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Ryan Tichenor

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THE PUBLIC ENTITY END RUN: GOVERNMENT ACTOR'S EXCEPTION TO DORMANT COMMERCE CLAUSE CONSIDERATIONS

*United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*¹

I. INTRODUCTION

In the 1980's, Oneida and Herkimer Counties were responding to a "solid waste crisis."² Many landfills were operating without permits and outside the bounds of state regulations; in fact, sixteen were ordered to close and remediate their surroundings at a substantial cost to the public.³ In response to this problem, Oneida and Herkimer Counties appealed to the Governor and New York Legislature to create a public benefit corporation "empowered to collect, process, and dispose of solid waste generated in the Counties."⁴ The resulting Oneida-Herkimer Solid Waste Management Authority built a new facility for the solid waste and recyclables to address the concerns plaguing the counties.⁵ In order to ensure the financial feasibility of the facility, the towns enacted flow control ordinances⁶ which required all haulers to deliver the garbage to the Authority's facility and pay the above market tipping fee which it charged.⁷

The Supreme Court addressed similar flow control ordinances once before in *C & A Carbone v. The Town of Clarkstown*.⁸ When the Supreme Court struck down the flow control ordinance in *Carbone* two questions were left unaddressed: 1) whether the facility in *Carbone* was

¹ 127 S. Ct. 1786 (2007).

² *United Haulers*, 127 S.Ct. at 1790 (internal quotation marks omitted).

³ *Id.* at 1790-91.1791.

⁴ *Id.*

⁵ *Id.*

⁶ A flow control ordinance "requires all solid waste to be processed at a designated transfer station before leaving the municipality." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 385 (1994).

⁷ *United Haulers*, 127 S. Ct. at 1791.

⁸ *Carbone*, 511 U.S. at 386.

considered a public or private facility, and 2) whether the aforementioned distinction would change the analysis under the Dormant Commerce Clause.⁹ The Supreme Court granted Certiorari in *United Haulers* in order to clear up these unanswered questions and settle a circuit split between the 2nd and 6th Circuits.¹⁰ This note analyzes the Court's considerations in reaching their decision.

II. FACTS AND HOLDING

Respondent, Oneida-Herkimer Solid Waste Management Authority ("the Authority"), is a public benefit corporation under New York Law.¹¹ The New York Governor and Legislature formed the Authority in response to a solid waste "crisis" taking place in the central New York Counties of Oneida and Herkimer ("the Counties").¹² In 1989, the Authority and the Counties entered into a Solid Waste Management Contract.¹³ Under the agreement the Authority took the responsibility of handling and processing all of the solid waste generated by the Counties.¹⁴ The Authority also committed to "purchasing and developing" facilities for the processing of solid waste and recyclables.¹⁵ In order to cover the operating and maintenance costs for the facilities, the Authority charged "tipping fees" to private haulers.¹⁶ To ensure that private haulers used the Authority's facility, and thus paid the tipping fees, the Counties enacted

⁹ See *United Haulers*, 127 S. Ct. at 1793-94.1786.

¹⁰ *Id.* at 1792.

¹¹ *Id.* at 1791.1786.

¹² *Id.* at 1790-91 (quotation marks omitted). Responsible for their own waste disposal, the counties had relied for years on many local landfills which were operating without permits and in violation of state regulations. *Id.* By the 1980's 16 of the local landfills had been ordered to close and remediate the surrounding environment which costs the public in the tens of millions of dollars. *Id.*

¹³ *Id.* at 1791.

¹⁴ *Id.* Although, the Authority handled and processed the solid waste, under the agreement private haulers were still free to "pick up" citizens trash. *Id.*

¹⁵ *Id.*

¹⁶ *Id.* Under the agreement with the Authority, if the tipping fees and other charges did not cover the operating costs and debt service of the new facilities then the Counties would make up the difference. *Id.*

“flow control” ordinances which required private haulers to deposit all solid waste at the Authority’s processing sites.¹⁷

Petitioner, United Haulers Association, Inc. (“UHA”), is a trade association composed of solid waste management companies and haulers operating in the Counties at the time the action was filed.¹⁸ UHA alleges that the aforementioned flow control ordinances discriminate against interstate commerce and thus violate the Commerce Clause.¹⁹ In 1995, UHA brought a section 1983 action against the Counties and the Authority.²⁰

¹⁷ *Id.* Oneida’s flow control ordinance provides:

“From the time of placement of solid waste and of recyclables at the roadside or other designated area approved by the County or by the Authority pursuant to contract with the County, or by a person for collection in accordance herewith, such solid waste and recyclables shall be delivered to the appropriate facility, entity or person responsible for disposition designated by the County or by the Authority pursuant to contract with the Authority.”

Id. at 1791 n.2 (quoting Petition for Writ of Certiorari, United Haulers Ass’n Inc., 127 S. Ct. 1786 app. at 122a) (No. 05-1345). Herkimer’s flow ordinance provides:

“After placement of garbage and of recyclable materials at the roadside or other designated area approved by the Legislature by a person for collection in accordance herewith, such garbage and recyclable material shall be delivered to the appropriate facility designated by the Legislature, or by the Authority pursuant to contract with the County.”

Id. (quoting Petition for Writ of Certiorari, United Haulers Ass’n Inc., 127 S. Ct. 1786 app. at 135a) (No. 05-1345).

¹⁸ *Id.* at 1792.

¹⁹ *Id.* UHA showed that the flow control laws forced them to pay an \$86-per-ton tipping fee at the Authority’s facility, when absent the flow control they could pay between \$37 and \$55 per ton at out of state facilities. *Id.* The Commerce Clause, although it does not explicitly limit the power of the states, has long been recognized by the Court as acting as an implicit restraint on state authority (this what’s known as the negative or dormant Commerce Clause). *Id.* The Commerce Clause provides in relevant part that “Congress shall have Power...[t]o regulate Commerce with foreign Nations, and among the several States.” *Id.* (quoting U.S. Const., art. I, § 8, cl. 3.).

²⁰ *Id.* A section 1983 action is appropriate when a person believes a defendant has deprived him of a constitutional right while acting “under the color” of state law. 42 U.S.C. § 1983 (2000). Section 1983 provides in relevant part that “[e]very person who, under the color of any ... ordinance... of any State or Territory... , subjects, or causes to be subjected, any citizen of the United States ... the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit at equity, or other proper proceedings for redress...” *Id.*

The District Court agreed with UHA. After examining previous Supreme Court rulings regarding flow controls, the Court interpreted the rulings as “categorically rejecting” virtually all flow control ordinances.²¹ The Second Circuit reversed and remanded the case to the lower court for a decision as to whether an incidental burden on interstate commerce had been placed on UHA, and if so whether the benefits of the ordinances outweighed the burden which UHA had to endure.²² On remand the Magistrate Judge and the District Court found that the ordinances did not have “*any* cognizable burden on interstate commerce.”²³ Because of a split between the circuits on the issue of favoring public entities, the Supreme Court granted certiorari.²⁴ The Supreme Court held that when the Counties’ flow ordinances treat in-state and out-of-state private business interests the same, benefit a government interest, and when any incidental burden on interstate commerce is outweighed by the local benefit, the ordinances do not “discriminate against interstate commerce” under the Dormant Commerce Clause.²⁵

III. LEGAL BACKGROUND

A. *The “Dormant” Commerce Clause Doctrine*

The Commerce Clause of the United States Constitution provides, “Congress shall have the Power ... to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”²⁶ The Supreme Court has read this provision to also imply “dormant”²⁷

²¹ *United Haulers*, 127 S. Ct. at 1792. The district court made this assumption after it examined the Courts ruling in *C & A Carbone, Inc. v. Clarkstown*. 511 U.S. 383 (1994).

²² *United Haulers*, 127 S. Ct. at 1792. Examining the previous Dormant Commerce Clause precedents the Second Circuit found a distinction could be made between laws that benefit the public as opposed to private facilities. *Id.*

²³ *Id.* (emphasis in original).

²⁴ *Id.*

²⁵ *Id.* at 1797-98.

²⁶ U.S. CONST. art. I, § 8, cl 3.

²⁷ The word “dormant” was first used in connection with the Commerce Clause and the right of the federal government to strike down state laws which burden interstate commerce by Chief Justice John Marshall. *See Gibbons v. Ogden*, 22 U.S. 1, 189 (1824)

limitations on state and local government's ability to create laws which burden the flow of interstate commerce, and give the federal courts power to strike such laws down.²⁸ The Court has reasoned that granting states such power would allow the states to "retreat[] into economic isolation" by placing restrictions on the flow of commerce across its borders.²⁹

The Supreme Court in *City of Philadelphia v. New Jersey* adopted a two-part test for the application of the Dormant Commerce Clause.³⁰ In creating this test the Court tried to strike a balance between the "evils of 'economic isolation' and protectionism..." and the competing interest of States in safeguarding the health and safety of it's people.³¹

The Court recognized that in the latter instance, incidental burdens to interstate commerce "may be unavoidable []".³² For this reason the Court ruled that they must first apply a "virtually *per se* rule of invalidity" where the effect of state legislation is simple economic protectionism.³³ According to a later opinion of the Court, "The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."³⁴ It is important to note, however, that the definition of discrimination in the Dormant Commerce Clause analysis is not limited only to legislation where the *objective* is discrimination.³⁵ As one

(saying "[the power to regulate interstate commerce] can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant.").

²⁸ See *Okl. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179-80 (1995).

²⁹ *Id.* The Court also states that the provision "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Id.* at 80 (citing *Wardair Can. Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 7 (1986); see also *The Federalist* Nos. 42 (James Madison), 7, 11 (Alexander Hamilton)).

³⁰ *City of Phila. v. N.J.*, 437 U.S. 617, 624 (1978).

³¹ *Id.* at 623-24.

³² *Id.*

³³ *Id.* at 624 (emphasis in the original).

³⁴ *Carbone.*, 511 U.S. at 390.

³⁵ Bradford C. Mank, *Are Public Facilities Different From Private Ones?: Adopting a New Standard of Review for the Dormant Commerce Clause*, 60 SMU L. REV. 157, 164 (2007).

commentator importantly pointed out, the Dormant Commerce Clause analysis considers the discriminatory *effects* of the legislation, making the Court's definition of discrimination in Dormant Commerce Clause cases significantly broader than the definition in Equal Protection cases.³⁶

The second part of the two part test is that, "where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental" the Court will apply the test laid out in *Pike v. Bruce Church, Inc.*³⁷ The Court in *Pike* ruled that when a legitimate local public interest is identified with only incidental effects on interstate commerce, "it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."³⁸ In creating this balancing test, however, the Court in *Pike* gave only a vague explanation of how the test should be applied.³⁹ The Court indicated that the question becomes one of degree once a legitimate local purpose is found. The Court then qualified its statement as to the burden that would be tolerated saying that it will "of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."⁴⁰

Although clear in theory, as Courts have taken this test and applied it to local laws with alleged discriminatory purposes it has been frequently unclear whether to apply the *per se* test or the *Pike* test.⁴¹

B. Troubled Application: C & A Carbone, Inc

In *C & A Carbone, Inc. v. Town of Clarkston*,⁴² the United States Supreme Court examined a flow control ordinance placed on solid waste

³⁶ *Id.* Discrimination in the Equal Protection context only prohibits "laws with discriminatory purposes or intentions but not ones with discriminatory effects." *Id.*

³⁷ *City of Philadelphia*, 437 U.S. at 624 (referencing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1978)).

³⁸ *Pike*, 397 U.S. at 142.

³⁹ Mank, *supra* note 35, at 165.

⁴⁰ *Pike*, 397 U.S. at 142.

⁴¹ Mank, *supra* note 35, at 165.

⁴² *Carbone*, 511 U.S. at 383.

processors operating in the Town of Clarkson (“the Town”).⁴³ The flow control ordinance was created in response to a consent decree the Town entered into with the New York State Department of Environmental Conservation in August of 1989.⁴⁴ Under the decree the Town agreed to close its landfill, and build a new solid waste transfer station.⁴⁵ In order to deliver on their promise to build a new transfer station the town entered into an agreement with a private contractor to build the new facility and operate it for the first 5 years.⁴⁶ Under the agreement the Town guaranteed a minimum waste flow of 120,000 tons a year, at a tipping fee of \$81 dollars a ton to the contractor.⁴⁷ At the end of the 5 years the Town could buy back the facility for only \$1. The object of the agreement with the contractor was to amortize the cost of the cost of the transfer station with income generated by the tipping fees.⁴⁸ The town enacted the ordinance at issue⁴⁹ in order to make sure that the transfer facility met its yearly guarantee.⁵⁰

Writing for the five Justice majority⁵¹ in the *Carbone* decision, Justice Kennedy examined the effect of the ordinance.⁵² The Court determined that, “[w]hile the immediate effect of the ordinance is to direct local transport of solid waste to a designated site within the local jurisdiction, it’s *economic effects* are interstate in reach.”⁵³ The Court reasoned that because this ordinance made it more expensive for out-of-state businesses who use the Clarkstown transfer station, and because it

⁴³ *Id.* at 387.

⁴⁴ *Id.* at 386-87.

⁴⁵ *Id.* at 387.

⁴⁶ *Id.*

⁴⁷ *Id.* The disposal price of \$81 was more than the disposal cost on the private market, and if the 120,000 ton guarantee is not met the town is responsible for the tipping fee deficit. *Id.*

⁴⁸ *Id.*

⁴⁹ The ordinance at issue is Local Laws 1990, No. 9 of the Town of Clarkstown. *Id.*; Clarkstown, N.Y., Local Laws No. 9 (1990).

⁵⁰ *Id.*

⁵¹ Justice Kennedy was joined by Justices Stevens, Scalia Thomas, and Ginsburg.

⁵² *Id.* at 389.

⁵³ *Id.* (emphasis added). This reflects the premise that the profitable portion of the garbage business is not the garbage itself, but the fact that people must pay to dispose and process it. *Id.* at 390-91.

deprived out-of-state business access to the local waste disposal market a Commerce Clause analysis was appropriate.⁵⁴

The Majority, while acknowledging the Pike balancing test,⁵⁵ chose to apply the *per se* test, stating that:

[d]iscrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.⁵⁶

The Majority concluded that the Town had failed to meet the narrow exception.⁵⁷ The Court noted that Clarkstown had “any number of nondiscriminatory alternatives” which they could use to accomplish the goal of the health and environmental concerns used as justification for the ordinance.⁵⁸ The Majority never analyzed the ordinance under the *Pike* test; however both the concurrence and the dissent felt that this was the proper vehicle to analyze the ordinance.⁵⁹

Justice Souter, with whom Chief Justice Rehnquist and Justice Blackmun joined, filed a dissenting opinion.⁶⁰ The dissenting opinion focused on two differences which they say should “prevent this case from being decided [for C & A Carbone].”⁶¹ First, the dissent looked at the fact

⁵⁴ *Id.* at 389.

⁵⁵ *Id.* at 390.

⁵⁶ *Id.* at 392 (emphasis in original).

⁵⁷ *Id.* at 393.

⁵⁸ *Id.* The Court suggested that uniform safety regulations would have accomplished the same goal without the discriminatory effects. *Id.*

⁵⁹ Justice O'Connor filed an opinion concurring in the judgment, but disagreeing in the analysis. *Id.* at 401. She argued that the Town's ordinance was unconstitutional based on its excessive burden on interstate commerce, not because of any “facial or effective discrimination against interstate commerce.” *Id.* Justice O'Connor applied the *Pike* test and determined that the interests could be promoted just as well through other means which would have a lesser impact on interstate activities such as specific standards for town processors, and taxes to ensure financial viability. *Id.* at 405-06.

⁶⁰ *Carbone*, 511 U.S. at 410-30 (Souter, J., dissenting).

⁶¹ *Id.* at 416.

that the ordinance favored one single processor, instead of the general class of local processors.⁶² The dissent pointed out, that in the past when the Court had struck down processing laws it was because they benefited local firms at the expense of their out-of-town competitors.⁶³ The dissent argued that because this ordinance did not discriminate against a class of out-of-town processors, but rather treats all in-state and out-of-state actors the same choosing to favor a single municipal⁶⁴ processor that it is not protectionist in its application.⁶⁵

Second, the dissent looked at the public nature of the facility.⁶⁶ Justice Souter states that “Clarkstown’s transfer station is essentially a municipal facility... soon to revert entirely to municipal ownership.”⁶⁷ He focused on the function the facility performed and stated that both tradition as well as state and federal law recognized trash removal as the domain of local government.⁶⁸ Justice Souter contended that a public facility occupied a different market position than a private facility.⁶⁹ He recognized little reason other than economic protectionism to benefit a private interest; however, he pointed out that a local government could enter the market in order to serve the citizens rather than amass wealth.⁷⁰

Justice Souter believes that a “more particularized enquiry” must be made before the ordinance, which prefers the government, can be struck down.⁷¹ For this reason he abandons the “virtually fatal” *per se* test

⁶² *Id.*

⁶³ *Id.* The Court quoted one commentator summarizing the case law in this area, describing this type of unconstitutional category of laws as laws “adopted for the purpose of improving the competitive position of local economic actors , just because they are local, vis-à-vis their foreign competitors[.]” *Id.* at 417 (quoting Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1184 (1986) (internal quotation marks omitted)).

⁶⁴ Justice Souter argues that this should be a considered a municipal facility.

⁶⁵ *Carbone*, 511 U.S. at 418.

⁶⁶ *Id.* at 419.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 420-21.

⁷⁰ *Id.* at 421.

⁷¹ *Id.* at 422.

and argues for the more lenient *Pike* standard.⁷² For purposes of the *Pike* test the majority found that the monopolistic nature of the ordinance was not fatal under the Dormant Commerce Clause analysis.⁷³ Additionally they found that the higher prices charged by the facility were not fatal to its constitutionality.⁷⁴ For the benefit side of the *Pike* equation the dissent looked not only to the financing of the facility, but he also points out that because the cost is proportional to how much trash one generated there was also a benefit in trash deterrence. Ultimately, the dissent reached the opposite conclusion of Justice O'Connor, who also applied the *Pike* test in her concurrence, finding that the ordinance was constitutional and should be upheld.⁷⁵

C. Circuit Split Stemming from Justice Souter's Dissent

Since the decision in *Carbone* the Circuit Courts have been unable to reach a consensus on whether the rule laid down was meant to apply to both public and private facilities⁷⁶, or whether like Justice Souter's dissent suggested that a different test is applicable in the case of a public facility.⁷⁷

The Second Circuit in *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority* reversed a district court decision which compared the municipal corporation in the case to the private corporation in *Carbone*, and thus applied the *per se* test striking the flow ordinances down.⁷⁸ In striking down the District Court ruling the Court stated that, "the district court erred in its Commerce Clause analysis

⁷² *Id.* at 422-23.

⁷³ *Id.* at 424. The dissent points out that the "authority to dismember and penalize [monopolies] ... arises from a statutory, not a constitutional, mandate." *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 430.

⁷⁶ See *Nat'l Solid Waste Mgmt. Ass'n v. Davis County Ky.*, 434 F.3d 898 (6th Cir. 2006) (applying the *Carbone per se* approach); compare with *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245 (2nd Cir. 2001), and *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 438 F.3d 150 (2nd Cir. 2006) (applying the *Pike* test and recognizing the difference between public and private facilities.)

⁷⁷ *Carbone*, 511 U.S. at 410-30 (Souter, J., dissenting).

⁷⁸ *United Haulers*, 261 F.3d at 252, 264.

by failing to recognize the distinction between private and public ownership of the favored facility.”⁷⁹ The Court found that there was a distinction and that the *Pike* balancing test should be applied in the case of public facilities.⁸⁰ The Court later determined that the ordinances were valid under the *Pike* test when “the challenged laws do not treat similarly situated in-state and out-of-state business interests differently.”⁸¹

In a case involving similar municipal ordinances, the Sixth Circuit in *National Solid Wastes Management Ass’n v. Daviess Co., Ky* criticized the Second Circuit’s ruling in *United Haulers*.⁸² In the Sixth Circuit’s opinion the Court pointed out that the facts in *Carbone* clearly indicate that the facility was public, and for this reason *Carbone* should apply to the instant case.⁸³ The Court stated that determining a government-run business is public “does not cloak ... facially protectionist activity from the appropriate scrutiny under the Commerce Clause.”⁸⁴ The Court therefore upheld the District Court ruling that the ordinances violated the Commerce Clause.⁸⁵

IV. Instant Decision

The *United Haulers* Court began by laying a foundation for “dormant” Commerce Clause analysis.⁸⁶ The Court stated that the first question in this analysis is whether the ordinance facially discriminates against interstate commerce.⁸⁷ The Court noted that laws motivated by “simple economic protectionism”⁸⁸ are subject to a rule of virtually *per se*

⁷⁹ *Id.* at 257.

⁸⁰ *Id.* at 264.

⁸¹ *United Haulers*, 438 F.3d at 155 (internal quotation marks omitted).

⁸² *Nat’l Solid Waste Mgmt. Ass’n v. Daviess Co.*, 434 F.3d 898, 912 (6th Cir. 2006)..

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 913.

⁸⁶ *Id.* at 1793.

⁸⁷ *Id.* The Court defines discrimination in this context as “differential treatment of in-state and out-of-state economic interests that benefit the former and burden the latter.”*Id.* (quoting *Ore. Waste Systems, Inc. v. Department of Env’tl. Quality of Ore.*, 511 U.S. 93, 99 (1994); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988)).

⁸⁸ *Daviess Co.*, 434 F.3d at 1793 (Internal quotation marks omitted).

invalidity that is only overcome by a showing that the State had no other means to advance a legitimate local purpose.⁸⁹

The Court then explained reasons for different treatment of public entities and private businesses.⁹⁰ The Court noted that unlike private entities, governments have the responsibility of protecting the “health, safety, and welfare of its citizens.”⁹¹ Given the differences, the Court commented that it does not make sense to treat laws favoring government and those favoring private industry the same.⁹² The Court reasoned that a law which favors an in-state business over a business from out-of-state is subject to “rigorous scrutiny” because it is often the product of “simple economic protectionism”.⁹³ There is a difference, however, when those laws favor a local government because, according to the Court, “laws

⁸⁹ *Id.* (quoting *Philadelphia v. N.J.*, 437 U.S. 617, 624 (1978); citing *Me. v. Taylor*, 477 U.S. 131, 138 (1986)).

⁹⁰ *Id.* at 1794. UHA urged the Court to treat the majorities silence in *Carbone* on the issue of the facilities being public or private as agreement with the dissents characterization in *Carbone* that facility was public. *Id.* The inference being that the same rules should apply to both public and private interests. *Id.* The Authority argued that the silence can not be taken as agreement, rather that the majority “studiously” avoided the issue of whether public facilities could be favored because the facility in *Carbone* was private, thus the question was not properly before the Court. *Id.* The Court ultimately decides that the later view is the correct one. *Id.* The Court notes that the dissent in *Carbone* offered many reasons why public entities should be treated different from private ones under the Dormant Commerce Clause and that it would be “hard to suppose” the majority would have rejected the dissents argument without explaining why. *Id.* The Court also states that if the *Carbone* court was extending its rejection of the ordinances to cover discrimination in favor of local government that they would expect them to do so in plain and explicit terms. *Id.* (citing *U. S. v. Burr*, 25 F. Cas. 55, 165 (No. 14,693) (CC Va. 1807) (Marshall, C.J.) (“[A]n opinion which is to ... establish a principle never before recognized, should be expressed in plain and explicit terms”)).

⁹¹ *Id.* at 1795 (citing *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 756 (1985) (“The States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons”) (internal quotation marks omitted)).

⁹² *Id.*

⁹³ *Id.* at 1795-96 (quoting *Wyo. v. Okla.*, 502 U.S. 437, 454 (1992); *Philadelphia v. N.J.*, 437 U.S. 617, 626-27 (1978)).

favoring local government... may be directed toward any number of legitimate goals unrelated to protectionism.”⁹⁴

In addition to the above considerations, the Court was also hesitant to intrude into the Counties’ regulation of waste disposal because it is both “typically and traditionally a local government function.”⁹⁵ In the Resource Conservation and Recovery Act of 1976, Congress even noted the local government’s role in waste management by stating, “collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies.”⁹⁶

The Court’s final analysis focuses on the test set forth in *Pike v. Bruce Church, Inc.*⁹⁷ Under the *Pike* test, a law “directed to legitimate local concerns, with effects upon interstate commerce that are only incidental”⁹⁸ is held to be nondiscriminatory “unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.”⁹⁹ The Court found that any arguable burden the ordinance produced did not exceed the benefits provided to the public.¹⁰⁰ The Court recognized that a major function of the ordinance is to finance the waste-disposal services the Authority provides.¹⁰¹ Although County revenue

⁹⁴ *Id.* at 1796. “The Commerce Clause significantly limits the ability of States and Localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values.”*Id.* (internal quotation marks omitted) (quoting *Me. v. Taylor*, 477 U.S. 131, 151 (1986)). *See also* *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978) (Commerce Clause does not protect “the particular structure or method” of a market.).

⁹⁵ *Id.* (quoting *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 264 (2d Cir. 2001)). *See also* *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1275 (2d Cir. 1995) (“For ninety years, it has been settled law that garbage collection and disposal is a core function of local government in the United States”) (internal quotation marks omitted).; M. Melosi, *Garbage in the Cities: Refuse, Reform, and the Environment, 1880-1980*, at 153-55 (1981)).

⁹⁶ *Id.* (quoting the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901(a)(4) (2000)).

⁹⁷ *Id.* at 1797 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

⁹⁸ *Id.* (quoting *Philadelphia v. N.J.*, 437 U.S. 617, 624 (1978)).

⁹⁹ *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).; *N.W. Central Pipeline Corp. v. State Corp. Corporation Comm’n of Kan.*, 489 U.S. 493, 525-26 (1989) (internal quotation marks omitted)).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1798.

generation is “not a local interest that can justify discrimination against interstate commerce” the Court stated that it believes the Counties receive a cognizable benefit for the purpose of the *Pike* test.¹⁰²

Ultimately, the Court held that county flow ordinances, like those imposed by Oneida and Herkimer counties, do not violate the Dormant Commerce Clause when they treat in-state and out-of-state private business interests the same, they benefit a government interests, and any incidental burden on interstate commerce is not excessive in relation to the local benefit.¹⁰³

V. COMMENT

There is no doubt that the flow control ordinance imposed by Oneida and Herkimer counties could have been “directed toward any number of legitimate goals unrelated to protectionism.”¹⁰⁴ However, the question as to what justified the courts departure from its ruling in *Carbone* is perhaps more controversial.¹⁰⁵

As the dissent in *United Haulers* points out, the Court has always subjected discriminatory legislation to strict scrutiny, and never before had it recognized an exception for state-owned entities.¹⁰⁶ In addition to this departure from the Court’s long history of applying strict scrutiny, the distinction the majority drew between the facilities in *Carbone* and *United Haulers* is essentially a distinction without a difference. The dissent is correct in pointing out that by making the distinction the majority “exalts form over substance [].”¹⁰⁷ Additionally, the Court gives little guidance on

¹⁰² *Id.* (quoting *Carbone*, 511 U.S. 386, 393 (1994) (internal quotation marks omitted)).

¹⁰³ *Id.* at 1797-98. Justice Thomas and Scalia filed separate concurrences. *Id.* at 1798-1801.1798-801. Justice Alito, with whom Justice Stevens and Justice Kennedy joined filed a dissent discussed *infra*. The dissent urged that the instant case can not be meaningfully distinguished from *Carbone*. *Id.* at 1803. As such they believe that in ruling for the Authority the Court “exalt[ed] form over substance in adopting a test that turns on [a] ... technical distinction, particularly since, barring any obstacle presented by state law, the transaction in *Carbone* could have been restructured to provide for the passage of title at the beginning, rather than the end of the 5-year [private] period.” *Id.* at 1804-05.

¹⁰⁴ *Id.* at 1796.

¹⁰⁵ See generally *Carbone*, 511 U.S. 383.

¹⁰⁶ *United Haulers*, 127 S. Ct. at 1805-06.

¹⁰⁷ *Id.* at 1804.

what “legitimate goals” in which it would be willing to allow the states to indulge.¹⁰⁸

A. Distinction Without a Difference

The majority uses an arbitrary difference to distinguishes the facilities in *United Haulers* are from those in *Carbone*. A distinction which the dissent noted, “barring any obstacle presented by the state ... could have been restructured ... [to satisfy the *United Hauler’s* test].”¹⁰⁹ In *Carbone* the facility was built by a contractor for the city free of charge.¹¹⁰ In return for building the transfer station the city guaranteed that for the first five years after construction the contractor would receive, “a minimum waste flow of 120,000 tons per year” for which he could charge an above market tipping fee of \$81.”¹¹¹ At the end of the 5 year period the contractor would sell the facility back to Clarkston for \$1.¹¹²

The situation in *United Haulers* is not all that distinguishable from the situation in *Carbone*, both involved the building of a new waste transfer station, and both involved what could fairly be characterized as a financing measure on the part of the town or municipality. In *United Haulers*, however, there was no five-year waiting period for Oneida and Herkimer counties, the facility was built by a state-created public benefit corporation which took title immediately.¹¹³

After the holding in *United Haulers*, C & A Carbone, Inc. could have simply turned the title to the plant over to the town of Clarkstown in exchange for a note, and resumed the plant’s normal operation. While the Court attempted to provide a bright line rule, they just provided municipalities with an end run around Dormant Commerce Clause considerations.

¹⁰⁸ *Id.* at 1796.

¹⁰⁹ *Id.* at 1804-05.

¹¹⁰ *Carbone*, 511 U.S. at 387.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *United Haulers*, 127 S. Ct. at 1790.

B. What is a Legitimate Goal?

As long as the state or municipality is directing the questionable legislation toward “legitimate goals unrelated to protectionism”¹¹⁴ and they are treating in-state and out-of-state private business interests the same, then the legislation does not discriminate for purposes of the Dormant Commerce Clause.¹¹⁵ The question then arises what is and is not a legitimate goal for the states. At oral argument the Court used an exaggerated analogy to make the point that this holding had broad implications.¹¹⁶ The Court created the idea of an “Oneida-Herkimer Hamburger Stand” and it’s hypothetical “flow control” requiring residents to buy their burgers only from the aforementioned stand.¹¹⁷ In the opinion the Court responded to this hypothetical by stating that, “[r]ecognizing that local government may *facilitate* a customary and traditional government function such as waste disposal, without running afoul of the Commerce Clause, is hardly a prescription for state control of the economy.”¹¹⁸

While the end the government seeks to pursue may be a legitimate one, equating discriminatory legislation to a simple facilitation is a drastic understatement of the means used to achieve it. The dissent in *United Haulers* makes this oversight by the majority particularly clear by citing the Court’s willingness to “repeatedly invalidate[] legislation where ‘a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy.’”¹¹⁹

IV. CONCLUSION

Although some Justices, such as Thomas, see the Dormant Commerce Clause as activity, now largely rebuked, similar to the type of economic policy making which was engaged in by the *Lochner* court;

¹¹⁴ *Id.* at 1796.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1796 n.7.

¹¹⁷ *Id.*

¹¹⁸ *Id.* (emphasis added).

¹¹⁹ *Id.* at 1808 (Alito, J., dissenting)1806 (citing *Philadelphia v. N.J.*, 437 U.S. 617, 627 (1978)).

whether they like it or not the Court seems unwilling to depart from this analysis.¹²⁰ The Court in *United Haulers* has instead “tweak[ed]” the Dormant Commerce Clause to provide an exception for government actors.¹²¹ Essentially, what the Supreme Court has done in *United Haulers* is provide local governments with an end run around Dormant Commerce Clause considerations to pursue whatever goal they like, as long as it’s not protectionism through discriminatory means. The Court in *United Haulers* took a step away from its analysis in *Carbone*, however, by granting such a broad exception, they may have opened the door for Oneida and Herkimer counties in such a way that it will not easily be closed. Going forward it should be interesting to see how the Court deals with what is sure to be an increase in questionably protectionist local legislation, let’s just hope that Oneida and Herkimer counties are content with regulating trash flow and stay out of the hamburger business.

RYAN TICHENOR

¹²⁰ See *id.* at 1798-1803 (Scalia, J., concurring and Thomas, J., concurring).

¹²¹ *Id.* at 1802 (Thomas, J., concurring)..

