AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 11: The Contemporary Era – Federalism

United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority,550 U.S. 330 (2007)

Waste disposal is big business, and the government is deeply involved in it. The Court had previously ruled that states could not create a private monopoly in waste processing without impinging on the freedom of interstate commerce. But could a state or local government create its own waste processing facility and require that local waste be brought to that facility? This case highlights the fine distinctions that separate legitimate state regulations from regulations that impose unconstitutional burdens on interstate commerce. What do you think of Justices Scalia and Thomas's claim that such fine distinctions argue in favor of an abandonment of the Court's so-called "negative" or "dormant" commerce clause jurisprudence? Are the justices debating principles of interstate commerce or the wisdom of certain types of commercial discrimination? As you read the facts you may be reminded of another state regulation that was upheld by the Supreme Court in the Slaughter-House Cases *back in 1873.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court,

"Flow control" ordinances require trash haulers to deliver solid waste to a particular waste processing facility. In *C & A Carbone, Inc. v. Clarkstown* (1994), . . . this Court struck down under the Commerce Clause a flow control ordinance that forced haulers to deliver waste to a particular private processing facility. In this case, we face flow control ordinances quite similar to the one invalidated in *Carbone*. The only salient difference is that the laws at issue here require haulers to bring waste to facilities owned and operated by a state-created public benefit corporation. We find this difference constitutionally significant. Disposing of trash has been a traditional government activity for years, and laws that favor the government in such areas--but treat every private business, whether in-state or out-of-state, exactly the same--do not discriminate against interstate commerce for purposes of the Commerce Clause. Applying the Commerce Clause test reserved for regulations that do not discriminate against interstate commerce, we uphold these ordinances because any incidental burden they may have on interstate commerce does not outweigh the benefits they confer on the citizens of Oneida and Herkimer Counties.

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To determine whether a law violates this so-called "dormant" aspect of the Commerce Clause, we first ask whether it discriminates on its face against interstate commerce. . . . In this context, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." . . . Discriminatory laws motivated by "simple economic protectionism" are subject to a "virtually per se rule of invalidity," *Philadelphia v. New Jersey* (1978), . . . which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose, *Maine v. Taylor* (1986). . . .

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Compelling reasons justify treating [laws benefitted a public facility] differently from laws favoring particular private businesses over their competitors. . . . States and municipalities are not private businesses-far from it. Unlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens. . . .

Given these differences, it does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism. As our local processing cases demonstrate, when a law favors in-state business over out-of-state competition, rigorous scrutiny is appropriate because the

law is often the product of "simple economic protectionism." . . . Laws favoring local government, by contrast, may be directed toward any number of legitimate goals unrelated to protectionism. Here the flow control ordinances enable the Counties to pursue particular policies with respect to the handling and treatment of waste generated in the Counties, while allocating the costs of those policies on citizens and businesses according to the volume of waste they generate.

The contrary approach of treating public and private entities the same under the dormant Commerce Clause would lead to unprecedented and unbounded interference by the courts with state and local government. The dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition. In this case, the citizens of Oneida and Herkimer Counties have chosen the government to provide waste management services, with a limited role for the private sector in arranging for transport of waste from the curb to the public facilities. The citizens could have left the entire matter for the private sector, in which case any regulation they undertook could not discriminate against interstate commerce. But it was also open to them to vest responsibility for the matter with their government, and to adopt flow control ordinances to support the government effort. It is not the office of the Commerce Clause to control the decision of the voters on whether government or the private sector should provide waste management services. . . .

We should be particularly hesitant to interfere with the Counties' efforts under the guise of the Commerce Clause because "[w]aste disposal is both typically and traditionally a local government function." . . . Congress itself has recognized local government's vital role in waste management, making clear that "collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies." . . .

Finally, it bears mentioning that the most palpable harm imposed by the ordinances-more expensive trash removal-is likely to fall upon the very people who voted for the laws. Our dormant Commerce Clause cases often find discrimination when a State shifts the costs of regulation to other States, 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." . . . Here, the citizens and businesses of the Counties bear the costs of the ordinances. There is no reason to step in and hand local businesses a victory they could not obtain through the political process.

We hold that the Counties' flow control ordinances, which treat in-state private business interests exactly the same as out-of-state ones, do not "discriminate against interstate commerce" for purposes of the dormant Commerce Clause.

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[The omitted portion of the opinion concluded that the local benefits of the regulation outweighed any burden to interstate commerce]

The Counties' ordinances are exercises of the police power in an effort to address waste disposal, a typical and traditional concern of local government. The haulers nevertheless ask us to hold that laws favoring public entities while treating all private businesses the same are subject to an almost per se rule of invalidity, because of asserted discrimination. In the alternative, they maintain that the Counties' laws cannot survive the more permissive Pike test, because of asserted burdens on commerce. There is a common thread to these arguments: They are invitations to rigorously scrutinize economic legislation passed under the auspices of the police power. There was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. See *Lochner v. New York*. . . . We should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause.

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JUSTICE SCALIA, concurring in part.

. . . . I write separately to reaffirm my view that "the so-called 'negative' Commerce Clause is an unjustified judicial invention, not to be expanded beyond its existing domain." . . . .

I have been willing to enforce on stare decisis grounds a "negative" self-executing Commerce

Clause in two situations: "(1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by the Court.". . . . As today's opinion makes clear, the flow-control law at issue in this case meets neither condition. It benefits a public entity performing a traditional local-government function and treats all private entities precisely the same way. . . .

I am unable to join [the part] of the principal opinion, in which the plurality performs so-called "*Pike* balancing." Generally speaking, the balancing of various values is left to Congress-which is precisely what the Commerce Clause (the real Commerce Clause) envisions.

JUSTICE THOMAS, concurring in the judgment.

. . . . The negative Commerce Clause has no basis in the Constitution and has proved unworkable in practice. . . . As the debate between the majority and dissent shows, application of the negative Commerce Clause turns solely on policy considerations, not on the Constitution. Because this Court has no policy role in regulating interstate commerce, I would discard the Court's negative Commerce Clause jurisprudence.

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Many [previous] cases (and today's majority and dissent) rest on the erroneous assumption that the Court must choose between economic protectionism and the free market. But the Constitution vests that fundamentally legislative choice in Congress. To the extent that Congress does not exercise its authority to make that choice, the Constitution does not limit the States' power to regulate commerce. In the face of congressional silence, the States are free to set the balance between protectionism and the free market. Instead of accepting this constitutional reality, the Court's negative Commerce Clause jurisprudence gives nine Justices of this Court the power to decide the appropriate balance.

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The majority distinguishes *Carbone* by deciding that favoritism of a government monopoly is less suspect than government regulation of private entities. I see no basis for drawing such a conclusion, which, if anything, suggests a policy-driven preference for government monopoly over privatization. . . . (stating that "waste disposal is both typically and traditionally a local government function"). Whatever the reason, the choice is not the Court's to make. Like all of the Court's previous negative Commerce Clause cases, today's decision leaves the future of state and local regulation of commerce to the whim of the Federal Judiciary.

JUSTICE ALITO, with whom JUSTICE STEVENS and JUSTICE KENNEDY join, dissenting.

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This case cannot be meaningfully distinguished from *Carbone*. As the Court itself acknowledges, "[t]he only salient difference" between the cases is that the ordinance invalidated in *Carbone* discriminated in favor of a privately owned facility, whereas the laws at issue here discriminate in favor of "facilities owned and operated by a state-created public benefit corporation." . . . The Court relies on the distinction between public and private ownership to uphold the flow-control laws, even though a straightforward application of *Carbone* would lead to the opposite result. . . . The public-private distinction drawn by the Court is both illusory and without precedent.

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The only real difference between the facility at issue in *Carbone* and its counterpart in this case is that title to the former had not yet formally passed to the municipality. The Court exalts form over substance in adopting a test that turns on this 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 period.

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I see no basis for the Court's assumption that discrimination in favor of an in-state acility owned by the government is likely to serve "legitimate goals unrelated to protectionism." . . .

Experience in other countries, where state ownership is more common than it is in this country, teaches that governments often discriminate in favor of state-owned businesses (by shielding them from international competition) precisely for the purpose of protecting those who derive economic benefits from those businesses, including their employees. Such discrimination amounts to economic protectionism in any realistic sense of the term.

By the same token, discrimination in favor of an in-state, privately owned facility may serve legitimate ends, such as the promotion of public health and safety. For example, a State might enact legislation discriminating in favor of produce or livestock grown within the State, reasoning that the State's inspectors can more easily monitor the use of pesticides, fertilizers, and feed on farms within the State's borders. . . .

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[I]f the legislative means are themselves discriminatory, then regardless of how legitimate and nonprotectionist the underlying legislative goals may be, the legislation is subject to strict scrutiny. Similarly, the fact that a discriminatory law "may [in some sense] be directed toward any number of legitimate goals unrelated to protectionism" does not make the law nondiscriminatory. The existence of such goals is relevant, not to whether the law is discriminatory, but to whether the law can be allowed to stand even though it discriminates against interstate commerce. And even then, the existence of legitimate goals is not enough; discriminatory legislation can be upheld only where such goals cannot adequately be achieved through nondiscriminatory means. . . .

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. . . . [T]hese laws discriminate against interstate commerce (generally favoring local interests over nonlocal interests), but are defended on the ground that they serve legitimate goals unrelated to protectionism (e.g., health, safety, and protection of the environment). And while I do not question that the laws at issue in this case serve legitimate goals, the laws offend the dormant Commerce Clause because those goals could be attained effectively through nondiscriminatory means. . . . .

The Court next suggests that deference to legislation discriminating in favor of a municipal landfill is especially appropriate considering that "'[w]aste disposal is both typically and traditionally a local government function.' " . . . I disagree on two grounds.

First, 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.' " *Garcia v. San Antonio Metropolitan Transit Authority* (1985) . . . .

Second, although many municipalities in this country have long assumed responsibility for disposing of local garbage . . . most of the garbage produced in this country is still managed by the private sector. . . .

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Equally unpersuasive is the Court's suggestion that the flow-control laws do not discriminate against interstate commerce because they "treat in-state private business interests exactly the same as out-of-state ones." . . . Again, the critical issue is whether the challenged legislation discriminates against interstate commerce. If it does, then regardless of whether those harmed by it reside entirely outside the State in question, the law is subject to strict scrutiny. . . .