

United Haulers v. Oneida-Herkimer Solid Waste Management Authority. Introducing the “Public Benefit” Exception to the Dormant Commerce Clause

I. OVERVIEW OF THE CASE..... 135
II. BACKGROUND..... 136
III. THE COURT’S DECISION 141
IV. ANALYSIS 147
V. CONCLUSION 149

I. OVERVIEW OF THE CASE

In the early 1990s, Oneida and Herkimer Counties in central New York State each enacted a “flow control” ordinance that required all solid waste generated in the Counties be disposed of at a single facility, owned by the Oneida-Herkimer Waste Management Authority (Authority), a public benefit corporation created by the state.¹ Local waste management companies and an association representing them responded to the ordinance by filing a complaint alleging that the ordinance violated the dormant Commerce Clause by discriminating against interstate commerce.² The United States District Court for the Northern District of New York agreed and enjoined the enforcement of the Counties’ laws.³ The United States Court of Appeals for the Second Circuit reversed, holding that a statute does not discriminate against interstate commerce when it favors local government over all private industry.⁴ The Second Circuit remanded to let the district court decide whether the Counties’ ordinance placed an incidental burden on interstate commerce, and if so, whether the benefits outweighed that burden.⁵ On remand, the district court found that the haulers did not show that the ordinances imposed any cognizable burden on interstate commerce.⁶ The Second Circuit affirmed, believing that the laws “exacted some toll on interstate commerce, but finding any possible burden ‘modest’ compared to the

1. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1788 (2007).

2. *Id.* at 1792.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

‘clear and substantial’ benefits of the ordinance.”⁷ Because the United States Court of Appeals for the Sixth Circuit had recently held that a similar ordinance favoring a public entity did violate the Commerce Clause, the Supreme Court of the United States granted certiorari.⁸ Agreeing with the Second Circuit, the Supreme Court *held* that the “flow control” ordinance did not discriminate against interstate commerce when it favored a public entity over all private business. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Management Authority*, 127 S. Ct. 1786 (2007).

II. BACKGROUND

In the late 1980s, the New York State Legislature and Governor created the Authority, a public benefit corporation, to “collect, process, and dispose of solid waste generated” in Oneida and Herkimer counties in central New York.⁹ The statute also empowered the Counties to impose “appropriate and reasonable limitations on competition” by adopting local laws “requiring that all solid waste . . . be delivered to a specified solid waste management-resource recovery facility.”¹⁰ The Authority was created at the request of the Counties who were confronted by what they called a solid waste “crisis,” characterized by rampant disregard of zoning and permit law by local landfills, price-fixing, dramatic price hikes, and the influence of organized crime.¹¹ In 1989, the Authority and the Counties entered into a Solid Waste Management Agreement where the Authority would take over the job of processing the trash, sorting it, and sending it off for disposal.¹² The Authority charged haulers “tipping fees” that significantly exceeded those charged on the open market, but allowed the Authority to provide more services like recycling and household hazardous waste disposal.¹³ To make sure the facilities were used, the Counties enacted “flow control” ordinances requiring that all solid waste generated within the Counties be delivered to the Authority’s processing sites and required all local trash haulers to obtain a permit from the Authority to collect trash at citizens’ curbs.¹⁴ Over the past century, states’ and municipalities’

7. *Id.* (citing *United Haulers Ass’n v. Oneida Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 263 (2d Cir. 2001)).

8. *Id.* at 1792.

9. *Id.* at 1791.

10. *Id.* (citing N.Y. Pub. Auth. Law Ann § 2049-ee(4)).

11. *Id.* at 1790-91.

12. *Id.* at 1791.

13. *Id.*

14. *Id.*

attempts at managing solid waste disposal have been frustrated by the dormant Commerce Clause.¹⁵ The magnitude of this dilemma became even more apparent with the enactment of the Resource Conservation and Recovery Act of 1976 (RCRA) and the Pollution Prevention Act of 1990, requiring the States to take steps to implement waste management policies and take responsibility for cleaning up landfills.¹⁶

The Commerce Clause of the United States Constitution provides that Congress shall have the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹⁷ The Supreme Court has declared that “the framers granted Congress plenary authority over interstate commerce in ‘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.’”¹⁸ To effectuate this purpose, the Court has interpreted the Clause to contain “dormant” limits that authorize federal courts to invalidate local laws that burden the flow of interstate commerce in the absence of affirmative congressional action validating the law.¹⁹ In other words, the dormant Commerce Clause’s purpose is to “prevent the states from erecting barriers to the free flow of interstate commerce.”²⁰

A two-part test has been developed to guide courts in determining whether a law has violated the dormant Commerce Clause.²¹ First, the court must consider whether the regulation “burden[s] interstate transactions only incidentally” or “affirmatively discriminates against such transactions.”²² The second part of the test is path-dependent. Statutes in the first group will be judged by balancing the burdens imposed on interstate commerce against the putative local benefits, and will be upheld unless those burdens are deemed “clearly excessive” in comparison to the benefits.²³ Statutes in the second group, those that

15. *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 385-86 (1994).

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

17. U.S. CONST., art. I, § 8, cl. 3.

18. *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 98 (1994) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979)).

19. *Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978). Justices Scalia and Thomas have proposed to eliminate the dormant Commerce Clause because it is not explicitly in the text of the Constitution and the doctrine is too inconsistent. *Id.*; *see infra* notes 82-86 and accompanying text.

20. *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 439 (1978).

21. *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

22. *Id.*

23. Justice Scalia has argued that the Pike test provides no guidance on how to balance the competing local and interstate interests involved, comparing the test to “judging whether a

“affirmatively discriminate” against interstate commerce, must withstand a strict scrutiny analysis whereby the law will be considered “per se invalid” and will only be upheld if the State can show that it “serves a legitimate local purpose” and this purpose could not be served by other “nondiscriminatory” means.²⁴ The Court has defined “discrimination” in this context as “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”²⁵ In *Maine v. Taylor*, the only case to survive strict scrutiny, the Court upheld a statute banning out-of-state baitfish from being imported into Maine because the ban “serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives.”²⁶

One exception to the dormant Commerce Clause has been recognized traditionally, the “market participant” exception.²⁷ The Court has allowed a State to escape the confines of the dormant Commerce Clause when it acts as a market participant instead of a market regulator.²⁸ In *Reeves v. Stake*, a case where the Court upheld the state’s right to refuse to sell cement from the state-owned manufacturer to out-of-state buyers, the Court explained the exception: [T]he Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace.²⁹ “There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market,” or from “exercising the right to favor [their] own citizens over others” while operating as a market participant.³⁰

The Supreme Court has applied the dormant Commerce Clause doctrine in five cases where States attempted to regulate the flow of waste, and in all five cases the ordinances were held invalid.³¹ The Supreme Court first applied the dormant Commerce Clause to a New

particular line is longer than a particular rock is heavy.” *Bendix Autolite Corp. v. Midwesco Enter., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

24. *Maine*, 477 U.S. at 138.

25. *Or. Waste Sys., Inc. v. Dep’t of Envtl. Quality*, 511 U.S. 93, 99 (1994).

26. *Maine*, 477 U.S. at 151.

27. *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-39 (1980). As stated earlier, the states would also be exempt from “dormant” commerce clause scrutiny if Congress explicitly granted the state the ability to regulate in a certain area. See *supra* note 18 and accompanying text.

28. *Reeves*, 447 U.S. at 436-39.

29. *Id.* at 436-37 (citing *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 807-08 (1976)).

30. *Id.* at 437 (citing *Hughes*, 426 U.S. at 810).

31. *Or. Waste Sys., Inc. v. Dep’t of Envtl. Quality*, 511 U.S. 93 (1994); *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Natural Res.*, 504 U.S. 353 (1992); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

Jersey ban of all out-of-state waste in *Philadelphia v. New Jersey*.³² The New Jersey Supreme Court had decided that the dormant Commerce Clause did not apply because solid waste was not an article of commerce.³³ Rejecting this assertion, the Court went on to apply strict scrutiny and found that although the state had a legitimate purpose—protecting the environment by prolonging the life of its landfills—it could not be achieved by “discrimination or isolation from the national economy.”³⁴ Fourteen years after deciding *Philadelphia*, the Court reviewed two cases involving flow control, *Chemical Waste Management v. Hunt* and *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*.³⁵ *Chemical Waste* was a challenge to an Alabama statute that imposed a higher fee on waste generated out-of-state and disposed of in state.³⁶ The Court applied the “strict scrutiny” test from *Philadelphia* and held that, although the purpose of slowing waste to the State’s landfills was legitimate, the statute could not be upheld because there were nondiscriminatory alternatives available.³⁷ The Court gave three examples of alternatives: (1) applying an additional fee on all hazardous waste disposed of in Alabama; (2) a per-mile tax on all vehicles hauling waste on state roads; and (3) an even-handed cap on the tonnage of waste disposed of in a year.³⁸

The challenged statute in *Fort Gratiot* was a Michigan law that required all waste generated in a county to be disposed of in that county.³⁹ The State argued that because the regulation treated out-of-county waste and out-of-state waste the same, the dormant Commerce Clause was not violated.⁴⁰ The Court found this fact irrelevant, stating that “a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.”⁴¹ Two years later, the Court invalidated an Oregon statute placing a surcharge on all in-state landfills that accepted out-of-state waste in *Oregon Waste Systems v. Department of Environmental Quality*.⁴² The Oregon state courts upheld the statute, distinguishing it from *Chemical Waste* because

32. 437 U.S. at 617.

33. *Id.* at 621-22.

34. *Id.* at 626-27.

35. *See Chem. Waste*, 504 U.S. at 334; *See Fort Gratiot*, 504 U.S. at 353.

36. *Fort Gratiot*, 504 U.S. at 334.

37. *Id.* at 344-48.

38. *Id.* at 345.

39. *Id.* at 356-57.

40. *Id.* at 358.

41. *Id.* at 362.

42. 511 U.S. 93 (1994).

the surcharge was related directly to the extra cost incurred by the state for disposing of the waste.⁴³ The Court found this distinction irrelevant because the charge applied was based solely on from where the waste came, which made it facially discriminatory and therefore subject to strict scrutiny.⁴⁴ The Court found that there were other nondiscriminatory alternatives available and invalidated the statute.⁴⁵ The Court went on to remind Oregon that “however serious the shortage in landfill space may be, . . . ‘[n]o State may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade.’”⁴⁶

The latest case reviewed by the Court revolved around a slightly different statute than the previous cases. In *C & A Carbone v. Clarkstown*, a town regulation that required all waste generated in or brought to the town to be disposed of at a single processing facility, was challenged.⁴⁷ The fees generated by this regulation were supposed to allow the private developer to build the facility, get it running, and at the end of a five-year period, sell it to the town for a nominal sum.⁴⁸ The Court found that the regulation was simply a “financing measure,” and while financing a town facility was a legitimate purpose, it could not be justified under the Commerce Clause because it was “prohibiting patronage of out-of-state competitors and their facilities.”⁴⁹ While *Clarkstown* argued that the regulation was the only way the town could accomplish its purposes, the Court disagreed, stating other less discriminatory alternatives such as uniform safety regulations.⁵⁰

After *Carbone*, the lower courts continued to grapple with the constitutionality of flow control regulations. In 2006, the Sixth Circuit and the Second Circuit disagreed on the effect of *Carbone* on the application of the dormant Commerce Clause to similar local flow control laws.⁵¹ Both courts had a flow control regulation before them that required all waste within county limits be brought to a single, publicly

43. *Id.* at 93-97.

44. *Id.* at 99-101.

45. *Id.*

46. *Id.* at 107 (quoting *Chem. Waste*, 504 U.S. at 339-340, and 346, n.9).

47. 511 U.S. 383, 383-86 (1994).

48. *Id.* at 387.

49. *Id.* at 393-94.

50. *Id.* at 393. “The most obvious would be uniform safety regulations enacted without the object to discriminate. These regulations would ensure that competitors like *Carbone* do not underprice the market by cutting corners on environmental safety.” *Id.*

51. See *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 438 F.3d 150 (2d Cir. 2006); See *Nat’l Solid Waste Mgmt. Ass’n v. Daviess County*, 434 F.3d 898 (6th Cir. 2006).

owned facility.⁵² The Second Circuit in *United Haulers I* decided that the *Carbone* decision was *not* dispositive because when the *Carbone* Court held that States “may not use their regulatory power to favor *local enterprise*,” it applied only to local private business.⁵³ The Second Circuit then determined that laws favoring public entities and treating all private business, whether in-state or out-of-state, the same were not discriminatory and would be correctly examined under the *Pike* balancing test.⁵⁴ The court concluded that the burden imposed on interstate commerce was “modest” and the benefits were “clear and substantial.”⁵⁵ In explanation of this conclusion, the court cited its prior holding in *USA Recycling, Inc. v. Town of Babylon* that “a municipality, consistent with the Commerce Clause, may impose a public monopoly encompassing the activities of waste collection, processing and disposal.”⁵⁶ The court reasoned that if a

government may *eliminate* the local private market for waste disposal services, we think it necessarily follows that a local government imposes no more than a limited burden on interstate commerce when it creates a partial monopoly with respect to solid waste management—here, at the processing stage—that has the ancillary effect of diminishing interstate commerce in that same market.⁵⁷

The Sixth Circuit vehemently disagreed with the Second Circuit, finding that the *Carbone* decision was “not based on the categorization of the waste transfer facility as a private business” and that “free access for out-of-state businesses to the local market is the ‘rationale underlying the dormant Commerce Clause.’”⁵⁸ “[T]he crux of the inquiry is whether the local ordinance burdens interstate commerce, not whether the local entity benefited by the ordinance is publicly owned.”⁵⁹

III. THE COURT’S DECISION

In the noted case, the Supreme Court upheld a local flow-control ordinance that required that all local waste be processed at the county-

52. 438 F.3d at 154; 434 F.3d at 900-01.

53. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 249-50 (2d Cir. 2001). *See supra* notes 9-12 and accompanying text.

54. 438 F.3d at 159-60.

55. *Id.*

56. *Id.* at 161 (citing *USA Recycling v. Town of Babylon*, 66 F.3d 1272, 1293-94 (2d Cir. 1995)).

57. 438 F.3d at 161 (emphasis in original).

58. *Nat’l Solid Waste Mgmt. v. Daviess County*, 434 F.3d 898, 911-12 (6th Cir. 2006) (quoting *United Haulers*, 261 F.3d at 254).

59. *Id.*

designated, publicly owned facility.⁶⁰ The majority reasoned that the law did not discriminate against interstate commerce because it favored a public facility acting in a traditional state function and treated every private business, whether in-state or out-of-state, exactly the same.⁶¹ The Court began by distinguishing this case from their recent decision in *Carbone*, where the Court struck down a similar law for violation of the dormant Commerce Clause.⁶² The Court stated that the “the only salient difference” between the noted case and *Carbone* was that the law here requires haulers to bring waste to “facilities owned and operated by a state-created public benefit corporation.”⁶³ Finding this difference “constitutionally significant,” the court stated that *Carbone* did not determine the outcome of the present case.⁶⁴ The Court reasoned that the *Carbone* majority “would have said so” if they were “extending this line of local processing cases to cover discrimination in favor of local government.”⁶⁵ In deciding how to apply the dormant Commerce Clause to the particular flow control ordinance, the Court declared that there were “compelling reasons that justify” treating laws that favor public facilities over all private business differently from laws that favor in-state private business over out-of-state private business.⁶⁶ First, the Court stated that “conceptually... any notion of discrimination assumes a comparison of substantially similar entities,” and continued on to explain that government and private entities are not similar entities.⁶⁷ The Court reasoned that “given these differences, it does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism.”⁶⁸ Furthering this conclusion, the Court reasoned that prior local processing cases demonstrated that strict scrutiny was appropriate when laws favor in-state business because such laws are “often the product of ‘simple economic protectionism,’” while laws favoring government “may be directed toward any number of legitimate

60. *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1790 (2007).

61. *Id.*

62. *Id.* (distinguishing *C & A Carbone Inc. v. Town of Clarkstown*, 511 U.S. 383, 386 (1994)).

63. *Id.*

64. *Id.* at 1795 (“*Carbone* can not be regarded as having decided the public-private question.”).

65. *Id.* at 1794.

66. *Id.*

67. *Id.* (“Unlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens.”).

68. *Id.*

goals unrelated to protectionism.”⁶⁹ Rejecting the contrary approach (finding no distinction, for dormant Commerce Clause purposes, between laws that favor public entities over private and laws that favor private business over out-of-state similarly situated private business), the Court declared that it would “lead to unprecedented and unbounded interference by the courts with state and local government.”⁷⁰ The Court further asserted that the “dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for . . . government to undertake, and what activities must be the province of private market competition.”⁷¹ The Court did not believe it was appropriate to use the Commerce Clause to control the decision of voters on whether the public or the private sector should provide waste management services.⁷² Next, the Court cautioned that when a state is engaged in a “typically and traditionally local government function” the courts should be “particularly hesitant” to interfere with its efforts “under the guise of the Commerce Clause.”⁷³ RCRA and New York state law also gave the Court some guidance.⁷⁴ The Court noted that RCRA’s statement that “collection and disposal of solid wastes should continue to be primarily the function of the State” showed Congressional support of flow control laws.⁷⁵ Even though the Court did not necessarily agree, the policy of New York supporting “displac[ing] competition with regulation or monopoly” control in the area of waste disposal was persuasive.⁷⁶

Finally, the Court noted that the only “palpable harm imposed by the ordinance—more expensive trash removal—is likely to fall upon the very people who voted for the laws.”⁷⁷ This fact made it especially easy for the Court to uphold the law because when “the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.”⁷⁸

Although the plurality of the Court applied the *Pike* test, they found it “unnecessary to decide whether the ordinances impose any incidental burden because any arguable burden on interstate commerce does not

69. *Id.* at 1795-96.

70. *Id.*

71. *Id.* at 1796.

72. *Id.*

73. *Id.*

74. *Id.*

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

76. *Id.*

77. *Id.* at 1797.

78. *Id.* (quoting *S. Pac. Co. v. Arizona*, 325 U.S. 761, 767-768 (1945)).

exceed the public benefits.”⁷⁹ Agreeing with the Second Circuit, the plurality stated that although revenue generation was not a “legitimate purpose that could justify discrimination,” it was a “cognizable benefit” for purposes of the *Pike* test, and along with the benefits of increased recycling and better enforcement of recycling laws, it demonstrated that any arguable burden did not exceed these benefits.⁸⁰

In the two concurring opinions, Justices Scalia and Thomas remind readers of their long-held view that the Commerce Clause is merely “an authorization to regulate commerce,” and that the dormant Commerce Clause “has no basis in the Constitution and has proven unworkable in practice.”⁸¹ Scalia was willing to enforce on “*stare decisis* grounds” a dormant Commerce Clause in two situations, where a state law “facially discriminates against interstate commerce” and where a state law is “indistinguishable from a type of law previously held unconstitutional by the Court.”⁸² Believing that “disparate treatment constitutes discrimination only if the objects of the disparate treatment are . . . similarly situated,” Scalia thought that it “would broaden the negative Commerce Clause beyond its existing scope, and intrude on a regulatory sphere traditionally occupied by . . . the states” to treat public and private business the same.⁸³ Thomas, who joined in the majority in *Carbone*, renounced his position on that case and concluded by denouncing the entire doctrine.⁸⁴ In his view, to the extent that the Court’s dormant Commerce Clause jurisprudence considers whether a rule is discriminatory and what purpose that discrimination may serve, it “gives nine Justices of this Court the power to decide the appropriate balance . . . between protectionism and the free market.”⁸⁵

Joined by Justices Stevens and Kennedy, Justice Alito’s dissent asserted that the provisions challenged were identical to the ordinance in *Carbone*.⁸⁶ The dissent argued that the facility in *Carbone* was municipal for dormant Commerce Clause purposes and that the majority in *Carbone* did not believe that the public nature made a difference in

79. *Id.*

80. *Id.*

81. *Id.* at 1798-99.

82. *Id.* at 1798 (quoting *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (1994) (Scalia, J., concurring)).

83. *Id.* (quoting *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 313 (1997) (Scalia, J., concurring) (quoting *Campus Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 601 (1997) (Scalia, J., dissenting)).

84. *Id.* at 1801.

85. *Id.*

86. *Id.* at 1803.

finding the ordinance discriminatory.⁸⁷ The dissent accused the majority of creating the “public-private distinction out of whole cloth,” and characterized this distinction as “illusory and without precedent.”⁸⁸

Alito cited two cases, *Scott v. Donald* and *Vance v. W.A. Vandercook*, to illustrate that the Court has “long ago recognized that the Commerce Clause can be violated by a law that discriminates in favor of a state-owned monopoly.”⁸⁹ If not for the Twenty-First Amendment, Alito found, the liquor law in *Scott* granting sole authority to sell liquor in the state to a state agency would have been overturned.⁹⁰ Alito cited *Vance* in stating that a State “cannot discriminate against the bringing of lawful articles in and importing them from other States.”⁹¹

Alito next found that the “market participant” exception contemplated what the majority encouraged here and implicitly forbade it.⁹² “While acting as market participants . . . in an area in which there is an established interstate market, respondents are also regulating that market in a discriminatory manner and claiming that their special government status somehow insulates them from a dormant Commerce Clause challenge.”⁹³ Alito lamented that today the Court, “contrary to its prior holdings,” suggests “that States can discriminate in favor of in-state interests while acting as both a market participant and as a market regulator.”⁹⁴

Alito then went on to rebut three premises that the Court relied on in coming to its decision: (1) that laws favoring local government were not as likely to be motivated by “economic protectionism” as laws favoring private business; (2) that deference was warranted because waste disposal is a traditional state function; and (3) that the flow control laws were not discriminatory because they treated all in-state and out-of-state private business equally.⁹⁵

Alito saw “no basis” for the “assumption that discrimination in favor of an in-state facility owned by the government is likely to serve ‘legitimate goals unrelated to protectionism,’” and noted that many laws favoring locally owned entities were put in place for the benefit of the employees of the facilities, local businesses who supply the facilities, and

87. *Id.* at 1805.

88. *Id.* at 1804.

89. *Id.* at 1806; 165 U.S. 58 (1897); 170 U.S. 438 (1898).

90. *Id.*

91. *Id.* (quoting *Vance*, 170 U.S. at 438).

92. *Id.* at 1807.

93. *Id.*

94. *Id.*

95. *Id.*

their employees.⁹⁶ Alito was concerned about the message this reasoning sent to States and the effect it had on the goals of the dormant Commerce Clause: It therefore seems strange that the Commerce Clause, which has historically been understood to protect free trade and prohibit States from “plac[ing] [themselves] in a position of economic isolation,”⁹⁷ is now being construed to condone blatantly protectionist laws on the grounds that such legislation is necessary to support governmental efforts to commandeer the local market for a particular good or service. In adopting that construction, the Court sends a bold and enticing message to local governments throughout the United States: Protectionist legislation is now permissible, so long as the enacting government excludes all private sector participants from the attended market.⁹⁸

Refuting the majority’s second reason for upholding the ordinance, that the government’s traditional role in waste disposal suggested deference, Alito cited *Garcia v. San Antonio Metropolitan Transit Authority*, which stated that “this Court has previously recognized that any standard that turns on a judicial appraisal of whether a particular governmental function is ‘integral’ or ‘traditional’ is ‘unsound in principle and unworkable in practice.’”⁹⁹ Alito found the final assertion of the majority, that the laws do not discriminate because they treat all private business equally, as unpersuasive as the previous two reasons.¹⁰⁰ He explained that “the critical issue is whether the challenged legislation discriminates against interstate commerce.”¹⁰¹ “This Court,” he declared, “has long recognized that ‘a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute . . . applies alike to the people of all States, including the people . . . enacting such statute.’”¹⁰²

Finally, Alito explained why the regulation would not pass strict scrutiny, under which it rightly belonged, by citing the “nondiscriminatory alternatives” suggested in *Carbone*: “uniform health and safety regulations” and “subsidizing their program through taxes.”¹⁰³

96. *Id.*

97. *Id.* at 1808 (quoting *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 527 (1935)).

98. *Id.*

99. *Id.* at 1810 (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546–47 (1985)).

100. *See id.* at 1811.

101. *Id.*

102. *Id.* (quoting *Brimmer v. Rebman*, 138 U.S. 78, 83 (1891)).

103. *Id.* at 1810 (quoting *C & A Carbone, Inc. v. Town of Clarkson*, 511 U.S. 383, 393 (1994)).

IV. ANALYSIS

Considering the origins and the avowed purpose of the dormant Commerce Clause, it is difficult to reconcile the Court's reasoning with prior jurisprudence.¹⁰⁴ First, the Court's assertion that prior "local processing cases demonstrate" that "rigorous scrutiny is appropriate" when laws favor in-state business because such laws are often the product of "simple economic protectionism," while laws favoring government "may be directed toward any number of goals unrelated to protectionism," is truly without precedent.¹⁰⁵ In fact, the two cases cited to support this statement, *Philadelphia* and *Wyoming v. Oklahoma* do just the opposite. In *Wyoming*, the Court characterizes the need for rigorous scrutiny when the law benefits "in-state *economic interests*" by "burdening out-of-state competitors."¹⁰⁶ And *Philadelphia's* rhetoric certainly did not focus on the benefit to private business when it stated that "whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."¹⁰⁷ The statute in *Philadelphia* was not even alleged to benefit local business over out-of-state; it benefited local citizens at the expense of out-of-state trash haulers and state bodies who had to find a new place to dispose of their waste.¹⁰⁸ The focus was not on which type of entity was benefited, but on keeping the borders open to interstate commerce.¹⁰⁹

Furthermore, the comparison of entities and the Court's reference to *General Motors Corp. v. Tracy* is also puzzling.¹¹⁰ The Court used a quote from *General Motors* that "discrimination assumes a comparison of substantially similar entities," to bolster its reasoning for finding that favoring the government over the private sector is not discrimination.¹¹¹ But in *General Motors*, the Court only inquired about the similarity of the in-state and competing out-of-state business because they sold different products and the Court wanted to be sure, for purposes of

104. *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 439 (1978) (stating the purpose of the dormant Commerce Clause "to prevent the states from erecting barriers to the free flow of interstate commerce").

105. *United Haulers*, 127 S. Ct. at 1795-96 (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992)).

106. 502 U.S. at 454.

107. *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978).

108. *Id.* at 626.

109. *Id.* at 627-28.

110. *United Haulers*, 127 S. Ct. at 1795.

111. *Id.* (quoting *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997)).

redress, that the ordinance in fact had an effect on the market in which the challenger was engaged.¹¹²

The Court's third reason for supporting the regulation—that the traditional government role in waste management implied deference—has been abandoned for quite some time.¹¹³ Over the previous few decades the Court has tried this method and subsequently found it unworkable and inconsistent.¹¹⁴ Thus, as the dissent asserted, to the extent this holding rests on waste disposal as a traditional government function, it cannot be reconciled with prior precedent.¹¹⁵

The Court's final justification for its outcome, that the regulation treated in-state business the same as out-of-state business, is also refuted by precedent.¹¹⁶ This fact has long been regarded as irrelevant because it undermines the dormant Commerce Clause by allowing the State to accomplish through its subdivisions what it would not be allowed to accomplish as a whole.¹¹⁷

The dissent's argument that the "Market Participant" exception implicitly forbids the activity condoned by today's holding soundly rests on prior cases that applied the exception. In *South-Central Timber Development, Inc. v. Wunnicke*, the Court struck a state law requiring all timber sold in the state to be processed before leaving the state because the state was acting not only as a market participant in selling the timber, but also as a market regulator in requiring it to be processed in state, an action that was not allowed under the Market Participant exception.¹¹⁸ In *Reeves, Inc. v. Stake* the Court allowed a state-owned cement facility to discriminate against out-of-state interests in its sale of cement because it was acting as a participant in the market. In upholding this practice the Court aptly stated that the "Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the

112. 519 U.S. at 299 ("[W]hen the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes. This is so for the simple reason that the difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed.")

113. See *supra* note 99 and accompanying text.

114. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1982) (overruling *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976)); *New York v. United States*, 326 U.S. 572, 579 (1976) (overruling *South Carolina v. United States*, 199 U.S. 437 (1905)).

115. 127 S. Ct. at 1810.

116. See *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 361-63 (1992).

117. *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 n.4 (1951) ("It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce.")

118. 467 U.S. 82, 95-96 (1984).

national marketplace.”¹¹⁹ Given this precedent, the dissent’s conclusion that upholding the regulation was “contrary to [the Court’s] previous holdings” because it allowed the Counties to enter the market and regulate it in their favor is a persuasive argument.¹²⁰

In the five prior cases concerning flow control, the Court never once mentioned that the States could avoid strict scrutiny by owning the favored facility.¹²¹ Rather, they gave many suggestions for how the State could manage its waste problems and stay within the bounds of the dormant Commerce Clause: imposing a “generally applicable per-ton additional fee on all hazardous waste disposed of within” the State, a per-mile tax on all vehicles transporting hazardous waste across the State’s roads, or an “evenhanded cap on the total tonnage” landfilled in the State.¹²² It is difficult to imagine that the Courts would have considered public ownership a viable alternative without mentioning it.

V. CONCLUSION

Given the stated purpose of the dormant Commerce Clause, “to prevent the States from erecting barriers to the free flow of interstate commerce,” the Supreme Court’s decision is somewhat surprising.¹²³ In creating a “public benefit” exception to the “Per Se Invalid” rule for discriminatory regulation, the Court has risked undermining the entire doctrine by giving States the ability to enter the market and regulate it at the same time. The majority believed that this incentive will be properly checked by the political process, but that presumption is worrisome because the Court failed to recognize the real burden put in place by this regulation.¹²⁴ The Court found that the only “palpable harm” would be inflicted on the citizens of the Counties through more expensive waste disposal, but failed to recognize the barrier placed on out-of-state and out-of-county waste disposal facilities who offered the same service at a lower price.¹²⁵ These interests did not vote for the regulation and therefore would not have access to the “political check” upon which the Court relied.¹²⁶ This misguided assumption and the fact that the “public

119. 447 U.S. 429, 437 (1980).

120. 127 S. Ct. at 1807.

121. See *supra* notes 32-52 and accompanying text.

122. See *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344-45 (1992); *Or. Waste System, Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93 (1994); *C & A Carbone Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994); See *supra* notes 39-40, 43-46, 52, and accompanying text.

123. *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 439 (1978).

124. *United Haulers*, 127 S. Ct. at 1797.

125. *Id.*; see *supra* notes 77-78 and accompanying text.

126. See *supra* note 78 and accompanying text.

exception” has no support in precedent makes it difficult to understand the Court’s holding in this case.

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