavita and Pontell (1994:307) note, most of the sociological work on law creation has focused on social legislation and regulation, such as worker safety laws, rather than economic regulation, such as regulation of the savings and loan industry and flow control.

The Congressional struggle over flow is both more complex and simpler than many cases of social legislation (e.g. Calavita 1986). Neither ideological positions nor economic interests provide a complete guide to the dynamics of the debate or the positions of participants. Both instrumentalist and structuralist models of law creation tend to emphasize (or assume) the unitary nature of both the state and the interests of capitalists (Calavita and Pontell 1994). Instrumentalists such as Domhoff (1978) and Milliband (1969), argue that those “who rule”—read, “those who hold the economic power”—get their way. Structuralists suggest that the state has “relative autonomy” from the particular interests of particular capitalists but not from the more general interests of capital accumulation. “While the state may be free from the manipulation of individual capitalists or even the business community as a whole, it is by no means autonomous from the structural requirements of the political economy within which it is embedded and which it must work to preserve” (Calavita and Pontell 1994:306).

In many ways, the flow control debate most closely parallels Kolko’s (1993) analysis of the development of regulation from 1900 to 1916. He argues that various industries—banking, meat packing, telephone, copper, automobile, and others—that the development of regulation was dominated by large corporate enterprises and that regulation served, in conception and intent, to consolidate the position of these corporations. Thus, Kolko finds, it is misleading to speak of “the interests of the meat packing industry” expressed in regulation; it is more accurate to speak of the interests of several large meat packing corporations in contrast with the interests of smaller meat packers. Essentially, Kolko argues, these corporations defined the regulatory debate.

Similarly, the flow control debate has been dominated and in many ways controlled by the large, international, vertically integrated, waste management corporations which have emerged over the past 30 years, Browning-Ferris Industries (BFI) and WMX Technologies (formerly Waste Management). Although the issue is deregulation rather than regulation, the major effect will be the consolidation of the industry.

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, and officials from several interested organizations in Washington, DC. 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, DC. Finally, to supplement news reports and court documents, local information about Clarkstown, New York, and Regional Waste Systems in the Portland, Maine, area, personal interviews were conducted with local officials, trash haulers, and disposal facility operators.

The Context of Flow Control and Two Local Cases

With the development of increased environmental consciousness beginning in the 1970's, and especially the passage of Federal legislation regulating landfills and calling for alternative means of trash disposal, municipalities, counties, and regional agencies built expensive facilities, most often waste-to-energy incinerators but also landfills and materials recycling facilities (MRF's) (see Blumberg and Gottlieb 1989, for a discussion of these developments).

To finance these facilities they developed state and local ordinances which required that municipal solid waste (MSW)¹ be disposed of at certain sites—flow control. Flow control guaranteed that trash would be delivered to the facilities thus guaranteeing income for the facility and, in turn, guaranteeing the bonds used to finance the facilities. By 1995, the Public Securities Association estimated that over \$20 billion of bonds, mostly, although not exclusively, public, were underwritten by flow control ordinances (*Solid Waste Report* March 30, 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).

The concrete arrangements in these and other local projects using flow control are remarkably diverse. This diversity is essential to understanding the complexity and contradictions faced in dealing with the issue in Congress. Two local cases, quite different, serve to illustrate the diversity and the ambiguity confronted at the Federal level.

Regional Waste Systems in Maine

In the late 1970's, local officials from towns in the Portland, Maine, region began searching for ways to deal with their expanding trash problems. Faced with the need to close local dumps, lack of disposal capacity, and a concern for finding more environmentally sound ways to manage their municipal solid waste, they developed a regional landfill and a bailer facility to compact trash. By the mid-1980's this interim solution was no longer adequate. Twenty-one towns banded together as Regional Waste Systems, Inc. (RWS) to build a waste-to-energy facility. This facility burns trash, reducing its volume to ash and saving landfill space. At the same time, the heat is used to generate electricity which is sold to the local power company. This income helps offset the operating costs of the facility. The rest of the operating costs, including repayment of debt, is financed through fees to dump trash—tipping fees.

To finance construction of the facility, the member communities underwrote bonds. These bonds, in turn, were underwritten, or guaranteed, by the flow of trash coming to the facility—a flow of trash which generated electricity and tipping fees to pay for the system and its debts. The flow of trash, in turn, was guaranteed by flow control ordinances in

¹ In this context, MSW can be understood as ordinary residential and commercial trash, excluding hazardous waste and construction and demolition debris. Recyclable trash is general included in MSW although not always included in flow control laws.

each of the communities. These ordinances required that all MSW (except recyclables) from the communities be dumped at the RWS facility. These ordinances were invalidated by *C&A Carbone, Inc. v. Town of Clarkstown* in 1994.

Clarkstown, New York

In 1989, Clarkstown, New York, had to close its local landfill under a consent order from the state Department of Environmental Conservation. The town then entered into a contract with a local company, Clarkstown Recycling, Inc., to build a transfer facility. In return for the company constructing the facility, the town guaranteed 120,000 tons of trash each year for five years at a fixed tipping fee of \$81 per ton. The town would have to pay the difference if the tonnage was not met. In other words, the town guaranteed that Clarkstown Recycling a minimum return on its investment.

In order to guarantee the flow of trash to the transfer station, the town enacted a flow control ordinance requiring that trash (except recyclables) from the town be taken to the transfer facility.

Trash deposited at the transfer facility is then transported to disposal sites—landfills or incinerators—by the trailer-truck load. The facility uses various disposal sites ranging from Ohio landfills to incinerators in Maine and Massachusetts depending on the tipping fees being charged at those sites. Since Clarkstown Recycling's profit margin is ultimately determined by the difference between the tipping fee received and the tipping fee paid for disposal, disposal location is determined only by cost.

Who Cares? Local and National Interests

Even these brief sketches of these two communities and their trash arrangements should make it clear that there are both differences and commonalities. To some extent, different players have different stakes in the two communities—who cares about flow control and why is not straightforward.

Trash haulers

The *Carbone* case began when Carmine and Angelo Carbone were charged with violating Clarkstown's flow control ordinance. As trash haulers, the Carbone brothers were seeking lower cost disposal than the fee at the Clarkstown transfer station. From their perspective, they were doing just exactly what Clarkstown Recycling was doing: putting trash into trailers and shipping them to cheap disposal sites. As Carmine Carbone put it, "They can ship it out, why can't I?" (interview, 1995).

In both RWS and Clarkstown, most trash is collected by private haulers who then transport it to the transfer station or disposal facility. This is the situation in most towns in the United States although some larger communities have municipal collection. Even in these communities, however, commercial trash—trash from businesses and industries—is generally collected by private haulers. Generally speaking, a third to a half

of all trash is commercial and thus hauled by private companies.² Moreover, commercial trash is the most lucrative business for trash haulers, much preferred over residential routes.

Tipping fees define profits for trash haulers. The hauler's expenses and profits come out of the difference between the fee paid by the consumer (commercial or residential) and tipping fee. The lower the disposal fee, the greater the difference. This means that the trash hauler has an interest and incentive to seek out cheaper disposal sites and flow control is perceived by haulers as an intrusion into their competitive business.

The largest association of trash haulers, the National Solid Waste Management Association (NSWMA), has vigorously opposed all forms of flow control, helped fund the *Carbone* case, and lobbied against any Federal legislation. Through their umbrella organization, Environmental Industry Associations, and teamed up with the Competitive Enterprise Institute, they have been a loud and potent voice in Washington; they have been instrumental making anything but the narrowest grandfather of existing flow control impossible. In other words, they have had a major impact on setting the ground rules of the debate.

The interest of small haulers against flow control, however, is not as obvious with more scrutiny. In a competitive environment, if all haulers have access to the same cheaper disposal facilities one would expect the fees charged customers to come down enough to erase the initial cost savings of diverting trash to cheaper sites. In the long run, then, it would seem that flow control would not significantly effect a hauler's profits.

However, all haulers do not have equal access to cheaper facilities. Trash companies which have their own disposal facilities can dispose of trash more cheaply than those who do not, both because they would give themselves a lower disposal rate and because they would be taking profits from both the hauling and the disposal. In addition, haulers with capital to invest in more efficient transportation to remote sites would hold an edge in locating lower disposal rates.³

None of this is evident from the presentations of the National Solid Waste Management Association. In personal interviews, representatives of the NSWMA have been offended by this analysis which, they say, misses the philosophical and ideological point: that government should not tell haulers where to take their trash. A number of small haulers have actively opposed the NSWMA position and supported flow control legislation. They argue that flow control provides a level playing field for small and large haulers.

² Recent news articles about the crackdown on trash haulers in New York City illustrate this point. The City collects residential trash but the private companies are competing for trash from commercial establishments.

³ In Springfield, Missouri, this dynamic is already evident. Browning-Ferris and WMX Technologies have increased their market share dramatically by hauling to landfills they own more than 100 miles from the city.

Although most of the members of the NSWMA are small private companies, the organization was founded by large trash corporations, BFI and WMX in particular, from which they receive much of their funding. These corporations own huge amounts of disposal capacity and have the capital to invest in efficient transport, which may explain the NSWMA position.

The crucial point here, however, is that not all trash haulers have an equal interest in the abolition or creation of flow control laws. This is less evident in Clarkstown where all of the haulers are small and local and more evident in RWS where national corporations are actively involved in the market.

Waste Disposers

Flow control really has more to do with disposal than with trash haulers. Flow control allows disposal facilities to compete for trash. Just as your local hotel or motel have rooms to fill and compete for customers, landfills and incinerators have capacity to fill and compete for trash. In Clarkstown, flow control is fairly irrelevant to final disposers since the transfer station passes trash out into the competitive disposal world.

In contrast, flow control is extremely relevant at RWS. The publicly owned facility at RWS is perfectly happy with flow control. Flow control means a captive stream of trash at whatever rate the communities decide to set. However, commercially operated landfills and incinerators would like to compete with RWS and cannot with flow control. Thus, some disposers benefit from flow control and some do not.

This is not a simple distinction between public and private facilities. Rather than a transfer station, Clarkstown could have built an incinerator or new landfill, funded the same way. They could have, as many communities have, had a commercial firm build and operate the facility with a minimum return guaranteed by flow control. The owner-operator of the facility would greatly benefit from flow control.

It turns out that a lot of communities have done this and that the largest contractors have been BFI and WMX directly in the case of landfills or through RefFuel (owned by BFI) or Wheelabrator (controlled by WMX), in the case of incinerators. At the same time, BFI and WMX own or control vast amounts of disposal capacity which is not flow controlled. As a result, purely as a matter of economic interest, these international trash corporations find themselves on both sides of the fence as disposers—they both benefit from pre-*Carbone* flow control and are impeded by flow control.

Other disposers are in a much less conflicted situation. Ogden Projects, for instance, primarily operates disposal facilities for local governments and supported flow control, even future flow control authority. In contrast, Chambers and USA Waste, owner-operators of non-flow controlled disposal capacity, opposed flow control.

Once again, not all disposers had an equal interest in the complete abolition of flow control laws. The largest corporations had some interest in grandfathering pre-*Carbone* arrangements but no interest in allowing new flow control arrangements.

Environmental Organizations

It may be surprising that environmental organizations played a small role in debates about flow control. Representatives of these organizations exacted early agreements from all parties that any flow control authorization would not include recyclables—that recyclables would not be flow controlled. Beyond this, they have remained steadfastly neutral.

RWS provides a good example of how flow control can be used for sound environmental practices. Incineration is superior to landfilling in the Resource Conservation and Recovery Act of 1976 (RCRA)⁴ and flow control allows for financing of expensive waste-to-energy facilities. In addition, some jurisdictions have used flow control laws to both fund and ensure utilization of facilities such as the composting facility constructed by Fairbault and Martin Counties in Minnesota.

However, the Clarkstown case provides an example of flow control which has nothing to do with promoting sound environmental practices and arguably promotes overuse of landfill capacity. Indeed, the Clarkstown approach doesn't really address any of the critical issues in developing a comprehensive solid waste management plan.

A report on flow control to Congress by the Office of Solid Waste, Municipal and Industrial Solid Waste Division of the Environmental Protection Agency (EPA) in March, 1995, disappointed many advocates of flow control. After surveying the role of flow control in the United States, the EPA concluded that “there are no empirical data showing that flow control provides more or less [environmental] protection” (ES-4). Along these lines, the EPA also concluded that “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” (ES-5).

In this case the view of the EPA apparently corresponded to that of environmental organizations. As a result, these organizations contributed to the framework or ground rules for debate, ensuring that recyclables not be included, but have not played any subsequent role.⁵

Waste Transporters

Of all the groups involved in the flow control debate, transportation corporations and trade organizations were perhaps the least visible and almost the only group with a clear

⁴ The guidelines in RCRA, implemented in state plans, created an hierarchy of waste management options which makes 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.”

⁵ The recycling industry is not really discussed here but their perspective seems to have been the same as the environmental groups: so long as you don't flow control recyclables we don't really care.

and unambiguous interest. Railroad and trucking companies were part of a coalition that strongly opposed any flow control.

The Environmental Transportation Association (ETA) was a vehicle for discussions and lobbying from this segment of the industry. Companies involved with the include Southern Pacific, Union Pacific, Burlington Northern, and Chicago and Illinois Midland railroads along with companies such as Chambers Development primarily concerned with solid waste.

The role of the transportation industry in solid waste is expanding. In 1992, New York exported 3.8 million tons of MSW and New Jersey exported 2.6 million tons while Pennsylvania imported 4.3 million tons, Illinois imported 4.3 million tons, and both Ohio and Indiana imported 1.8 million tons (Environmental Industry Association 1995). In more concrete terms, New York's 3.8 million tons is roughly the equivalent of 1,630 trash compacting trucks crossing the state line each day!

These numbers are prior to the abolition of flow control—with flow control gone the demand for transportation services, often long-haul services, is rapidly expanding. The motivation for the transportation industry to oppose flow control is clear.

Bond Holders

The leading advocate for the financial community in general, and bond holders in particular, was the Public Securities Association (PSA). This organization strongly supported legislation that would grandfather existing flow control arrangements at least until bonds were paid off, thus protecting the investments of bond holders. The fear presented was that local governments would have to default on their bonds.

This narrow interest of the PSA has been dismissed by the groups most adamantly opposed to flow control, the Environmental Industries Associations and the Competitive Enterprise Institute. "The real issue," one representative told me, "is whether we should save people who buy bonds from themselves?" (March, 1995). He also suggested that towns are unlikely to be hurt if they default since MSW bonds are a very small part of their debt—"this is smoke and mirrors."

Although the arguments on behalf of the bond holders remained influential they were substantially reduced over the two years following the *Carbone* decision. In October, 1994, a PSA news release said, "It is absolutely vital that Congress enact a flow control bill this week. ... The credit standing of billions of dollars of outstanding bonds hangs in the balance." Although the situation was complex, these images of doom became less powerful as time passed. As the chief lobbyist for BFI noted to me in August, 1995, the "sky is falling syndrome" becomes less persuasive every day. "It hasn't happened."

What had happened, and continues to happen, is that rating agencies have been reluctant to lower their ratings. Local governments have not generally defaulted on their bonds, often fearing lower credit ratings themselves. They have found other schemes including,

most often, raising local taxes or raising local trash assessments on residents and businesses.

Local Governments

Local government organizations have been the major force pushing for flow control legislation. The most active has been the Municipal Waste Management Association affiliated with the U.S. Conference of Mayors, and the National Association of Counties. These organizations initially pushed for blanket authorization of local flow control by local governments. The concerted opposition of the large trash corporations and numerous other organizations, however, quickly led to a primary emphasis on, and concern about, local governments with outstanding financial obligations, such as RWS communities and Clarkstown.

In the Fall, 1994, these organizations, with the assistance of Senate majority leader Mitchell, put together a coalition, that included BFI and WMX, the National League of Cities, 300 state and local governments, the Public Securities Association, and various other groups. This “Flow Control Compromise Coalition” supported legislation which authorized flow control for communities that already had it in May, 1994, but severely limited any flow control in the future. By March, 1995, the legislation the coalition supported was even narrower eliminating, for example, the ability of grandfathered communities to use flow control to construct future facilities.

Generally speaking, municipal, county and state governments have favored flow control legislation. Those governments most directly effected, including Clarkstown and the communities involved in RWS, were left with a financial liability which may ultimately be borne by citizen in those communities. Nationally, this liability is more than \$20 billion in bonds alone and much more when liabilities such as that of Clarkstown is included.

However, support of flow control is far from unanimous among municipal officials, placing national organizations in a difficult position. The municipalities involved in RWS joined the regional system and are full participants. They support flow control. Clarkstown, however, is really a 44 square mile township which includes various municipalities, for instance, Nyack. Conceivably, West Nyack could begin to chaff at the constraints imposed by Clarkstown and want to reduce its trash bill by shipping somewhere other than the Clarkstown transfer station.

That is exactly what happened in some areas of New Jersey, Pennsylvania, Minnesota, and other states, where counties had taken on primary responsibility for solid waste management. In Bergen and Passaic Counties, New Jersey, for instance, several towns including Patterson and Jersey City, sued the counties in 1994 to ship their trash out of state and cut costs. According to the *New Jersey Record* (Voreacos 1994) officials claimed they could save over \$40 per ton taking their trash to Pennsylvania.

In addition, there are the communities which receive (and welcome) trash from the exporting states—they host the disposers who stand to benefit from the defeat of flow control.

These internal divisions have undoubtedly weakened the clout of the public sector organizations pushing flow control. In some organizations there is noticeable internal dissension. But even without this dissension, when opponents trot out panels of mayors and city officials to speak out against flow control the message of the public sector groups is bound to be weakened.

In addition, a basic argument for protecting local governments who have outstanding financial liability, including bonds, became weaker over time. Local governments suffered from the same dynamic as progressively weakened the position of the bond holders: the sky didn't fall and local government found creative ways to limp through. At the local level, this has meant real difficulties but from a national perspective the fact that Gorham, Maine, may have to raise its tax rate ten cents per \$1000 doesn't feel like an crisis.

The sense of urgency was lost and with it a sense that the legislation was even necessary. After all, the only legislation that was seriously discussed was relief for communities which had flow control prior to the *Carbone* decision. Without some immediate legislation, the argument went, these communities would be in serious trouble. As a BFI lobbyist put it in August, 1995: "As time goes on, those arguments ring increasingly hollow."

Discussion

The major victory for the trash corporations came in the *Carbone* decision overturning local flow control laws. As suggested above, elimination of flow control most benefits companies who control disposal facilities. This benefit is compounded for vertically integrated corporations which can collect and transport trash to themselves at their own disposal facilities.

The apparent primary concern of the trash corporations in Congress was to ensure that the *Carbone* decision was not overturned by broadly authorizing the local flow control authority implied in RCRA. In this they were quite successful. The broadest legislation ever seriously considered authorized future flow control only after meeting various stringent competitive tests and applied only to residential trash. Over the 18 months following the *Carbone* decision, even that legislation was narrowed—it applied only to localities which already exercised flow control in May, 1994, and was extended for a limited time for limited purposes.

Although the corporations, and especially WMX, have economic interests in legislation which grandfathers existing arrangements, this can be over emphasized. BFI was a much more reluctant participant in supporting the compromise legislation and incurred the wrath of some public sector groups by pushing for extremely narrow authorization. WMX seems to have pursued a strategy as much based on public relations with the public

sector groups as their own limited economic interests in grandfathering legislation. In other words, there was some ambivalence on the part of these corporations.

One indication of WMX's ambivalence is their lack of vigorous leadership in either crafting or lobbying for legislation. Although they were a strong participant in most discussions, they rarely, if ever, called them or led them. Nor did their representatives pound on Congressional doors. The chief lobbyist for WMX made this clear to me in April, 1995, suggesting that WMX position was more that they "wouldn't oppose" the current compromise. He was not, he noted, "going door to door supporting [the current bill], but those who are can tell them we support it."

It would be a mistake to ignore the fertile ground on which the arguments against flow control fell in Congress. The ideology of classical *laissez faire* liberalism (Lowi 1995) permeated Congress. One Senate staffer in 1994 put it that "the idea that private enterprise can do it better is an article of faith around here." The Senators coordinating the successful effort to pass legislation in May, 1995, openly and vigorously proclaimed their deep opposition to flow control; their interest was only in protecting stranded investors and municipalities.

This case study suggests a major weakness in the literature on law creation. As noted at the beginning, there are many more case studies of social legislation than economic legislation. This has led, perhaps, to an overreaction against the sort of instrumentalist analysis championed by Milliband and Kolko in part because the complex legitimation dynamics and disunity of both capital and the state are more evident in the production of social legislation.

In the case of flow control, structural theory is useful in helping to understand and frame the transformations and dilemmas which led to and surrounded Congressional debate but the internal story of that debate is well and productively understood from an instrumentalist perspective.

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