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The Supreme Court's New Public-Private Distinction Under the Dormant Commerce Clause: Avoiding the Traditional Versus Nontraditional Classification Trap

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by BRADFORD MANK *

Introduction

In its 2007 decision *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, the Supreme Court for the first time held the "dormant" Commerce Clause doctrine ("DCCD") allows for a distinction between appropriate laws establishing local government monopolies providing public services such as waste disposal, and inappropriate laws favoring the self-interest of in-state private businesses over out-of-state competition.[1] The Court concluded that "[c]ompelling reasons justify treating" laws favoring public facilities "differently from laws favoring particular private businesses over their competitors."[2] Chief Justice Roberts maintained "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

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1. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (*United Haulers*), 550 U.S. 330, 341–47 (2007).

2. *Id.*

citizens."[3] Additionally, the Court emphasized that courts should apply the DCCD more leniently in the area of waste disposal because it is a traditional local government function.[4] In its 2008 decision, *Department of Revenue of Kentucky v. Davis*, the Court reaffirmed *United Haulers'* distinction between laws preferring government activities serving the public interest and laws favoring local private firms at the expense of other private firms, but clarified to what extent it matters whether a government function is traditional or nontraditional.[5] This article argues there are compelling reasons to treat public entities differently from private entities, but that courts should be wary of focusing on whether a government function is traditional or nontraditional.

Even though the Constitution's Commerce Clause only expressly grants Congress the authority to regulate interstate commerce,[6] for more than a century the Supreme Court has interpreted the Clause to grant federal courts an implied authority under the DCCD to strike down state or local laws that discriminate against out-of-state firms or goods.[7] In 1994, the Supreme Court in *C & A Carbone v. Town of Clarkstown* invalidated under the DCCD a local government "flow control" ordinance requiring all solid waste in its jurisdiction to be sent to a single privately-operated transfer station as unconstitutional per se discrimination against out-of-state businesses seeking to haul or dispose of that waste.[8] The *Carbone* Court did not address whether a state or local government could enact a similar flow control scheme if the government itself owned the waste facility, although Justice Souter's dissenting opinion in that case argued flow control laws favoring publicly owned facilities are not per se discrimination and should be subject to a the less rigorous *Pike* balancing test.[9]

In 2006, the Second Circuit held public waste monopolies that do not discriminate between in-state and out-of-state private firms are not subject to the *Carbone* decision's per se test, but the Sixth Circuit

3. *Id.* (citing Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985)).

4. *Id.* at 344.

5. Dep't of Revenue of Ky. v. Davis, 128 S. Ct. 1801 (2008).

6. The Commerce Clause provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3.

7. *See United Haulers,* 550 U.S. at 337–40 (2007); Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179–80 (1995); 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, 160–62 (2007).

8. C & A Carbone v. Town of Clarkstown, 511 U.S. 383, 386, 394 (1994).

9. *Id.* at 410–30 (Souter, J., dissenting).

disagreed.[10] Resolving a split in the circuits, the Supreme Court in *United Haulers* agreed with the Second Circuit's view that *Carbone* addressed only flow control laws discriminating in favor of a particular private company, and did not control a case involving a flow control ordinance favoring a public facility that equally discriminated against all in-state and out-of-state private firms.[11] In *United Haulers*, Chief Justice Roberts' majority opinion for the Court concluded the challenged ordinances did not violate the DCCD because they did not discriminate between in-state and out-of-state private firms.[12] He emphasized that courts applying the DCCD should analyze laws favoring public entities differently from those favoring local private firms because the former often serve important public interests in the health and welfare of citizens, while the latter usually simply enrich particular local firms at the expense of their competitors.[13] Roberts also suggested courts should be especially deferential if a challenged government monopoly is performing a traditional local government function.[14] The Court concluded the challenged ordinances conferred important health and environmental benefits by promoting a broad range of recycling that would be more costly or impossible to achieve if, in the alternative, the counties had sought to regulate private firms to achieve the same goals.[15] Additionally, the Court observed it was significant that the extra costs of the flow control ordinance primarily fell upon the voters and residents of the counties rather than out-of-state interests.[16]

Justice Alito wrote a dissenting opinion, which was joined by Justices Stevens and Kennedy.[17] Justice Alito maintained that the

10. *Compare* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (*United Haulers II*), 438 F.3d 150, 157–60 (2d Cir. 2006), *aff'd*, 550 U.S. 330 (2007) *with* Nat'l Solid Waste Mgmt. Ass'n v. Daviess County, 434 F.3d 898, 909–12 (6th Cir. 2006), *cert. granted, vacated and remanded*, 127 S. Ct. 2294 (mem.) (2007) (vacating judgment and remanding case to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *United Haulers*; Mank, *supra* note 7, at 158, 184–90 (discussing split between the Second and Sixth Circuit over whether laws favoring public waste disposal violate the DCCD).

11. *United Haulers,* 550 U.S. at 338–43.

12. *Id.* at 343.

13. *Id.*

14. *Id.* at 344.

15. *Id.* at 347.

16. *Id.* at 345.

17. *Id.* at 356–71 (Alito, J., dissenting). It is worth observing that Justice Kennedy wrote the majority opinion in *Carbone* and that Justice Stevens joined the *Carbone* majority opinion; these two justices presumably believed that the *United Haulers* decision

Court in DCCD cases never treated laws discriminating in favor of public facilities differently from laws discriminating in favor of private facilities.[18] Furthermore, Justice Alito criticized the majority's argument that courts should give special deference to public monopolies performing a "traditional" government function because the Court's prior cases demonstrated that a distinction between traditional and nontraditional government functions was unworkable, since it is too difficult to draw a line between the two.[19] Additionally, Alito challenged the view that waste collection is a traditional government function since most landfills are privately operated, and questioned whether the counties' monopolistic facilities are comparable to "traditional" municipal landfills.[20]

In *Davis*, Justice Souter's majority opinion clarified to what extent the Court gives greater deference under the DCCD to "traditional" government functions. Justice Alito's dissenting opinion in *United Haulers* argued the Court's exemption of traditional government functions from strict scrutiny was unworkable because it required the Court to make arbitrary distinctions between traditional and nontraditional functions.[21] Additionally, Justice Kennedy's dissenting opinion in *Davis* argued the Court used circular reasoning in exempting local police power regulation from the DCCD.[22] In a footnote in *Davis*, Justice Souter explained the *United Haulers* decision had not meant to "draw fine distinctions among governmental functions, but to find out whether the preference was for the benefit of a government fulfilling governmental obligations or for the benefit of private interests, favored because they were local."[23] Justice Souter's footnote clarified that the *United Haulers* decision's exemption of traditional government functions from rigorous scrutiny under the DCCD was based on the fundamental issue of whether the law appropriately served the public interest or inappropriately favored private interests, and was not simply based on the history of a government practice.[24]

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was inconsistent with the *Carbone* decision. C & A Carbone v. Town of Clarkstown, 511 U.S. 383, 384–85 (1994) (listing members of majority opinion).

18. *United Haulers*, 550 U.S. at 360–64.

19. *Id.* at 368–69.

20. *Id.* at 369.

21. *Id.* at 368–69 (Alito, J., dissenting).

22. Dep't of Revenue of Ky. v. Davis, 128 S. Ct. 1801, 1811 (Kennedy, J., dissenting).

23. *Davis*, 128 S. Ct. at 1812 n.9.

24. *Id.*

This Article argues that Souter's footnote rectifies a potentially serious problem in the application of the *United Haulers* decision to future DCCD cases. Although it was appropriate for the *United Haulers* decision to give some weight in its analysis to the fact that waste disposal is a traditional government function, the Court's distinction between traditional and nontraditional government functions was likely to cause problems in future DCCD cases where the distinction would be more ambiguous or irrelevant, as the *Garcia v. San Antonio Metropolitan Transit Authority* decision demonstrated.[25] Because, as Justice Alito's dissenting opinion in *United Haulers* correctly pointed out, it is sometimes difficult to distinguish between traditional and nontraditional government activities, courts should follow Justice Souter's explanation in *Davis* that the determining factor of whether a law is valid under the DCCD is whether it appropriately favors the government's provision of public services, or inappropriately prefers local private interests.[26] Thus, courts should focus on whether a challenged local law fulfills a legitimate public purpose or instead favors local private firms at the expense of out-of-state firms.[27]

On the whole, there is a case for treating laws favoring public facilities differently from those promoting the interests of local private firms. Chief Justice Roberts in *United Haulers* demonstrated that public facilities are more likely to be concerned with protecting the public health and welfare than typical private facilities, which are primarily motivated by profits.[28] In theory, local governments could enact regulations attempting to force private firms to match the environmental record of public facilities, but the *United Haulers* decision concluded it is more difficult for local governments to enforce regulations against private firms than to address public health and welfare concerns directly through a public facility.[29] Furthermore, courts can use the *Pike* balancing test to prevent state and local governments from abusing laws favoring public facilities as a pretext for favoring local interests at the expense of out-of-state interests.[30] In *United Haulers*, the Court used the *Pike* test to determine that local residents bore most of the extra costs associated

25. *See infra* Part V.C.

26. *Davis*, 128 S. Ct. at 1812 n.9; *see infra* Part V.C.

27. *See infra* Part V.C.

28. *See infra* Part III.C.3.

29. *See infra* Part III.C.3.

30. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); *infra* Part I.C.2.

with the flow control laws and that the ordinance at issue imposed at most only incidental burdens on interstate commerce.[31] Together, *United Haulers* and *Davis* appropriately emphasize that the dormant Commerce Clause's purpose is to prevent local private favoritism, but not to force governments to turn over public functions to private markets.[32]

This Article proceeds in five parts. Part I summarizes the DCCD. Part II discusses the *Carbone* decision. Part III explores the Court's *United Haulers* decision. Part IV examines the *Davis* decision. Part V argues it is appropriate to treat laws that prefer public facilities serving a valid public purpose differently from laws that discriminate in favor of local private firms.

I. The Dormant Commerce Clause Doctrine

A. Justification for the Dormant Commerce Clause Doctrine

The Constitution does not mention a dormant Commerce Clause nor explicitly grant courts the authority to invalidate state or local laws that interfere with interstate commerce.[33] The Commerce Clause expressly provides that "Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[34] Nevertheless, since the nineteenth century, the Supreme Court has interpreted the Clause to implicitly authorize federal courts to invalidate state or local laws which violate the Clause's "dormant" principle that those laws may not unduly interfere with interstate commerce, even where Congress has not adopted a law prohibiting local discrimination.[35] The Court has invoked the DCCD to invalidate local laws serving the goal of "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[36] Because the DCCD is an implied doctrine justified

31. *See infra* Part III.C.4.

32. *See infra* Part V.C.3.

33. Barry Friedman, *Valuing Federalism,* 82 MINN. L. REV. 317, 347–48 (1997).

34. U.S. CONST. art. I, § 8, cl. 3.

35. *See* Case of the State Freight Tax, 82 U.S. (15 Wall.) 232, 279 (1873); Cooley v. Bd. of Wardens of Port of Philadelphia *ex rel.* Soc. for Relief of Distressed Pilots, 53 U.S. (12 How.) 299, 318 (1852); Mank, *supra* note 7, at 160–61; Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism,* 1987 DUKE L.J. 569, 575–81 (discussing historical development of DCCD).

36. Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992); *accord* West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 199 (1994) (stating "the cardinal principle that a State may not

upon Congress' presumptive intent to forbid economic protectionism by local governments and states, Congress can override the DCCD if it enacts clear legislation authorizing local governments to adopt discriminatory measures,[37] although Congress rarely enacts legislation directly overriding the Court's DCCD decisions.[38]

There are three primary arguments supporting the DCCD. First, a structural argument contends local protectionist laws that harm fellow states are contrary to the Constitution's central goals of political union and cooperation among states.[39] Second, some decisions and commentators support the DCCD by maintaining the framers of the Constitution intended the Commerce Clause to promote free markets by eliminating protectionist trade barriers.[40] Other commentators, however, argue the framers did not intend to create a national free market above all considerations of state sovereignty.[41] Third, some decisions and commentators argue the DCCD serves the representative process goal of preventing elected officials in one jurisdiction from imposing burdens on people in other jurisdictions who did not elect them.[42]

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benefit in-state economic interests by burdening out-of-state competitors") (internal quotation marks omitted); Mank, *supra* note 7, at 160–61.

37. Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 66 (2003) (recognizing congressional authority to override DCCD); Jim Chen, *A Vision Softly Creeping: Congressional Acquiescence and the Dormant Commerce Clause*, 88 MINN. L. REV. 1764, 1773–75 (2004); Mank, *supra* note 7, at 161; *but see* Norman W. Williams, *Why Congress May Not "Overrule" the Dormant Commerce Clause*, 53 UCLA L. REV. 153, 158 (2005) (arguing Congress may not override DCCD because it is constitutional doctrine).

38. Chen, *supra* note 37, at 1784–87 (observing that Congress "very rarely" overrides the Court's DCCD decisions).

39. Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 595 (1997) (Scalia, J., dissenting) ("The history of our Commerce Clause jurisprudence has shown that even the smallest scale discrimination can interfere with the project of our Federal Union."); Friedman, *supra* note 33, at 348–49; Mank, *supra* note 7, at 161; *but see* Redish & Nugent, *supra* note 35, at 599–601 (criticizing structural argument for DCCD because Constitution only gives Congress the authority to invalidate state laws promoting protectionism).

40. Gen. Motors Corp. v. Tracy, 519 U.S. 278, 299 (1997); C & A Carbone v. Town of Clarkstown, 511 U.S. 383, 389–90, 393 (1994); Friedman, *supra* note 33, at 354–55; Mank, *supra* note 7, at 161.

41. Thomas K. Anson & P.M. Schenkkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 TEX. L. REV. 71, 78–80 (1980); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 429–35 (1982); Mank, *supra* note 7, at 161, 178.

42. S. Pac. Co. v. Arizona, 325 U.S. 761, 766–68, 767 n.2 (1945) ("The Court has often recognized that to the extent that 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."); Mank, *supra* note 7, at

Some critics of the DCCD have argued that the doctrine should be abolished because it lacks textual support in the Constitution. Justice Thomas has argued the Court should abolish the DCCD because the text of the Commerce Clause grants authority to Congress to regulate commerce, and not the federal courts.[43] Similarly, Justice Scalia has criticized the doctrine as "arbitrary, conclusory, and irreconcilable with the constitutional text."[44] Unlike Justice Thomas, however, Justice Scalia has been willing to follow the Court's DCCD precedent as long as a decision does not expand the doctrine.[45] Additionally, some critics of the DCCD argue Congress should not have to enact affirmative legislation to override a doctrine that has no basis in the text of the Constitution.[46] One scholar, however, has argued that Congress has implicitly acquiesced to the DCCD by not enacting legislation to override it, although that argument fails to address Justices Thomas's and Scalia's textualist argument that constitutional doctrines must be justified by the text of the Constitution.[47]

Other critics of the DCCD have argued the doctrine should be limited because of federalist concerns that an expansive reading of the doctrine threatens appropriate state and local autonomy. Before the *United Haulers* decision, some judges and commentators criticized the Court for too aggressively applying the DCCD to invalidate local laws having only a limited effect on interstate commerce but

161, 202–05; Robert R. M. Verchick, *The Commerce Clause, Environmental Justice, and the Interstate Garbage Wars*, 70 S. CAL. L. REV. 1239, 1250–55 (1997); *but see* Redish & Nugent, *supra* note 35, at 612–17 (criticizing democratic process model as justification for DCCD because the language of the Constitution does not authorize federal courts to consider such values nor to invalidate laws using the DCCD).

43. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (*United Haulers*), 550 U.S. 330, 349–55 (2007) (Thomas, J., concurring in the judgment); *see also* Redish & Nugent, *supra* note 35, at 569–619 (arguing DCCD has no constitutional validity because the text of the Constitution does not authorize the doctrine).

44. Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 259–65 (1987) (Scalia, J., concurring in part and dissenting in part).

45. *United Haulers*, 550 U.S. at 348 (Scalia, J., concurring in part).

46. Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 615–17 (1997) (Thomas, J., dissenting) (criticizing theory that Congressional inaction justifies DCCD); *Tyler Pipe Indus.*, 483 U.S. at 262 (Scalia, J., concurring in part and dissenting in part) (same); Laura Gabrysch, Casenote, *Constitutional Law–Dormant Commerce Clause–Flow Control Ordinances That Require Disposal of Trash at a Designated Facility Violate the Dormant Commerce Clause*, 26 ST. MARY'S L.J. 563, 591, 600 (1995).

47. *See* Chen, *supra* note 37, at 1764–1800.

significant local benefits.[48] Similarly, state and local officials have often accused the Court of misusing the DCCD to unduly interfere with local laws.[49] In *United Haulers*, twenty-six states joined a brief supporting the flow control laws; not a single state supported the challengers.[50]

B. Market Participant or Market Regulator?

The DCCD prohibits state and local governments from using their coercive regulatory authority to discriminate against out-of-state firms.[51] If a local government is acting as a market participant rather than a market regulator, however, its actions are exempt from Commerce Clause scrutiny.[52] In *United Haulers*, the flow control laws were clearly regulatory in nature because the ordinances imposed coercive penalties on private haulers who failed to comply, including "permit revocation, fines, and imprisonment."[53]

C. The Per Se and *Pike* Tests

When a local government acts as a market regulator, courts apply two different tests to determine whether a challenged law violates the DCCD.[54] First, if a law facially, purposefully, or effectively discriminates against interstate commerce, courts apply a

48. *See, e.g.*, W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 207–08 (1994) (Scalia, J., concurring) (criticizing the "expansive view of the Commerce Clause [that] calls into question a wide variety of state laws that have hitherto been thought permissible"); Lincoln L. Davies, Note, *If You Give the Court a Commerce Clause: An Environmental Justice Critique of Supreme Court Interstate Waste Jurisprudence*, 11 FORDHAM ENVTL. LAW J. 207, 248–52 (1999) (arguing Court's DCCD decisions during 1980s and 1990s applied doctrine too broadly); Mank, *supra* note 7, at 162, 164 (same).

49. DOUGLAS T. KENDALL ET AL., REDEFINING FEDERALISM: LISTENING TO THE STATES IN SHAPING "OUR FEDERALISM," 82, 90 (Douglas T. Kendall ed., Entl. Law Inst. 2004); Mank, *supra* note 7, at 159, 162.

50. Brief for the States of New York et al. as Amici Curiae Supporting Respondents, United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007) (No. 05-1345).

51. Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 98 (1994); Mank, *supra* note 7, at 162.

52. New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 277 (1988); Mank, *supra* note 7, at 162.

53. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (*United Haulers I*), 261 F.3d 245, 255 (2d Cir. 2001), *aff'd*, 550 U.S. 330 (2007); Mank, *supra* note 7, at 180, 185.

54. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); Mank, *supra* note 7, at 162–63; Verchick, *supra* note 42, at 1249.

very strict per se test.[55] Second, for local laws that may hinder interstate commerce but are not clearly discriminatory, the Supreme Court in *Pike v. Bruce Church, Inc.* applied a balancing test to determine whether a law's burdens on interstate commerce are "clearly excessive in relation to the putative local benefits."[56] The Court has conceded it is frequently unclear whether a local law with alleged discriminatory purpose or effect should be analyzed under the per se or the *Pike* test even though the choice of the test is often outcome determinative.[57]

1. Per Se Discrimination

The Court applies the per se test to three different types of discrimination.[58] First, the simplest example of a discriminatory law is one that facially discriminates by "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[59] For example, the Court has invalidated laws that impose higher taxes or bans on waste from other jurisdictions.[60] Second, a court will strike down a facially neutral law if a legislature enacted it to purposely discriminate.[61] Third, when a facially neutral law has obvious discriminatory effects, the Court reviews it under the per se standard.[62]

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55. *City of Philadelphia*, 437 U.S. at 624; Mank, *supra* note 7, at 163.

56. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); Mank, *supra* note 7, at 163, 165.

57. *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986); Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1, 43 (2003); Mank, *supra* note 7, at 163, 165.

58. Mank, *supra* note 7, at 163–64; Catherine Gage O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 578–82 (1997); Julian Cyril Zebot, Note, *Awakening a Sleeping Dog: An Examination of the Confusion in Ascertaining Purposeful Discrimination Against Interstate Commerce*, 86 MINN. L. REV. 1063, 1076–84 (2002) ("A statute is per se invalid if it discriminates against interstate commerce on its face, in its purpose, or in its effect.").

59. Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994); Mank, *supra* note 7, at 163; O'Grady, *supra* note 58, at 578–81, 582–87.

60. Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994) (invalidating differential fees for out-of-state waste); *City of Philadelphia*, 437 U.S. at 627 (invalidating waste import ban).

61. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984) ("A finding that state legislation constitutes 'economic protectionism' may be made on the basis of . . . discriminatory purpose . . . ."); Mank, *supra* note 7, at 163–64.

62. *See* New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 275–76, 278–79 (1988) (invalidating reciprocal tax credit because it "in effect, taxes a product made by [Indiana]

The Court presumes that all discriminatory local laws are invalid unless a local government demonstrates a nondiscriminatory alternative is not available to effectuate an important local purpose unrelated to economic protectionism.[63] In only one case has the Supreme Court allowed a local government to enforce a discriminatory law: *Maine v. Taylor*, in which the Court held the State of Maine could forbid importation of out-of-state baitfish because the ban was the only practicable method to avoid the contamination of its rivers by parasites and alien fish species.[64]

2. The Pike Balancing Test

The Supreme Court in *Pike v. Bruce Church, Inc.* applied a balancing test to determine whether a law's burdens on interstate commerce are "clearly excessive in relation to the putative local benefits."[65] A local law is valid under the *Pike* test "where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental."[66] A court is much more likely to uphold a local law under the *Pike* test than under the per se rule.[67]

The *Pike* Court never clearly explained how courts should balance the benefits and burdens of a challenged law.[68] It provided only this vague explanation:

> If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated 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.[69]

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manufacturers at a rate higher than the same product made by Ohio manufacturers"); Mank, *supra* note 7, at 164; O'Grady, *supra* note 58, at 581–82.

63. C & A Carbone v. Town of Clarkstown, 511 U.S. 383, 389–90, 390 (1994); KENDALL, *supra* note 49, at 81; Mank, *supra* note 7, at 163.

64. Maine v. Taylor, 477 U.S. 131, 148, 151 (1986); Mank, *supra* note 7, at 163.

65. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); Mank, *supra* note 7, at 163, 165.

66. *Id.* at 142.

67. Mank, *supra* note 7, at 163, 165; O'Grady, *supra* note 58, at 573–75.

68. James D. Fox, Note, *State Benefits Under the Pike Balancing Test of the Dormant Commerce Clause: Putative or Actual?*, 1 AVE MARIA L. REV. 175, 188–90 (2003); Mank, *supra* note 7, at 165.

69. *Pike*, 397 U.S. at 142; Mank, *supra* note 7, at 165; Paula C. Murray & David B. Spence, *Fair Weather Federalism and America's Waste Disposal Crisis*, 27 HARV. ENVTL. L. REV. 71, 77 (2003).

Before the *United Haulers* decision, the Court failed to further clarify the *Pike* test. For example, in *City of Philadelphia v. New Jersey*, the Court vaguely explained that "incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people."[70]

II. Carbone

A. Majority Opinion

In *C & A Carbone, Inc. v. Town of Clarkstown*, the Supreme Court, in a decision written by Justice Kennedy, and joined by Justices Stevens, Scalia, Thomas, and Ginsburg, interpreted the DCCD to prohibit any local law that prevents access to local waste disposal markets, even if the law treats all in-state and out-of-state firms the same except for a designated private provider.[71] The Court invalidated Clarkstown's ("the Town") flow control ordinance requiring that all non-recyclable, non-hazardous solid waste generated within the Town or generated outside the Town and brought into the Town be processed at a designated privately operated transfer station as violating the DCCD's per se standard.[72] The Court rejected the Town's argument that its export restriction was different from the import or export bans the Court invalidated in prior cases, because its flow control ordinance treated in-state and out-of-state waste and waste facilities evenhandedly.[73] The Court also rejected the Town's argument that for this reason the ordinance should be reviewed under the *Pike* balancing test, and instead applied the stricter per se standard.[74] The Court's expansive reading of the DCCD was consistent with a series of cases in the 1980s and 1990s that applied the per se test broadly and minimized the use of the *Pike* test.[75]

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70. City of Philadelphia v. New Jersey, 437 U.S. 617, 623–24 (1978); Mank, *supra* note 7, at 165.

71. C & A Carbone v. Town of Clarkstown, 511 U.S. 383, 386–92, (1994).

72. *Id.* at 386–92.

73. *Id.* at 390–92; Joi Elizabeth Peake, *South Carolina Loses a Battle in the Hazardous Waste Wars: Using the Dormant Commerce Clause to Invalidate South Carolina's Hazardous Waste Laws in* Environmental Technology v. Sierra Club, 76 N.C. L. REV. 650, 673 n.155 (1998).

74. *Carbone*, 511 U.S. at 390–92.

75. David S. Day, *The "Mature" Rehnquist Court and the Dormant Commerce Clause Doctrine: The Expanded Discrimination Tier*, 52 S.D. L. REV. 1, 47–51 (2007) (arguing

Clarkstown had good policy reasons for facilitating the creation of the challenged transfer station. The New York State Department of Environmental Conservation required Clarkstown to close its landfill, which had a history of environmental violations, and to build a new solid waste transfer station on the same site.[76] The Town signed a contract with a local private firm in which the firm agreed to construct the station and operate it for five years.[77] The Town was entitled to purchase the facility for one dollar after the private owner enjoyed a five-year monopoly on processing waste.[78] To insure the financial viability of the transfer station, the Town guaranteed the operator a minimum waste flow of 120,000 tons per year and authorized it to charge haulers who deposited waste at the station a tipping fee of eighty-one dollars per ton, a rate which significantly exceeded the disposal cost of unsorted solid waste on the private market.[79] To enforce the plan, the Town enacted a flow control ordinance, Local Law 9, which imposed fines and a maximum of fifteen days in jail on any hauler who took municipal solid waste ("MSW") from the Town without having it processed at the designated transfer station.[80]

The central issue in the *Carbone* case was whether the ordinance was discriminatory because it favored the designated private contractor, or was non-discriminatory because it treated all other firms the same, regardless of whether they were in-state or out-of-state.[81] Twenty-three state attorneys general and numerous local governments filed amicus briefs supporting the Town's position that

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Rehnquist Court between 1992 and 2005 expanded use of per se discrimination test and used *Pike* test less frequently); Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 221, 242–56 (1995) (arguing Court during 1980s and 1990s used per se test more frequently); Klein, *supra* note 57, at 48–52 (finding "that indeed the Court is expanding its view of discriminatory purpose" in DCCD cases); Mank, *supra* note 7, at 164 (stating Court expanded the type of cases in which it applied per se test and used *Pike* test less frequently); M. A. McCauliff, *The Environment Held in Trust for Future Generations or the Dormant Commerce Clause Held Hostage to the Invisible Hand of the Market?*, 40 VILL. L. REV. 645, 658-59 (1995) (same); O'Grady, supra note 58, at 575-76, 582-87 (same).

76. *Carbone,* 511 U.S. at 386–87.

77. *Id.*

78. *Id.* at 395–400 (Appendix containing Town of Clarkstown, Local Law No. 9 of the year 1990; a local law entitled, "Solid Waste Transportation and Disposal"); *id.* at 419 (Souter, J., dissenting).

79. *Id.* at 387.

80. *Id.*

81. *Id.* at 390–92.

the ordinance was non-discriminatory.[82] The Court conceded there is a distinction between laws favoring all local firms over all out-of-state competitors and the Clarkstown ordinance, which preferred one firm over all other local or out-of-state competitors.[83] Nevertheless, the Court determined that "this difference just makes the protectionist effect of the ordinance more acute" than several local laws it invalidated in the past that banned all out-of-state competitors but allowed out-of-state firms to compete if they built facilities within the local jurisdiction."[84] Accordingly, the Court reasoned the law was invalid under the DCCD even though it discriminated equally against all other local or out-of-state competitors.[85]

The Court went beyond its traditional test of whether a local law discriminated against out-of-state firms compared to in-state firms and instead interpreted the DCCD as prohibiting all local laws that interfere with free market access to a local market, unless a community can demonstrate there is no alternative method of achieving important health and safety goals.[86] While the ordinance did not bar the import or export of waste, the Court concluded the article of commerce at issue "is not so much the solid waste itself, but rather the service of processing and disposing of it."[87] The Court found that the "flow control ordinance drives up the cost for out-of-state interests to dispose of their solid waste," because the ordinance required Carbone to send the non-recyclable portion of any out-of-

82. *Id.* at 384.

83. *Id.* at 392.

84. *Id.*; *but see* Klein, *supra* note 57, at 51–52 (questioning *Carbone's* finding that the ordinance was discriminatory even though it treated in-state and out-of-state competitors alike); Mank, *supra* note 7, at 176-78 (arguing *Carbone* court should not have applied per se test to ordinance that treated in-state and out-of-state firms the same); Verchick, *supra* note 42, at 1274, 1285 (arguing that the *Carbone* Court should have used similar logic as in the Court's racial discrimination and Equal Protection Clause cases where the Court asks whether the municipality intended to discriminate before applying strict scrutiny).

85. *Carbone,* 511 U.S. at 392.

86. Friedman, *supra* note 33, at 354–55 ("Undoubtedly Congress could decide in favor of an entirely free market, but it has not done so, and the Court's limited antidiscrimination and antiprotectionism decisions do not justify the result in *Carbone.*"); Heinzerling, *supra* note 75, at 230–31, 268–70 (comparing *Carbone* to *Lochner* in an effort to promote markets); Mank, *supra* note 7, at 176-78 ("criticiz[ing] *Carbone* for going beyond the prevention of discrimination against out-of-state competitors, a core value of the DCCD, to a promotion of free-market competition"); McCauliff, *supra* note 75, at 661–64, 673–85 (criticizing *Carbone's* market-based discrimination test); O'Grady, *supra* note 58, at 604–06 (same); The Supreme Court, 1993 Term: Leading Cases, 108 HARV. L. REV. 139, 149, 153–59 (1994) (same) [hereinafter Supreme Court, 1993 Term].

87. *Carbone*, 511 U.S. at 391.

state waste to the transfer station at an additional cost.[88] For waste originating in the Town, the Court concluded the ordinance harmed out-of-state interests by "preventing everyone except the favored local operator from performing the initial processing step. The ordinance thus deprives out-of-state businesses of access to a local market."[89] Furthermore, because the Town "hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility," the Court determined that "the flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside."[90] Thus, the Court held the ordinance impermissibly discriminated against interstate commerce in violation of the DCCD by restricting access to the local waste market even though the ordinance harmed in-state firms and out-of-state interests equally, except for the designated private firm.[91]

Applying the per se test because it concluded the ordinance impermissibly discriminated against interstate commerce, the Court placed on the Town the burden of "demonstrat[ing], under rigorous scrutiny, that it had no other means to advance a legitimate local interest."[92] The Court concluded the ordinance was not exempt under the necessity exception to the per se rule, because the Town had alternative, nondiscriminatory methods to advance its legitimate interest in health and safety by enacting "safety regulations" to "ensure that competitors like Carbone do not underprice the market by cutting corners on environmental safety."[93] The Court considered the Town's interest in providing sufficient revenue to pay for the cost of the facility an insufficient reason for the ordinance's discrimination against out-of-state interests, because "the town may subsidize the facility through general taxes or municipal bonds."[94]

B. Justice O'Connor's Opinion Concurring in the Judgment

In her opinion concurring in the judgment, Justice O'Connor argued the ordinance was non-discriminatory and the Court should therefore have applied the *Pike* test rather than the per se test,

88. *Id.* at 389.
89. *Id.* at 383.
90. *Id.* at 392.
91. *Id.*
92. *Id.*
93. *Id.* at 392–93.
94. *Id.* at 394.

because "the garbage sorting monopoly [was] achieved at the expense of all competitors, be they local or nonlocal."[95] Disagreeing with the majority, she contended the discrimination decisions relied upon by the majority involved significantly different facts in which "the challenged enactment gave a competitive advantage to local business as a group vis-a-vis their out-of-state or nonlocal competitors as a group. In effect, the regulating jurisdiction . . . drew a line around itself and treated those inside the line more favorably than those outside the line."[96] She maintained the ordinance's evenhanded application was a "significant distinction," because "the existence of substantial in-state interests harmed by a regulation is 'a powerful safeguard' against legislative discrimination."[97] Justice O'Connor persuasively argued the Court should have applied the *Pike* test to a local law which did not discriminate on the basis of geographical location.

Although she found the ordinance non-discriminatory, Justice O'Connor concluded it was unconstitutional under the *Pike* test because its burdens on interstate commerce exceeded its benefits.[98] She argued courts in DCCD cases should consider the total impacts a law would have if other jurisdictions were to adopt similar legislation and then determined that the potential burdens of the Clarkstown ordinance on interstate commerce were substantial.[99] Accordingly, she argued the Court in the *Carbone* case should weigh the impact of similar ordinances in the twenty states that had already adopted legislation authorizing flow control ordinances and the reasonable possibility that other states would adopt similar legislation.[100] Justice O'Connor maintained courts applying the *Pike* balancing test should evaluate whether the local purpose "can be achieved by other means that would have a less dramatic impact on the flow of goods."[101] She agreed with the majority opinion that the Town could have used less discriminatory means to finance the facility "by imposing taxes, by issuing municipal bonds, or even by lowering its price for processing to a level competitive with other waste processing facilities."[102] Justice

95. *Id.* at 403–05 (O'Connor, J., concurring).
96. *Id.* at 403.
97. *Id.* at 404.
98. *Id.* at 404–05.
99. *Id.* at 406–07.
100. *Id.*
101. *Id.* at 405.
102. *Id.* at 405–06.

O'Connor, however, failed to consider that the important environmental benefits the flow control ordinance provided would not be as easily achieved by these less discriminatory means and that the local residents bore most of the costs.[103]

C. Justice Souter's Dissenting Opinion: Public Facilities Are Different

Justice Souter's dissenting opinion, which was joined by Chief Justice Rehnquist and Justice Blackmun, argued that laws favoring public facilities are different from ones preferring local private firms because the former do not discriminate between in-state and out-of-state private firms.[104] The *United Haulers* decision adopted many of his arguments, but distinguished *Carbone* by concluding the majority in that earlier case concluded that Clarkstown's facility was privately owned, and not a public facility, as Justice Souter argued in his *Carbone* dissent.[105] Although *United Haulers* was distinguished from *Carbone* on the basis of its facts, *United Haulers*' acceptance of a public trash disposal monopoly was philosophically closer to Justice Souter's dissenting opinion than the *Carbone* majority.[106]

Justice Souter asserted the majority wrongly implied that the DCCD requires local governments to provide access to any local market, including the local waste disposal market.[107] Instead, he contended the doctrine simply prohibited local governments from favoring local private actors at the expense of out-of-state competitors.[108] Because the DCCD only prohibits local governments from preferring local private firms over their out-of-state competitors, he maintained that the doctrine does not prohibit local governments from establishing a public monopoly excluding all private firms located both in-state and out-of-state, especially for services that local governments have traditionally provided as a public service.[109] He

103. *See id.* at 412, 422–30 (Souter, J., dissenting) (arguing flow control laws provide important environmental benefits and impose burdens on local residents); Gabrysch, *supra* note 46, at 587–91 (same); Mank, *supra* note 7, at 167–68, 175–77 (same and arguing Justice O'Connor failed to appreciate advantages of flow control laws); McCauliff, *supra* note 75, at 649 n.11, 650–51, 653, 656, 673 (arguing flow control laws provide important environmental benefits); *see infra* Part II.D.

104. *Carbone,* 511 U.S. at 410–30 (Souter, J., dissenting).

105. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (*United Haulers*), 550 U.S. 330, 339–41 (2007); *see infra* Part III.C.2.

106. *Id.* at 342–45; *see infra* Part II.B.

107. *Carbone,* 511 U.S. at 416–17 (Souter, J., dissenting).

108. *Id.* at 416–17.

109. *Id.* at 416–25.

argued the transfer station in Clarkstown was essentially public in nature because the Town had the right to purchase the facility for one dollar after five years, stating, "Clarkstown's transfer station is essentially a municipal facility . . . and soon to revert entirely to municipal ownership."[110] He argued the Court should have applied the *Pike* test to a quasi-public facility and concluded that the environmental benefits of the facility out-weighed any incidental restrictions the ordinance imposed on out-of-state commerce.[111]

Justice Souter argued the Court should treat laws preferring public facilities differently from ordinances that discriminate in preference of local private firms because special protections for private enterprise are usually based on economic favoritism toward local interests, but ordinances promoting public facilities are frequently based on valid public health or welfare concerns.[112] He argued that waste collection and disposal is a "municipal function that tradition as well as state and federal law recognize as the domain of local government."[113] He observed that "[t]hroughout the history of this country, municipalities have taken responsibility for disposing of local garbage to prevent noisome smells, obstruction of the streets, and threats to public health, and today 78 percent of landfills receiving municipal solid waste are owned by local governments."[114] He noted that two 1905 decisions of the Court rejected constitutional challenges to municipal waste monopolies, although neither case involved the DCCD.[115] Additionally, he commented that in *Garcia v. San Antonio Metropolitan Transit Authority*, the Court "'recognized that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under

110. *Id.* at 419.

111. *Id.* at 418–30.

112. *Id.* at 412–14, 420–21, 428–29.

113. *Id.* at 419.

114. *Id.* at 419–20 (citing U.S. Environmental Protection Agency, Resource Conservation and Recovery Act, Subtitle D Study: Phase 1 Report, p. 4–7 (Oct. 1986) (Table 4-2)) (footnote omitted).

115. *Id.* at 419 n.10 (citing Cal. Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905) (upholding against a takings challenge an ordinance requiring that all garbage in San Francisco be disposed of, for a fee, at facilities belonging to F. E. Sharon); Gardner v. Michigan, 199 U.S. 325 (1905) (upholding against due process challenge an ordinance requiring that all garbage in Detroit be collected and disposed of by a single city contractor); Mank, *supra* note 7, at 186 (discussing Supreme Court's two 1905 garbage monopoly decisions).

the Commerce Clause must reflect that position.'"[116] Accordingly, Justice Souter asserted the Court should apply the more lenient *Pike* test in deciding whether laws favoring public facilities violate the DCCD.[117] Because laws preferring public facilities do not discriminate between local and out-of-state private firms, he contended that such laws should not be reviewed under the per se discrimination test.[118] Many of his arguments for treating public monopolies differently from private ones were adopted in *United Haulers.*[119]

Justice Souter agreed with Justice O'Connor that the Court should apply the *Pike* balancing test to the Clarkstown ordinance instead of the per se test applied by the majority.[120] Disagreeing with Justice O'Connor, however, Justice Souter argued the Town's ordinance did not violate the *Pike* test.[121] He conceded the Town's transfer station was more expensive than Carbone's private facility, but he argued that the higher cost of a public facility does not violate the DCCD because the doctrine prohibits only discrimination against out-of-state interests, and does not require the least costly method of service or production.[122]

Implicitly criticizing the majority's free market interpretation of the DCCD, Justice Souter argued the Commerce Clause does not endorse the laissez faire assumptions in the Court's long-discredited 1905 decision *Lochner v. New York.*[123] He quoted the Court's decision in *Exxon Corp. v. Governor of Maryland*, which stated the "dormant Commerce Clause does not 'protec[t] the particular

116. *Carbone*, 511 U.S. at 421 (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985)).

117. *Id.* at 418–24.

118. *Id.*

119. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (*United Haulers*), 550 U.S. 330, 341–46 (2007); *see infra* Part III.C.

120. *Carbone,* 511 U.S. at 422–24 (Souter, J., dissenting).

121. *Id.* at 422–23, 430.

122. *Id.* at 424.

123. Lochner v. New York, 198 U.S. 45 (1905). Justice Souter quoted Justice Holmes' famous observation in his dissenting opinion in *Lochner* that the Fourteenth Amendment "'does not enact Mr. Herbert Spencer's Social Statics . . . [or] embody a particular economic theory, whether of paternalism . . . or of *laissez faire.*'" *Carbone,* 511 U.S. at 424–25 (Souter, J., dissenting) (quoting Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)); Heinzerling, *supra* note 75, at 230–31, 268–70 (comparing *Carbone* to *Lochner* in an effort to promote markets); Mank, *supra* note 7, at 177 n.172 (discussing Justice Souter and other commentators who criticized *Carbone* for adopting a free market theory of the Commerce Clause analogous to *Lochner*).

structure or methods of operation in a[ny]... market.'"[124] He contended the majority wrongly interpreted the DCCD to require local governments to open access to all local markets when the "only right to compete that it protects is the right to compete on terms independent of one's location."[125]

Next, Justice Souter claimed the Town's ordinance was presumptively valid under the DCCD because most of the economic costs were absorbed by local residents rather than out-of-state actors.[126] The *United Haulers* decision incorporated this argument.[127] He argued that the Court in prior cases invalidated a local law only where the law increased the cost of local goods in out-of-state markets.[128] He maintained there was no evidence of any burden on interstate commerce because the challenger, Carbone, was a local firm and there was no evidence in the record that an out-of-state facility desired or was able to process the Town's waste.[129] Furthermore, Justice Souter asserted that "[p]rotection of the public fisc is a legitimate local benefit directly advanced by the ordinance" because the burdens of the ordinance were borne primarily by local residents.[130] Moreover, Justice Souter claimed the Town's ordinance provided environmental benefits because by "proportioning each resident's burden to the amount of trash generated, the ordinance has the added virtue of providing a direct and measurable deterrent to the generation of unnecessary waste in the first place."[131] He concluded the ordinance was constitutional under the *Pike* test because the Town's residents absorbed the higher cost of operating a public landfill and it imposed only incidental burdens on out-of-state actors.[132]

124. *Carbone*, 511 U.S. at 425 (Souter, J., dissenting) (quoting Exxon Corp. v. Governor of Md., 437 U.S. 117, 127 (1978)).

125. *Id.*

126. *Id.* at 425–28.

127. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (*United Haulers*), 550 U.S. 330, 341–45 (2007); *see infra* Part III.C.

128. *Carbone*, 511 U.S. at 425 (Souter, J., dissenting).

129. *Id.* at 427–28.

130. *Id.* at 429.

131. *Id.*

132. *Id.* at 425–30.

D. Carbone's Flawed and Overly Expansive Approach to the DCCD

The *Carbone* Court's application of the per se test to a local law that treated all in-state and out-of-state private firms the same except for a private contractor who was essentially acting on behalf of the Town is highly questionable.[133] Adopting a strict free-market interpretation of the DCCD, the Court treated any local law denying private firms access to a market as per se discriminatory.[134] There was no evidence of actual discrimination against, or harm to, out-of-state firms.[135] For instance, there was no evidence in the record that the law actually increased costs for out-of-state persons.[136] Because there was no evidence of actual discrimination, the *Carbone* Court should have applied the *Pike* test to the Town's non-discriminatory ordinance.[137]

Justice O'Connor persuasively argued the Court should have applied the *Pike* test, but her balancing of the benefits and burdens of the ordinance was flawed. In applying the *Pike* balancing test, she underestimated the benefits of flow control laws and overestimated the costs of such legislation.[138] Her argument that courts should consider the total economic impact of flow control laws on the national waste market is reasonable.[139] But she failed to appreciate the environmental advantages of flow control laws. Public waste facilities are more likely to pursue environmentally positive practices such as recycling and waste reduction than private facilities, which generally focus on profits alone.[140] Local recycling has significant benefits because the farther trash is moved, the greater the risk of spills and contamination.[141] Furthermore, flow control ordinances employing waste reduction programs such as recycling or incineration may limit the potential legal liability of municipalities by reducing the

133. Mank, *supra* note 7, at 176; O'Grady, *supra* note 58, at 603–04.

134. Mank, *supra* note 7, at 170, 176–78.

135. *Carbone,* 511 U.S. at 427 (Souter, J., dissenting); O'Grady, *supra* note 58, at 603–06.

136. *Carbone,* 511 U.S. at 389; Heinzerling, *supra* note 75, at 245.

137. Mank, *supra* note 7, at 176–78, 192–93, 199, 205–07.

138. Mank, *supra* note 7, at 176–77.

139. *Carbone,* 511 U.S at 406–07 (O'Connor, J., concurring in the judgment).

140. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (*United Haulers II*), 438 F.3d 150, 162 (2d Cir. 2006); Gabrysch, *supra* note 46, at 589–90 (arguing municipal flow control ordinances are more likely to promote sound recycling practices than private firms); Mank, *supra* note 7, at 167–68, 170 (same); McCauliff, *supra* note 75, at 649 n.11, 650–51, 653, 673 (same).

141. Davies, *supra* note 48, at 259.

amount of waste contaminated with hazardous substances.[142] Since local residents bear most of the costs of flow control ordinances, there is little harm to foreign jurisdictions.[143] Additionally, flow control laws can actually benefit other jurisdictions by preventing them from receiving harmful waste.[144]

Justice Souter convincingly argued the Court should treat laws creating public monopolies serving the public health and welfare differently from laws favoring local private firms at the expense of out-of-state private firms by applying the *Pike* test to the former and the per se test only to the latter type of discriminatory law.[145] As is discussed in Part III, the *United Haulers* decision agreed with his reasoning that public monopolies which treat all private firms the same regardless of their geographical location should be evaluated under the *Pike* test rather than the per se test.[146] Applying the *Pike* test, Justice Souter showed that the environmental benefits of the ordinance clearly outweighed any incidental burdens on the interstate market because most of the costs were borne by local residents.[147] Similarly, the *United Haulers* decision found that the challenged flow control ordinances were valid under the *Pike* test because they provided significant environmental benefits and imposed most costs on local residents, with only incidental burdens on interstate commerce.[148]

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142. Flow control laws could reduce a local government's liability for tort suits. *United Haulers II,* 438 F.3d at 162. Municipalities or their inhabitants could also be liable under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") for waste that is improperly disposed of with hazardous substances. *See* 42 U.S.C. § 9607(a)(4) (2006) (stating governments and private parties may recover "response costs" for cleanup from a responsible person); Gabrysch, *supra* note 46, at 596 n.119 (same); Mank, *supra* note 7, at 168 (arguing flow control laws can reduce the toxicity of waste through recycling and incineration); *id.* at 171 n.115 (arguing flow control laws can reduce municipal liability for toxic waste); Eric S. Petersen & David N. Abramowitz, *Municipal Solid Waste Flow Control in the Post-Carbone World*, 22 FORDHAM URB. L.J. 361, 367–69 (1995) (same).

143. *Carbone,* 511 U.S at 429 (Souter, J., dissenting).

144. Mank, *supra* note 7, at 170 n.113 (arguing flow control laws help reduce risks to other jurisdictions); *see also* Davies, *supra* note 48, at 259 (stating that risk of spills and contamination is greater the longer the distance trash is moved).

145. *Carbone*, 511 U.S. at 412–29 (Souter, J., dissenting); O'Grady, *supra* note 58, at 603–06.

146. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (*United Haulers*), 550 U.S. 330, 341–45 (2007); *infra* Part III.C.4.

147. *Carbone,* 511 U.S. at 425–30 (Souter, J., dissenting).

148. *United Haulers*, 550 U.S. at 345; *infra* Part III.C.4.

III. United Haulers and National Solid Waste Management Association v. Daviess County, Kentucky

A. United Haulers Association Inc. v. Oneida-Herkimer Solid Waste Management Authority: The Lower Court Decisions

1. District Court Decision

In *United Haulers*, Oneida and Herkimer counties in New York State ("the Counties") enacted flow control regulations requiring all solid wastes and recyclables within the Counties to be delivered to one of several waste processing facilities owned by the Oneida-Herkimer Solid Waste Management Authority ("the Authority"), a municipal corporation.[149] The Authority charged a per-ton "tipping" fee for waste substantially higher than the fees charged on the open market in New York State.[150] The plaintiffs, United Haulers Association, Inc., a New York waste company, and several other New York waste firms, filed suit in the United States District Court for the Northern District of New York arguing the ordinances violated the DCCD.[151]

In 2000, the district court granted the plaintiffs' motion for summary judgment.[152] The district court concluded the Counties' flow control ordinances were similar to the law struck down by the *Carbone* Court, and constituted per se discrimination in favor of one preferred waste processor.[153] The district court rejected the defendants' argument that their actions were not discriminatory because they were public facilities and enjoined enforcement of the flow control ordinances.[154]

2. The Second Circuit: United Haulers I

Reversing the district court's decision, the Second Circuit in 2001 held the district court wrongly applied the per se test to the ordinances because they did not favor local business interests and

149. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (*United Haulers II*), 438 F.3d 150, 154 (2d Cir. 2006).

150. *Id.* at 154.

151. *Id.* at 153.

152. *United Haulers*, 550 U.S. at 345.

153. *Id.*

154. *Id.*

therefore are not discriminatory.[155] The Second Circuit concluded that "the district court erred in its Commerce Clause analysis by failing to recognize the distinction between private and public ownership of the favored facility" and that "in doing so, the district court also effectively foreclosed the Counties' ability to show that they had no reasonable alternatives to implementing flow control laws" under the *Pike* balancing test.[156] The Second Circuit remanded the case for discovery so that the district court judge could garner the additional facts needed to apply the *Pike* test.[157]

The Second Circuit distinguished the *Carbone* decision as being concerned with prohibiting local governments from favoring in-state private businesses, and as not addressing laws requiring that all waste be handled by local public facilities.[158] The plaintiffs argued the *Carbone* decision did not distinguish between private and public facilities, but the Second Circuit determined that "the *Carbone* majority referenced the private character of the favored facility several times."[159] Although it acknowledged the *Carbone* majority opinion never explicitly adopted the public-private distinction and that "its language can fairly be described as elusive on that point," the Second Circuit interpreted the *Carbone* decision as implicitly treating public facilities differently from private ones.[160] The Second Circuit argued the *Carbone* "Justices were divided over the *fact of whether* the preferred facility was public or private, rather than on the import of that distinction."[161] The court interpreted *Carbone* as a case in which a local government discriminated in favor of a private operator over out-of-state businesses.[162] Conversely, the Second Circuit determined that Justice O'Connor's concurring opinion and Justice Souter's dissenting opinion in *Carbone* viewed the station as a public facility.[163] Additionally, the Second Circuit interpreted several prior Supreme Court decisions as having "evidence[d] the same intent to

155. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (*United Haulers I*), 261 F.3d 245, 263 (2d Cir. 2001).

156. *Id.* at 256 n.3, 257.

157. *Id.* at 256–57, 264.

158. *Id.* at 258–59.

159. *Id.* at 258–60.

160. *Id.* at 259–60.

161. *Id.* at 259.

162. *Id.*

163. *Id.*

prevent state or local governments from preferring in-state business or investment at the expense of out-of-state businesses."[164]

Rebuffing the plaintiffs' contention that the DCCD proscribed local governments from "hoarding" local resources, including the waste processing market, the Second Circuit concluded the Clause only barred local laws authorizing local private businesses to hoard resources, stating "that a local law discriminates against interstate commerce when it hoards local resources *in a manner* that favors local business, industry or investment over out-of-state competition."[165] The *United Haulers I* court quoted a portion of the *Carbone* decision's discussion of the hoarding issue in which the Supreme Court appeared to be concerned with hoarding by local private businesses: "Put another way, the offending local laws hoard a local resource—be it meat, shrimp, . . . milk [or garbage]—*for the benefit of local businesses that treat it.*"[166] The Second Circuit's argument that the Supreme Court's decisions were only concerned with local private businesses "hoarding" natural resources, including waste and waste processing services, but unconcerned with whether a local government hoarded those same resources is problematic because "hoarding" would appear to harm interstate commerce whether the hoarder was a private or public entity.[167] Additionally, the *United Haulers I* court made a more convincing distinction between public and private facilities when it asserted that laws preferring public facilities were less likely to be protectionist, as well as "less likely to give rise to retaliation and jealousy from neighboring states" than laws favoring private facilities.[168] The Second Circuit also made a strong argument that the challenged ordinances did not violate the DCCD because their main economic burden was borne by local residents rather than out-of-state firms or people.[169]

Because "a flow control ordinance governing the processing of waste is not discriminatory under the Commerce Clause unless it favors local private business interests over out-of-state interests," the Second Circuit held that "flow control regulations like the Oneida-Herkimer ordinances, which negatively impact all private businesses alike, regardless of whether in-state or out-of-state, in favor of a

164. *Id.* at 260–61.

165. *Id.* at 261.

166. *Id.* (quoting *Carbone*, 511 U.S. at 392) (emphasis added by Second Circuit).

167. Mank, *supra* note 7, at 184.

168. *United Haulers I*, 261 F.3d at 261.

169. *Id.* at 261–62.

publicly owned facility, are not discriminatory under the dormant Commerce Clause."[170] The Second Circuit held the district court erred in applying the per se standard and remanded the case for a decision as to whether the requirement imposed an "undue burden" on interstate commerce under the *Pike* test.[171] The court of appeals held the district court must consider a facility's public ownership when applying the *Pike* test.[172]

In an opinion concurring in the result and with the majority opinion, Judge Calabresi stated, "[w]aste disposal is both typically and traditionally a local government function. With respect to such functions, the opinion's analysis of the significance of public ownership under *Carbone* seems to me quite right. Whether the same analysis would apply to activities that are not traditionally governmental is not before us."[173] The Supreme Court subsequently adopted much of the public-private distinction analysis in *United Haulers I* and agreed with Judge Calabresi that waste disposal is a traditional government function.[174]

3. The 2006 Second Circuit Decision: United Haulers II

In 2005, in an unreported decision, the district court granted the defendants' motion for summary judgment, upholding the flow control regulations under the *Pike* test, because "'the challenged laws do not treat similarly situated in-state and out-of-state business interests differently,'" and therefore the ordinances "do not impose any cognizable burden on interstate commerce."[175] In their appellate briefs, the challengers conceded that "the ordinances afford equal treatment to all commercial entities without regard to their location," but argued the district court erred in applying the *Pike* test by not evaluating whether the ordinances burdened interstate commerce by "prevent[ing] goods and services from flowing across internal political boundaries."[176] In 2006, the Second Circuit affirmed the district

170. *Id.* at 263.

171. *Id.* at 263–64.

172. *Id.* at 264.

173. *Id.* (Calabresi, J., concurring) (citation omitted).

174. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (*United Haulers*), 550 U.S. 330, 341–45 (2007).

175. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (*United Haulers II*), 438 F.3d 150, 155 (2d Cir. 2006) (quoting unreported district court decision).

176. *Id.* at 155–56.

court's decision that the Counties' flow control ordinances were valid under the *Pike* test.[177]

Applying its "different burden" interpretation of the *Pike* test, the Second Circuit determined that the counties' ordinances did not treat in-state private firms differently from out-of-state firms.[178] The Second Circuit rejected the challengers' argument that the ordinances violated the *Pike* test because the Circuit has understood the *Pike* balancing test to place a burden on the challenger to prove that a challenged local law "'imposes a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce.'"[179] Anticipating that the Second Circuit would reject their challenge to the ordinances under the "different burden" standard, the challengers asserted that the Second Circuit's different burden interpretation of the *Pike* test was flawed and inconsistent with the Supreme Court's approach to the test because the Circuit in its *United Haulers I* decision did not consider the issue of a public monopoly that hoarded resources within one state.[180] Responding to the challengers' criticism of how the *United Haulers I* decision and the subsequent district court decision applied the different burden test, the Second Circuit in *United Haulers II* acknowledged that the issue of possible hoarding by local public monopolies should be examined by courts under the *Pike* test.[181] By contrast, the earlier *United Haulers I* decision, in which two of the three judges on the panel were different from the later decision, seemed unwilling to acknowledge that hoarding by a public entity could ever be a problem under the DCCD.[182] While it was more willing to consider the hoarding issue than the *United Haulers I* decision, the *United Haulers II* court concluded that any possible hoarding of resources by the counties had

177. *Id.* at 153.

178. *Id.* at 156–57.

179. *Id.* (quoting Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 109 (2d Cir. 2001)); *accord* Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth., 389 F.3d 491, 500–03 (5th Cir. 2004) (applying *Pike* test to require challenger to demonstrate local law imposes different burden on interstate commerce than intrastate commerce); *but see* U & I Sanitation v. City of Columbus, 205 F.3d 1063, 1067–72 (8th Cir. 2000) (applying *Pike* test to invalidate a city law that imposed restrictions only on in-state competition).

180. *United Haulers II*, 438 F.3d 150 at 159–60 (2d Cir. 2006).

181. *Id.* at 160–62.

182. *See* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (*United Haulers I*), 261 F.3d 245, 261 (2d Cir. 2001). Only Judge Calabresi sat in both United Haulers decisions. In *United Haulers II*, Judges Katzman and Wesley sat instead of Judges Meskill and Leval. Mank, *supra* note 7, at 185 n.235.

no significant burden under the *Pike* test because any burden imposed by the ordinances "is blunted considerably by the absence of any suggestion that these ordinances have any practical effect other than to raise the costs of performing waste collection services within the Counties, and thus the prices paid by local consumers of those services."[183] The Second Circuit concluded the burden on interstate commerce as measured by the *Pike* test was low, because the burdens of the ordinances fall mostly on local residents rather than out-of-state interests.[184]

The Second Circuit also concluded the burden imposed by the flow control ordinances on the movement of waste to other states was acceptable under the DCCD.[185] The Second Circuit conceded that "the interstate market for waste disposal services would suffer if numerous jurisdictions were to impose restrictions like these on private entities that engage in trash collection."[186] Nevertheless, the *United Haulers II* court concluded that this burden was acceptable under the DCCD because the Supreme Court since at least 1905 had "allowed municipalities to exercise the greater power of taking exclusive control of all locally generated solid waste from the moment that it is placed on the curb."[187] The *United Haulers II* court determined that any burden from the Counties' ordinances on commerce was permissible under the DCCD because Supreme Court and Second Circuit precedent authorized local governments to establish waste monopolies.[188]

The *United Haulers II* decision understood the DCCD as having two main goals. First, the DCCD has the goal of "safeguard[ing] the ability of commercial goods to cross state lines primarily as a means to protect the right of businesses to compete on an equal footing wherever they choose to operate."[189] Second, the DCCD allows "states and municipalities to exercise their police powers without undue interference from the laws of neighboring jurisdictions."[190] The Second Circuit determined, "where neither of these underlying

183. *United Haulers II*, 438 F.3d 150 at 160.

184. *Id.* at 160–62.

185. *Id.*

186. *Id.* at 161.

187. *Id.* (citing Gardner v. Michigan, 199 U.S. 325 (1905) and Cal. Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905)).

188. *Id.*

189. *Id.* (citing H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949)).

190. *Id.* (citing Healy v. Beer Inst., 491 U.S. 324, 336–37 (1989)).

purposes is implicated by a particular legislative enactment, the burden imposed on interstate commerce must be regarded as insubstantial."[191]

The Second Circuit concluded the ordinances provided several local benefits that were significantly greater than the "slight" burden imposed by the ordinance.[192] Although financial advantages are not sufficient to vindicate a local law that discriminates against interstate commerce, the court determined that courts may weigh the financial benefits of non-discriminatory flow control ordinances.[193] The *United Haulers II* court also concluded the ordinances provided significant environmental protection benefits.[194] The court determined that "the flow control measures substantially facilitate the Counties' goal of establishing a comprehensive waste management system that encourages waste volume reduction, recycling, and reuse and ensures the proper disposal of hazardous wastes, thereby reducing the Counties' exposure to costly environmental tort suits."[195] Although it agreed with the plaintiffs' argument that the counties could use alternative methods to insure the Authority's financial health, the Second Circuit found that only the flow control ordinances "could address [the Counties'] liability concerns or encourage recycling across the wide range of waste products accepted by the Authority's recycling program."[196] The *United Haulers II* court determined that under the *Pike* test "the local benefits of the flow control measures substantially outweigh whatever modest differential burden they may place on interstate commerce."[197] The court concluded, "[b]ecause the *Pike* test places the onus on the plaintiffs to show that this burden is clearly excessive in relation to these benefits, we easily find that the Counties' flow control ordinances do not violate the dormant *Commerce Clause*, and therefore do not decide whether the ordinances burden interstate commerce at all."[198] As is discussed below, Chief Justice Roberts' majority opinion subsequently adopted most of the analysis in *United Haulers II*.

191. *Id.*
192. *Id.*
193. *Id.* at 161–62.
194. *Id.* at 162.
195. *Id.*
196. *Id.* at 162–63.
197. *Id.* at 163.
198. *Id.*

B. National Solid Waste Management Association v. Daviess County, Kentucky

In *National Solid Waste Management Association v. Daviess County, Kentucky*, the Sixth Circuit expressly disagreed with the public-private ownership distinction in *United Haulers I* and adopted reasoning clearly contrary to the subsequent *United Haulers II* decision, which was decided twenty-three days after *Daviess County*.[199] Daviess County in Kentucky enacted a flow control ordinance creating a county waste monopoly for all MSW collection services similar to the ordinances at issue in *United Haulers*.[200] A private trade association representing several waste collection, transportation, and disposal firms in the county filed suit in the United States District Court for the Western District of Kentucky, arguing the ordinance violated the DCCD by prohibiting firms from exporting waste to out-of-state sites, including sites owned by some of its members.[201] In 2004, the district court issued a declaratory judgment that the ordinance was unconstitutional and a permanent injunction barring the defendant from enforcing the ordinance.[202]

Affirming the district court's decision, the Sixth Circuit determined the ordinance facially discriminated against out-of-state interests by prohibiting the plaintiff's members from using other in-state and out-of-state facilities.[203] While it agreed with the County's argument that the ordinance did not treat out-of-state waste collectors differently from in-state collectors, the court concluded the ordinance "discriminates against out-of-state waste disposal facilities."[204] The court thus determined the ordinance violated the DCCD by prohibiting out-of-state firms from offering waste disposal services even though it imposed the same restriction on in-state businesses.[205]

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199. Nat'l Solid Waste Mgmt. Ass'n v. Daviess County, 434 F.3d 898, 909–12 (6th Cir. 2006), *cert. granted, vacated and remanded*, 550 U.S. 931 (2007) (vacating judgment and remanding case to the United States Court of Appeals for the Sixth Circuit for further consideration in light of United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007)).

200. *Id.* at 900–01.

201. *Id.*

202. *Id.* at 900.

203. *Id.* at 905.

204. *Id.*

205. *Id.*

Expressly rejecting *United Haulers I*'s distinction between laws favoring public monopolies as opposed to laws favoring local private firms, the Sixth Circuit "respectfully disagree[d] with the Second Circuit on the proposition that *Carbone* lends support for the public-private distinction drawn by that court."[206] The Sixth Circuit asserted the *Carbone* Court invalidated the Clarkstown ordinance because it "'deprives *out-of-state businesses of access to a local market*'" and that the Supreme Court did not make a distinction based on whether a flow control law established a private or public waste monopoly.[207] The Sixth Circuit contended that the *Carbone* court's emphasis "was on the economic harm to out-of-state actors and the local market" arising from the ordinance "'bar[ring] the import of the processing service.'"[208] Therefore, the Sixth Circuit determined that "the crux of the inquiry is whether the local ordinance burdens interstate commerce, not whether the local entity benefited by the ordinance is publicly owned."[209] The Sixth Circuit asserted the "free access" purpose of the DCCD mandated that courts examine a challenged local law's effects on out-of-state markets instead of whether the law benefits a local private or public firm.[210]

The *United Haulers* decisions and the *Daviess County* decision essentially revisited the philosophical arguments in the *Carbone* majority opinion and Justice Souter's dissenting opinion in that case. The Sixth Circuit's decision in *Daviess County* was more closely aligned with the underlying "market access" reasoning in Justice Kennedy's majority opinion in *Carbone*.[211] By contrast, the Second Circuit's *United Haulers I* decision limited *Carbone* to its facts involving a privately operated facility.[212] The Second Circuit's public-private distinction was closer to the reasoning in Justice Souter's

206. *Id.* at 910. The Sixth Circuit stated that its rules of precedent precluded it from adopting the Second Circuit's approach because prior Sixth Circuit precedents found "dormant Commerce Clause violations in cases where the facility was publicly owned." *Id.*

207. *Id.* at 910–11 (quoting C & A Carbone v. Town of Clarkstown, 511 U.S. 383, 390 (1994)) (emphasis supplied by Sixth Circuit).

208. *Id.* at 911 (quoting *Carbone*, 511 U.S. at 392).

209. *Id.*

210. *Id.* at 910–11.

211. Mank, *supra* note 7, at 176–78, 190.

212. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (*United Haulers I*), 261 F.3d 245, 258–60 (2d Cir. 2001); Mank, *supra* note 7, at 180–81.

dissenting opinion in *Carbone*.[213] As a result of the split between the Second and Sixth Circuits, the Supreme Court finally addressed the issue of whether it should apply a different DCCD standard for public monopolies established by local laws rather than the strict per se approach it had used for private monopolies in *Carbone*.

C. The Supreme Court Adopts the Public-Private Distinction in *United Haulers*

In light of the Second and Sixth Circuit's diametrically opposite conclusions about whether flow control laws favoring public facilities violate the DCCD, it is not surprising that the Supreme Court granted certiorari to resolve the split in the circuits. In his majority decision in *United Haulers*, Chief Justice Roberts essentially adopted the Second Circuit's approach of treating flow control laws favoring public facilities as fundamentally different from those preferring private facilities.[214] He began his opinion by characterizing the *Carbone* decision as invalidating "a flow control ordinance that forced haulers to deliver waste to a particular *private* processing facility."[215] He stated the "only salient difference" between the *Carbone* decision and the *United Haulers* case before the Court "is that the laws at issue here require haulers to bring waste to facilities owned and operated by a state-created public benefit corporation."[216] The majority concluded that "this difference [between private and public facilities is] constitutionally significant."[217] Because "[d]isposing of trash has been a traditional government activity for years," the Court determined that "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."[218] Applying the *Pike* test, a plurality of the Court then concluded the benefits of the challenged ordinances outweighed any incidental burdens they may have on interstate commerce.[219]

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213. *See Carbone*, 511 U.S. at 410–30 (Souter, J., dissenting); Mank, *supra* note 7, at 173–78, 190–91.

214. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (*United Haulers*), 550 U.S. 330, 341–47 (2007).

215. *Id.* at 334, 341.

216. *Id.* at 334.

217. *Id.*

218. *Id.*

219. *Id.*

1. Flow Control Laws Serve an Important Public Purpose in Addressing a Waste Crisis

The Court emphasized that the challenged flow control ordinances served an important public purpose in addressing serious environmental problems with the disposal of waste in those Counties.[220] The Court observed that "[t]raditionally, each city, town, or village within the Counties has been responsible for disposing of its own waste. Many had relied on local landfills, some in a more environmentally responsible fashion than others." By the 1980s, "the Counties confronted what they could credibly call a solid waste 'crisis'" as "[m]any local landfills were operating without permits and in violation of state regulations."[221] Because of these violations, state and federal environmental officials ordered the closure and environmental remediation of sixteen landfills at a cost of tens of millions of dollars to the public.[222] One federal cleanup action against a landfill in the area led the defendants in that case to name more than 600 local businesses and several municipalities and school districts as third-party defendants.[223] Furthermore, the Court argued that private waste disposal companies in the two counties caused serious problems that contributed to the waste crisis in the area. The Court stated, "The Counties had an uneasy relationship with local waste management companies, enduring price fixing, pervasive overcharging, and the influence of organized crime."[224] Chief Justice Roberts observed that, "[d]ramatic price hikes [by private waste companies] were not uncommon: In 1986, for example, a county contractor doubled its waste disposal rate on six weeks' notice."[225]

To address these serious waste problems, New York State created the Authority at the two Counties' request.[226] While the Authority charged higher fees than private firms, the Court observed that "the fees enabled the Authority to provide recycling of 33 kinds of materials, as well as composting, household hazardous waste disposal, and a number of other services."[227] To insure the financial stability of the Authority, the counties enacted flow control

220. *Id.* at 334–35.

221. *Id.* (quoting Brief for Respondents at 4).

222. *Id.* at 335.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 336.

legislation requiring private waste collectors to deliver all solid waste within the county to Authority facilities.[228] The ordinances authorized the Counties to impose penalties for noncompliance against firms that failed to deliver their waste to the county facilities, including the revocation of the firm's waste-hauling permit, fines, and imprisonment.[229]

2. Carbone Treated the Clarkstown Facility as Privately Owned.

The Court concluded *Carbone* treated the Clarkstown facility as privately owned and that the *Carbone* majority had not reached the issue of whether to treat public facilities differently.[230] Chief Justice Roberts observed that Justice Souter's dissenting opinion in *Carbone* characterized the Clarkstown transfer station as a public facility that should be treated differently under the DCCD from laws favoring private facilities, but that the *Carbone* "majority did not comment on the dissent's public-private distinction."[231] He noted that "[t]he parties in this case draw opposite inferences from the majority's silence."[232] Chief Justice Roberts interpreted *Carbone* as being concerned with discrimination in favor of local private businesses at the expense of out-of-state competitors. He noted that *Carbone* treated Clarkstown's flow control ordinance as "'just one more instance of local processing requirements that we long have held invalid.'"[233] He observed that *Carbone* "then cited six local processing cases, every one of which involved discrimination in favor of *private* enterprise."[234] He then quoted the *Carbone* decision's description of the six processing cases as involving "'offending local laws [that] hoard a local resource—be it meat, shrimp, or milk—for the benefit of *local businesses* that treat it.'"[235] Chief Justice Roberts concluded that "[i]f the [*Carbone*] Court were extending this line of local processing cases to cover discrimination in favor of local government, one would expect it to have said so."[236]

228. *Id.*
229. *Id.* at 337.
230. *Id.* at 340.
231. *Id.* at 339.
232. *Id.*
233. *Id.* at 340 (quoting C & A Carbone v. Town of Clarkstown, 511 U.S. 383, 386, 391 (1994).
234. *Id.* (citation omitted).
235. *Id.* at 341 (quoting *Carbone*, 511 U.S. at 392).
236. *Id.* (citation omitted).

Furthermore, Chief Justice Roberts maintained other aspects of the *Carbone* Court's reasoning strongly implied that it was not addressing the issue of public facilities. He observed the "*Carbone* majority stated that 'the *only conceivable distinction*' between the laws in the local processing cases and Clarkstown's flow control ordinance was that Clarkstown's ordinance favored a single local business, rather than a group of them."[237] He reasoned that "[i]f the Court thought Clarkstown's processing facility was public, that additional distinction was not merely 'conceivable'—it was conceived, and discussed at length, by three Justices in dissent."[238] He concluded, "*Carbone* cannot be regarded as having decided the public-private question."[239]

3. Flow Control Laws Benefiting Public Facilities are Different from Laws Favoring Private Facilities.

Having concluded that *Carbone* did not address public facilities, the Court in *United Haulers* held flow control laws that "benefit a clearly public facility, while treating all private companies exactly the same," as in this case, "do not discriminate against interstate commerce for purposes of the dormant Commerce Clause."[240] The Court concluded "[c]ompelling reasons justify treating" laws preferring public facilities "differently from laws favoring particular private businesses over their competitors."[241] In *General Motors Corp. v. Tracy,* the Court stated that "[c]onceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities."[242] Chief Justice Roberts relied on that principle in maintaining that "[s]tates 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."[243] "Given these differences," the *United Haulers* Court reasoned, "it does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism." The Court observed its local processing cases showed that "rigorous scrutiny is appropriate" for laws preferring in-

237. *Id.* (quoting *Carbone*, 511 U.S. at 392).

238. *Id.*

239. *Id.* (citation omitted).

240. *Id.* at 342.

241. *Id.*

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

243. *Id.* (citing Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985)).

state business over out-of-state competition "because the law is often the product of 'simple economic protectionism.'"[244] Conversely, the Court concluded that "[l]aws favoring local government . . . may be directed toward any number of legitimate goals unrelated to protectionism."[245] In *United Haulers*, the Court found the challenged flow control ordinances fulfilled "legitimate goals unrelated to protectionism" by "enabl[ing] 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."[246]

The Court reasoned 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."[247] Chief Justice Roberts did not specifically identify who was asserting this contrary approach, but his criticism was likely directed at Justice Alito's dissenting opinion. The majority opinion warned that 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."[248] Addressing the facts in the case, the *United Haulers* Court observed that "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."[249] Based on a limited role for the DCCD in regulating states and local governments, the Court declared that "[i]t 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."[250] Quoting its decision in *Maine v. Taylor*, the Court observed, "'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

244. *Id.* at 343 (quoting Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992)).
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* at 344.

trade above all other values.'"[251] The *United Haulers* Court's view on this point is contrary to the underlying free access to markets reasoning in *Carbone*.[252]

Additionally, the Court asserted that courts should be more deferential in applying the DCCD to traditional local government functions, stating, "[w]e 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.'"[253] Chief Justice Roberts also observed that Congress had given local governments a central role in waste management by "making clear that 'collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies.'"[254] Furthermore, the Court noted that New York law authorized local governments to impose regulation or public monopolies in the area of waste management.[255] The Court concluded, "[w]e may or may not agree with [New York's] approach, but nothing in the Commerce Clause vests the responsibility for that policy judgment with the Federal Judiciary."[256]

As its final reason for why the ordinances were non-discriminatory, the Court reasoned that "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."[257] The Court observed that "[o]ur 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.'"[258] The majority was alluding to the controversial political process theory for the DCCD, which asserts the doctrine is designed to prevent local

251. *Id.* (quoting Maine v. Taylor, 477 U.S. 131, 151 (1986)).

252. *See infra* Part V.A.

253. *United Haulers*, 550 U.S. at 344 (quoting United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (*United Haulers I*), 261 F.3d 245, 264 (2d Cir. 2001) (Calabresi, J., concurring)).

254. *Id.* (quoting Res. Conservation and Recovery Act of 1976, 42 U.S.C. § 6901(a)(4) (1984)).

255. *Id.* (quoting N.Y. Pub. Auth. Law Ann. § 2049-tt(3) (1995)).

256. *Id.* at 344–45.

257. *Id.* at 345.

258. *Id.* (quoting S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 767–768 n.2 (1945)).

governments from imposing burdens on non-citizens who cannot rely on the political process to oppose protectionist measures.[259] By contrast, in this case, the Court pointed out that "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."[260]

The Court also argued in-state private interests would usually prevent states and local governments from abusing government monopolies, and that it would intervene if a government monopoly interfered too much with interstate commerce. In a footnote, the Court responded to a question raised at the oral argument about whether local governments could require "citizens to purchase their burgers only from the state-owned producer."[261] The Court curtly responded, "[w]e doubt it."[262] The majority opinion referred to *Minnesota v. Clover Leaf Creamery Co.*, in which the Court previously observed, "[t]he existence of major in-state interests adversely affected by [a law] is a powerful safeguard against legislative abuse."[263] The implication of this quotation is the political process rationale that it is very unlikely a "hamburger" law could be passed in any state given the likelihood so many restaurants and grocers would oppose such legislation. The Court also suggested courts might be able to strike down a law regulating an area that is not a traditional local government function, and thus unlike waste disposal. The Court stated, "[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."[264] Finally, the Court observed that Congress retained express authority under the Commerce Clause to invalidate a state monopoly.[265]

259. *See supra* Part I.A.

260. *United Haulers*, 550 U.S. at 345.

261. *Id.* at 345 n.7 (citing transcript of oral argument and amicus brief of the State of New York).

262. *Id.*

263. *Id.* (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 n.17 (1981)).

264. *Id.* at 345–46 n.7.

265. *Id.* at 346 n.7.

4. A Plurality Applies the Pike Test and Concludes the Flow Control Laws' Benefits Outweigh Any Incidental Burdens on Interstate Commerce.

A plurality of the Court consisting of Chief Justice Roberts, and Justices Souter, Ginsburg, and Breyer applied the *Pike* test and concluded the benefits of the Counties' flow control laws outweighed any incidental burdens they might have on interstate commerce.[266] Justice Scalia refused to join this portion of the Court's opinion, believing the *Pike* test to be unconstitutional, as he understands the Commerce Clause to authorize only Congress to weigh the comparative policy benefits and burdens of local legislation.[267] However, the plurality applied the *Pike* test, which allows local governments to impose nondiscriminatory burdens on interstate commerce "'unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'"[268]

The plurality observed that the lower courts could find no clear evidence of the ordinances burdening interstate commerce. Chief Justice Roberts stated, "[a]fter years of discovery, both the Magistrate Judge and the District Court could not detect *any* disparate impact on out-of-state as opposed to in-state businesses."[269] He acknowledged, "[t]he Second Circuit alluded to, but did not endorse, a 'rather abstract harm' that may exist because 'the Counties' flow control ordinances have removed the waste generated in Oneida and Herkimer Counties from the national marketplace for waste processing services.'"[270] Avoiding the issue of any abstract or incidental harms that may result from the ordinances, the plurality concluded, "[w]e find it unnecessary to decide whether the ordinances impose any incidental burden on interstate commerce because any arguable burden does not exceed the public benefits of the ordinances."[271]

The plurality determined the ordinances produced many health and environmental benefits in addition to their usefulness in insuring

266. *Id.* at 334, 347 (plurality opinion).

267. *Id.* at 348 (Scalia, J., concurring in part).

268. *Id.* at 346 (plurality opinion) (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

269. *Id.*

270. *Id.* (quoting United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (*United Haulers II*), 438 F.3d 150, 160 (2d Cir. 2006).

271. *Id.*

the financial stability of the Authority.[272] The plurality found that the ordinances "increase recycling in at least two ways, conferring significant health and environmental benefits upon the citizens of the Counties."[273] First, the ordinances "create enhanced incentives for recycling and proper disposal of other kinds of waste. Solid waste disposal is expensive in Oneida-Herkimer, but the Counties accept recyclables and many forms of hazardous waste for free, effectively encouraging their citizens to sort their own trash."[274] Second, the ordinance's mandate that all waste in the counties go to Authority facilities "markedly increased [the Counties'] ability to enforce recycling laws. If the haulers could take waste to any disposal site, achieving an equal level of enforcement would be much more costly, if not impossible."[275] The plurality determined that "[f]or these reasons, any arguable burden the ordinances impose on interstate commerce does not exceed their public benefits."[276]

5. *A Contrary Decision Would Pose the Danger of Judicial Overreaching and a New Lochner Era*

In the conclusion of its opinion, the plurality addressed the broader philosophical reasons for holding the ordinances constitutional by strongly implying that a contrary decision could only be based on judicial overreaching.[277] The plurality observed that the "Counties' ordinances are exercises of the police power in an effort to address waste disposal, a typical and traditional concern of local government."[278] The plurality summarized the challengers' arguments:

> 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.[279]

272. *Id.* at 346–47.
273. *Id.*
274. *Id.* at 347.
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*

The plurality asserted the "common thread to these arguments . . . are invitations to rigorously scrutinize economic legislation passed under the auspices of the police power." Citing the Court's discredited opinion in *Lochner v. New York*, the plurality observed that "[t]here was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause."[280] The plurality concluded, "[w]e should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause."[281] In arguing a broad application of the DCCD was akin to the *Lochner* decision's inappropriate interference with the police power of states and local governments, the plurality adopted an approach very similar to Justice Souter's dissenting opinion in *Carbone*.[282]

D. The Concurring Opinions

1. Justice Scalia's Concurring Opinion

Justice Scalia joined the portions of the Court's opinion that concluded the ordinances do not discriminate and therefore are not subject to the per se discrimination test.[283] He did not join the plurality opinion applying the *Pike* test because he believes that the test is unconstitutional, as the text of the Commerce Clause authorizes only Congress to balance "various values."[284] He stated he wrote a separate opinion to reaffirm his view that the DCCD is "an unjustified judicial invention, not to be expanded beyond its existing domain.'"[285]

Justice Scalia explained he has been willing to follow the Court's DCCD precedent "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

280. *Id.* (citing Lochner v. New York, 198 U.S. 45 (1905)).

281. *Id.*

282. *See* C & A Carbone v. Town of Clarkstown, 511 U.S. 383, 425 (1994) (Souter, J., dissenting); *supra* Part III.B–C.

283. *United Haulers*, 550 U.S. at 348–49 (Scalia, J., concurring in part).

284. *Id.* at 348–49 (Scalia, J., concurring) ("I am unable to join Part II-D 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.").

285. *Id.* at 348 (quoting Gen. Motors Corp. v. Tracy, 519 U.S. 278, 312 (1997) (Scalia, J., concurring)).

unconstitutional by the Court.'"[286] He concluded the challenged flow control law did not fall into either category of DCCD precedent because it "benefits a *public entity* performing a traditional local-government function and treats *all private entities* precisely the same way."[287] He observed, "'[d]isparate treatment constitutes discrimination only if the objects of the disparate treatment are, for the relevant purposes, similarly situated.'"[288] He asserted, "[n]one of this Court's cases concludes that public entities and private entities are similarly situated for Commerce Clause purposes."[289] He refused to broaden the DCCD to regulate public entities because such an approach would "'intrude on a regulatory sphere traditionally occupied by . . . the States.'"[290]

2. Justice Thomas, Concurring in the Judgment: Abolish the DCCD

In his opinion concurring in the judgment, Justice Thomas argued the Court should abolish the DCCD.[291] Unlike Justice Scalia who is willing to follow but not expand the Court's DCCD precedent, Justice Thomas would overrule all of the Court's DCCD cases, including *Carbone.*[292] He stated, "[a]lthough I joined *C & A Carbone, Inc. v. Clarkstown,* I no longer believe it was correctly decided."[293] Because the text of the Constitution's Commerce Clause explicitly confers authority on only Congress to regulate interstate commerce, Justice Thomas believes it is unconstitutional for the Court to assert an implied dormant authority to strike down allegedly discriminatory local laws.[294] Although he concurred in the judgment because he believes the Court lacks authority to invalidate local ordinances like those at issue in *United Haulers,* Justice Thomas found the majority's greater trust of public monopolies than private monopolies an unconvincing distinction.[295] He also argued the majority's attempt to

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

287. *Id.*

288. *Id.* (quoting Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 601 (1997) (Scalia, J., dissenting)).

289. *Id.*

290. *Id.* (quoting *Tracy,* 519 U.S. at 313 (Scalia, J., concurring)).

291. *See id.* at 349–55 (Thomas, J., concurring).

292. *Id.* at 349–55.

293. *Id.* at 349 (citation omitted).

294. *Id.* at 349–55.

295. *Id.*

narrow the DCCD was bound to fail and that only abolition of the doctrine would end the danger it posed of judicial overreaching.[296]

E. Justice Alito's Dissenting Opinion

Justice Alito wrote a dissenting opinion because he believed that "the provisions challenged in this case are essentially identical to the ordinance invalidated in *Carbone*."[297] Justice Alito argued that "[t]he public-private distinction drawn by the Court is both illusory and without precedent."[298] Justice Stevens, who was a member of the *Carbone* majority, and Justice Kennedy, who wrote the *Carbone* majority opinion, joined the dissenting opinion.[299]

1. The Carbone Transfer Station Was Essentially a Public Facility

Justice Alito rejected the majority's view that flow control laws favoring public-owned facilities are fundamentally different from the private monopoly invalidated in *Carbone*.[300] First, he observed the facility at issue in *Carbone* was only nominally owned by a private contractor, but was essentially public in nature because the private contractor agreed to sell the transfer station to Clarkstown after five years for one dollar.[301] He noted the *Carbone* Court stated that "'[t]he town would finance *its new facility* with the income generated by the tipping fees.'"[302] Accordingly, Justice Alito concluded the Clarkstown facility and the Counties' facilities were essentially the same except for their nominal ownership.[303]

While Chief Justice Robert's majority opinion interpreted the *Carbone* majority as implicitly treating the Clarkstown facility as a private facility,[304] Justice Alito strongly disagreed and argued the *Carbone* court treated it as effectively a public facility.[305] He observed the *Carbone* majority did not dispute Justice Souter's characterization of the facility as "'essentially a municipal facility.'"[306] Additionally,

296. *Id.* at 353–55.
297. *Id.* at 356 (Alito, J., dissenting).
298. *Id.* at 358.
299. *Id.* at 356.
300. *Id.* at 357–58.
301. *Id.* at 358.
302. *Id.* (quoting C & A Carbone v. Town of Clarkstown, 511 U.S. 383, 387 (1994)).
303. *Id.* at 358–59.
304. *Id.* at 340 (majority opinion).
305. *Id.* at 359–60 (Alito, J., dissenting).
306. *Id.* at 359 (quoting *Carbone*, 511 U.S. at 419 (Souter, J., dissenting)).

Justice Alito pointed out that the Clarkstown ordinance, which the *Carbone* majority included in its entirety as an appendix to the Court's opinion, repeatedly characterized the transfer station as "'the Town of Clarkstown solid waste facility.'"[307] Furthermore, he observed Chief Justice Roberts' majority opinion failed to admit the parties in *Carbone* openly conceded in their briefs that the station was municipal in nature.[308]

2. *When Analyzing Discrimination Under the DCCD, Courts Should Treat Public Facilities the Same As Private Facilities*

Justice Alito further argued the Court's DCCD precedent had never applied a more deferential standard to local laws that discriminated in favor of publicly owned facilities.[309] He argued that the Court had misconstrued the Court's DCCD precedent by misinterpreting the term "local businesses" in *Carbone* to mean only private firms.[310] Justice Alito argued that *Carbone*'s reference to "businesses" prohibited local laws that discriminated in favor of either private or public monopolies.[311] For example, he contended laws creating state-owned liquor monopolies, which many States operated today, would be considered discriminatory under the DCCD, but for the fact that that the Twenty-First Amendment creates a special constitutional exception for such monopolies.[312] Justice Alito argued the Court had allowed deferential treatment for discriminatory local laws favoring a publicly owned facility only where the state was acting as a market participant.[313] He maintained the market participant exception was inapplicable because the Counties were using their regulatory authority to exclude competitors of the Authority's facilities.[314] He criticized the Court's "suggest[ion], contrary to its prior holdings, that States can discriminate in favor of

307. *Id.* (quoting *Carbone*, 511 U.S. at 396, 398, 399).

308. *Id.* at 359–60 (citing briefs for petitioner and respondent in *Carbone*, 511 U.S. 383 (1994)).

309. *Id.* at 360.

310. *Id.*

311. *Id.* at 360–62.

312. *Id.* at 361–62 (citing Granholm v. Heald, 544 U.S. 460, 489 (2005) (explaining that the Twenty-First Amendment makes it possible for States to "assume direct control of liquor distribution through state-run outlets")).

313. *Id.* at 362.

314. *Id.* at 362–63.

in-state interests while acting both as a market participant *and* as a market regulator."[315]

Justice Alito rejected "the Court's assumption that discrimination in favor of an in-state facility owned by the government is likely to serve 'legitimate goals unrelated to protectionism.'"[316] He argued legislation preferring local public facilities would "inur[e] to the benefit of local residents who are employed at the facility, local businesses that supply the facility with goods and services, and local workers employed by such businesses."[317] He observed that "[e]xperience 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."[318] Accordingly, he concluded that "[s]uch discrimination amounts to economic protectionism in any realistic sense of the term."[319] Justice Alito accused the Court of "send[ing] 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 affected local market."[320]

Even if the majority was correct that public monopolies in some cases advanced the public health and safety, Justice Alito maintained these monopolies were still unconstitutional under the DCCD.[321] Although an in-state private monopoly for all the livestock grown in a state might be easier for a state to monitor, he argued such a legislative monopoly "would almost certainly" violate the DCCD even if it advanced the public health.[322] He contended public monopolies were more discriminatory in some ways than private monopolies because public monopolies typically benefitted only local residents, but private firms were often owned by out-of-state

315. *Id.* at 363.
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.* at 364.
321. *See id.* at 365–66.
322. *Id.* at 365 (citing *Philadelphia*, 437 U.S. at 627).

investors.[323] Accordingly, he rejected the Court's adoption of a more deferential DCCD test for publically owned enterprises.[324]

3. The Majority Failed to Consider the Ordinances' Discriminatory Means and the Possibility of Nondiscriminatory Alternatives

Justice Alito criticized the Court for only examining the challenged ordinances' goals while ignoring their discriminatory means.[325] He observed the Court's precedent placed the burden on a local government to justify a discriminatory law by demonstrating both that the law served a legitimate purpose and that the purpose could not be served as well by other nondiscriminatory means.[326] He argued discriminatory legislation serving legitimate goals is valid under the DCCD only if those goals cannot "adequately be achieved through nondiscriminatory means."[327] Justice Alito contended the flow control laws at issue in *United Haulers* could achieve their goals through alternative nondiscriminatory means and therefore were unconstitutional under the DCCD. He argued that the case was no different from *Carbone* decision where the Court invalidated the Clarkstown ordinance because the Town could have used alternative nondiscriminatory methods such as health regulations or subsidies to achieve the same goals.[328]

4. The Majority's Traditional Government Function Analysis Is Unworkable and Waste Processing Is Not a Traditional Local Government Function

Justice Alito rejected the majority's conclusion that courts should defer to laws preferring municipal landfills because waste disposal is a traditional local government function.[329] First, he argued the Court had twice[330] experimented with giving extra deference to "traditional" local government functions "only to abandon them later as

323. *Id.* at 127.

324. *Id.* at 365–66.

325. *Id.* at 366.

326. *Id.* (citing Maine v. Taylor, 477 U.S. 131, 138 (1986)).

327. *Id.* (citing Philadelphia v. New Jersey, 437 U.S. 617, 626–27 (1978)).

328. *Id.* at 368.

329. *Id.*

330. *Id.* (citing Nat'l League of Cities v. Usery, 426 U.S. 833 (1976); South Carolina v. United States, 199 U.S. 437 (1905) (addressing intergovernmental tax immunity)).

analytically unsound."[331] First, in its 1905 decision *South Carolina v. United States,* the Court held states were exempt from federal taxation only for the "ordinary" and "strictly governmental" instrumentalities of state governments and not for proprietary instrumentalities "used by the State in the carrying on of an ordinary private business."[332] In its 1936 decision *United States v. California,* the Court interpreted *South Carolina*'s tax exemption to exclude "activities in which the states have traditionally engaged."[333] In its 1946 decision *New York v. United States,* however, the Court unanimously overruled *South Carolina* and held the distinction between "governmental" and "proprietary" functions was "untenable" and must be abandoned, which effectively overruled *California*'s tax exemption for traditional government activities.[334] Second, in its 1976 decision *National League of Cities v. Usery*, the Court held the Commerce Clause does not empower Congress to enforce the minimum wage and overtime provisions of the Fair Labor Standards Act ("FLSA") against the States "in areas of traditional governmental functions."[335] In 1985, however, the Court in *Garcia v. San Antonio Metropolitan Transit Authority,* overruled the *National League of Cities* decision because "[a]lthough *National League of Cities* supplied some examples of 'traditional governmental functions,' it did not offer a general explanation of how a 'traditional' function is to be distinguished from a 'nontraditional' one. Since then, federal and state courts have struggled with the task."[336] "Thus," Justice Alito concluded, "to the extent today's holding rests on a distinction between 'traditional' governmental functions and their nontraditional counterparts, it cannot be reconciled with prior precedent."[337]

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331. *Id.* (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546–547 (1985) (overruling Nat'l League of Cities v. Usery, 426 U.S. 833 (1976)); New York v. United States, 326 U.S. 572 (1946) (overruling South Carolina v. United States, 199 U.S. 437 (1905)).

332. South Carolina v. United States, 199 U.S. 437, 451, 461 (1905).

333. United States v. California, 297 U.S. 175, 185 (1936).

334. New York v. United States, 326 U.S. 572, 583 (1946) (opinion of Frankfurter, J., joined by Rutledge, J.); *id.* at 586 (Stone, C.J., concurring, joined by Reed, Murphy, and Burton, JJ.); *id.* at 590–96 (Douglas, J., dissenting, joined by Black, J.).

335. Nat'l League of Cites v. Usery, 426 U.S. 833, 852 (1976).

336. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 530, 538–57 (1985).

337. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (*United Haulers*), 550 U.S. 330, 369 (2007) (Alito, J., dissenting) (citation omitted).

Additionally, while he acknowledged that many American municipalities have long histories of managing local waste, Justice Alito disagreed with the majority's assertion that waste disposal is a traditional government function because the private sector manages most of the country's solid waste.[338] Furthermore, he argued that "a 'traditional' municipal landfill is for present purposes entirely different from a monopolistic landfill supported by the kind of discriminatory legislation at issue in this case and in *Carbone*. While the former may be rooted in history and tradition, the latter has been deemed unconstitutional until today."[339] Accordingly, he asserted that "[i]t is therefore far from clear that the laws at issue here can fairly be described as serving a function 'typically and traditionally' performed by local governments."[340]

Justice Alito's assertion that the Counties' landfills were different from traditional municipal landfills is at least partially true because, as is discussed in the majority opinion, the Counties' landfills were improved and enlarged in response to a waste crisis that developed during the 1980s.[341] During that decade, there was national concern about a shortage of landfill space, as the amount of household MSW grew dramatically compared with much smaller amounts in 1960.[342] Additionally, the Resource Conservation and Recovery Act of 1976 ("RCRA"),[343] as amended by the Hazardous and Solid Waste Amendments of 1984 ("HSWA"),[344] tightened environmental requirements and placed greater responsibility on state and local governments to develop plans to safely dispose of MSW.[345] As a result, the Counties developed extensive and expensive

338. *Id.*

339. *Id.* at 369–70.

340. *Id.*

341. *Id.* at 334–35 (majority opinion).

342. Klein, *supra* note 57, at 8–9 (2003); Mank, *supra* note 7, at 166.

343. 42 U.S.C. §§ 6901–6992k (2006).

344. Pub. L. No. 98–616, 98 Stat. 3221 (1984).

345. 42 U.S.C. § 6901(a)(4) (giving states and local governments the primary role in managing nonhazardous waste); *see id.* § 6901(b)(2), (8) (encouraging state and local waste plans); *see id.* § 6941 (providing planning objectives for solid waste management); *id.* § 6942 (identifying guidelines for state planning); *id.* §§ 6943, 6947 (listing criteria for approval of state plans); *id.* § 6946 (stating procedure for development and implementation of state plans); H.R. REP. NO. 1491–94(I), at 40 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6278 (urging cooperation between federal and state governments in developing solid waste plans); Solid Waste Disposal Facility Criteria, 56 Fed. Reg. 50,978 (Oct. 9, 1991) (codified at 40 C.F.R. 256 (1993)) (detailing guidelines for solid waste planning); Mank, *supra* note 7, at 166–68.

recycling programs to reduce the amount of solid waste.[346] Thus, Justice Alito had a point in arguing the Counties' landfills were not traditional landfills,[347] but the majority opinion advanced a strong policy argument that a public monopoly landfill was necessary to address new waste and environmental issues.[348]

5. Even Laws that Treat In-State and Out-of-State Business the Same Violate the DCCD

Justice Alito disagreed with "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.'"[349] He argued this distinction was irrelevant because "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."[350] He contended the Court for many years invalidated laws burdening interstate commerce even if they applied equally to in-state residents.[351] In a footnote, he observed *Carbone* struck down a law favoring a single, local business at the expense of both in-state and out-of-state competitors.[352] He commented that "[i]t is therefore strange for the Court to attach any significance to the fact that the flow-control laws at issue here apply to in-state and out-of-state competitors alike."[353] Because a law preferring a public facility is no different than a law favoring a single private facility, he reasoned that "[i]t therefore makes no difference that the flow-control laws at issue here apply to in-state and out-of-state businesses alike."[354] He concluded that "[t]he dormant Commerce Clause has long been understood to prohibit the kind of discriminatory legislation upheld by the Court in this case" and therefore he would have reversed the Second Circuit's decision.[355]

346. *United Haulers*, 550 U.S. at 335–346.
347. *Id.* at 369 (Alito, J., dissenting).
348. *Id.* at 334–35, 346–47 (majority opinion).
349. *Id.* at 370 (Alito, J., dissenting) (quoting *id.* at 345 (majority opinion)).
350. *Id.*
351. *Id.*
352. *Id.* at 370 n.4.
353. *Id.*
354. *Id.* at 370.
355. *Id.* at 371.

IV. *Davis*: Reaffirming the Public-Private Distinction with Some Refinements

In *Department of Revenue of Kentucky v. Davis*, the Court held the DCCD did not prohibit Kentucky from exempting interest on bonds issued by the State or its political subdivisions from state income taxes, while taxing interest income on bonds issued by other States and their subdivisions.[356] The decision relied upon *United Haulers'* principle that government functions are subject to a more liberal analysis under the DCCD.[357] Additionally, the *Davis* Court emphasized that exempting state bonds from taxation was a traditional government function deserving of deference from the Court, much as the *United Haulers* decision made a similar deference argument as to waste disposal.[358] Yet in a footnote, Justice Souter's majority opinion clarified that the *United Haulers* decision's exemption of traditional government functions from rigorous scrutiny under the DCCD was based on the fundamental issue of whether the law appropriately served the public interest or inappropriately favored private interests, and was not simply based on the history of a government practice.[359]

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356. Dep't of Revenue of Ky. v. Davis, 128 S. Ct. 1801, 1810–11, 1819 (2008). On the other hand, for well reasoned arguments that the Supreme Court in *Davis* should hold that discriminatory state taxation of municipal bonds violates the DCCD *see* Brian D. Galle & Ethan Yale, *Can Discriminatory State Taxation of Municipal Bonds Be Justified?*, Tax Notes, October 8, 2007, pp.153–59; Brian D. Galle & Ethan Yale, *Muni Bonds and the Commerce Clause After* United Haulers, Tax Notes, June 11, 2007, p. 1037–46.

357. *Id.* at 1809–11.

358. *Id.* at 1810–11, 1819.

359. Justice Souter stated in footnote nine:

> Justice Kennedy's dissent (hereinafter dissent) says this is just circular rationalization, that the *United Haulers* acceptance of governmental preference in support of public health, safety, and welfare is the equivalent of justifying the law as an exercise of the "police power" and thus an exercise in "tautology," since almost any state law could be so justified . . . . But this misunderstands what we said in *United Haulers.* The point of asking whether the challenged governmental preference operated to support a traditional public function was not to draw fine distinctions among governmental functions, but to find out whether the preference was for the benefit of a government fulfilling governmental obligations or for the benefit of private interests, favored because they were local. Under *United Haulers,* governmental public preference is constitutionally different from commercial private preference, and we make the governmental responsibility enquiry to identify the beneficiary as one or the other . . . . Because this is the distinction at which the enquiry about traditional governmental activity is aimed, it entails neither tautology nor the hopeless effort to pick and choose among legitimate governmental activity that led to *Garcia v. San Antonio Metropolitan Transit Authority* . . . .

Id. at 1810 n.9.

A. Souter's Majority Opinion

The *Davis* decision maintained that "[i]t follows *a fortiori* from *United Haulers* that Kentucky must prevail because "a government function is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors."[360] The *Davis* Court observed that *United Haulers*' exemption of traditional government functions from rigorous DCCD scrutiny "applies with even greater force to laws favoring a State's municipal bonds, given that the issuance of debt securities to pay for public projects is a quintessentially public function, with the venerable history we have already sketched."[361] As in *United Haulers,* the *Davis* decision determined that Kentucky could favor its own bonds and those of its political subdivisions because a public entity financing public projects is not substantially similar to other bond issuers in the state.[362] Furthermore, Kentucky treated in-state and out-of-state private bonds the same and thus did not discriminate in an inappropriate manner.[363] The Court concluded that *United Haulers* required it to uphold the Kentucky tax exemption because it "favors a traditional government function without any differential treatment favoring local entities over substantially similar out-of-state interests."[364]

Unlike *United Haulers*, however, the *Davis* Court held that a state's tax scheme is not susceptible to the *Pike* balancing test.[365] The Court concluded that "the Judicial Branch is not institutionally suited to draw reliable conclusions of the kind that would be necessary for the Davises to satisfy a *Pike* burden in this particular case."[366] The Court reasoned that it lacked the institutional competence to determine the economic impact of eliminating the tax exemption, and therefore that it could not balance the costs and benefits of the exemption.[367] The Court observed that Congress is better institutionally able to gather data and weigh the risks of eliminating the exemption, although it was entirely at Congress' discretion

360. *Id.* at 1810.
361. *Id.*
362. *Id.* at 1811.
363. *Id.*
364. *Id.*
365. *Id.* at 1818–19.
366. *Id.* at 1817.
367. *Id.* at 1817–19.

whether it would choose to use its affirmative authority over interstate commerce to regulate such benefits.[368]

B. Justice Kennedy's Dissenting Opinion

In his dissenting opinion in *Davis*, Justice Kennedy, who was joined by Justice Alito, echoed the *Carbone* decision by arguing the Framers of the Constitution intended the Commerce Clause to establish a national free market "unobstructed by state and local barriers."[369] He contended, "[t]he object of creating free trade throughout a single nation, without protectionist state laws, was a dominant theme of the convention at Philadelphia and during the ratification debates that followed."[370] He argued the challenged state tax exemption of Kentucky bonds was inconsistent with the Commerce Clause's free market rationale.[371] As discussed in Part V.C, he also criticized both the majority decision and the *United Haulers* decision for applying a more lenient DCCD test for traditional public functions.[372] He argued, however, that the majority's opinion was inconsistent with *United Haulers* because that decision emphasized the flow control laws treated in-state and out-of-state private businesses the same, but the Kentucky law taxed out-of-state bonds at a higher rate.[373] He maintained the Court's precedent prohibited states from imposing a discriminatory tax such as Kentucky's exemption of state bonds from taxation and, therefore, that the exemption was unconstitutional under the DCCD.[374]

V. The Public-Private Distinction Is Justified, but the Traditional-Nontraditional Distinction Is Problematic

While Chief Justice Roberts' majority opinion sought to emphasize that the Court's approach was consistent with DCCD precedent, the *United Haulers* decision rejected *Carbone*'s free market access principle. The *United Haulers* decision's public-private distinction is justified because there is a significant difference between appropriate laws that prefer public entities in order to

368. *Id.*
369. *Id.* at 1822 (Kennedy, J., dissenting).
370. *Id.* at 1823.
371. *Id.* at 1823–24.
372. *Id.* at 1824–25; *see infra* Part V.C.
373. *Davis*, 128 S.Ct. at 1827 (Kennedy, J., dissenting).
374. *Id.* at 1825–29.

promote the public welfare, and laws favoring the self-interest of local private businesses. Justice Souter's *Davis* decision corrected a potential flaw in the *United Haulers* approach by shifting the focus from whether a local government is performing a "traditional" government function to whether the law advances the public interest or impermissibly discriminates in favor of a local private business.

A. The *United Haulers* Decision Properly Rejected *Carbone's* Free Market Access Principle

Although it factually distinguished *Carbone* as a DCCD case invalidating a local law favoring a private firm, the *United Haulers* decision's acceptance of local government monopolies was philosophically at odds with the *Carbone* decision's free market access principle. The *Carbone* Court emphasized the DCCD protects free markets and invalidates any local law that "deprives out-of-state businesses of access to a local market" even if there is no evidence of discrimination between in-state and out-of-state firms.[375] The *United Haulers* decision appropriately rejected *Carbone's* excessively pro-free market interpretation of the DCCD. The *Carbone* decision's free access to markets interpretation of the DCCD is inconsistent with the Constitution's federalist principles.[376] The authors of the Constitution did not intend the Commerce Clause to prohibit all non-discriminatory state laws which incidentally interfere with free markets.[377] Although the founders sought to avoid blatantly protectionist laws, as one scholar asserts, "[t]here was no intent,

375. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 389 (1994); Heinzerling, *supra* note 75, at 269–70 (arguing that the *Carbone* decision emphasized free market access as essence of DCCD rather than traditional non-discrimination principle); Mank, *supra* note 7, at 176–78.

376. Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of the Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1489–90 (1995) ("Our theory of federalism suggests that the Court should not fetishize the free national market and should approach the cases with a more lenient eye toward state and local police and developmental policies."); Mank, *supra* note 7, at 178; *see generally* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

377. Anson & Schenkkan, *supra* note 41, at 78–80; Eule, *supra* note 41, at 429–35; Mank, *supra* note 7, at 178; Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1179 (1986); Verchick, *supra* note 42, at 1281–83.

however, to inject a philosophy of laissez-faire into the constitutional fabric."[378]

The *Carbone* decision's "free access" to local markets theory is inconsistent with a proper understanding of the Commerce Clause and the DCCD. As the *Harvard Law Review* observed, "[i]n striking down the flow control law, the [*Carbone*] Court mistook the Commerce Clause's prohibition against discrimination by a state within an open market for a requirement that states maintain open markets."[379] The one case *Carbone* cited as support for the free market access principle, *NLRB v. Jones & Laughlin Steel Corp.*, is a famous case involving Congress' authority to regulate interstate commerce under the Commerce Clause, and did not involve the DCCD.[380] Congress in many circumstances may have the authority to mandate free local markets, but the Court does not.[381]

Justice Souter's dissenting opinion in *Carbone* and a number of commentators have criticized *Carbone's* theory of "access to a local market" because it appeared to require local governments to open their services to private contractors and ignored a long history of local government monopolies in the United States.[382] Read broadly, the *Carbone* decision's reasoning suggested that any state or local monopoly, including traditional or core local activities such as operating prisons or providing law enforcement, is potentially unconstitutional under the DCCD.[383] Justice Souter in *Carbone* and some commentators have thus compared *Carbone* to the Court's

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378. Eule, *supra* note 41, at 435.

379. Supreme Court, 1993 Term, *supra* note 86, at 153.

380. *Carbone*, 511 U.S. at 389 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31 (1937)); Friedman, *supra* note 33, at 354–55 (discussing *Jones*).

381. Friedman, *supra* note 33, at 354–55 ("Undoubtedly Congress could decide in favor of an entirely free market, but it has not done so, and the Court's limited antidiscrimination and antiprotectionism decisions do not justify the result in *Carbone*.").

382. *Carbone*, 511 U.S. at 410–30 (Souter, J., dissenting); Bednar & Eskridge, *supra* note 376, at 1489–90 ("Our theory of federalism suggests that the Court should not fetishize the free national market and should approach the cases with a more lenient eye toward state and local police and developmental policies."); Friedman, *supra* note 33, at 354–55; Heinzerling, *supra* note 75, at 230–31, 268–70 (comparing *Carbone* to *Lochner* in an effort to promote markets); Mank, *supra* note 7, at 177–78 ("criticiz[ing] *Carbone* for going beyond the prevention of discrimination against out-of-state competitors, a core value of the DCCD, to a promotion of free-market competition"); McCauliff, *supra* note 75, at 661–64, 673–85 (criticizing *Carbone*'s market-based discrimination test); Supreme Court, 1993 Term, *supra* note 86, at 149, 153–59 (same).

383. *Carbone*, 511 U.S. at 424–25 (Souter, J., dissenting); Mank, *supra* note 7, at 178.

discredited 1905 decision *Lochner v. New York.*[384] *Lochner* invalidated a state maximum working hours law because the Court interpreted the Due Process Clause to implicitly require a free-market in which employers and employees had the right to make contracts without government regulation.[385] Chief Justice Roberts' opinion in *United Haulers* echoed Justice Souter's comparison of *Carbone* to *Lochner.*[386] Citing *Lochner*, Chief Justice Roberts, for a plurality of the Court, argued that "[t]here was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause."[387] He concluded, "[w]e should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause." [388] The *United Haulers* decision's "judicial modesty" approach was especially appropriate because Congress in the RCRA encouraged local governments to take a leading role in addressing waste issues.[389]

B. A Valid Distinction Exists Between Public Monopolies and Laws Favoring Local Private Businesses

The *United Haulers* Court argued that state and local governments are far different from private businesses because the former are concerned with the health and welfare of their citizens, while the latter are concerned with profits.[390] To justify its sharp distinction between appropriate local laws preferring public facilities from inappropriate laws favoring local private firms, the *United Haulers* decision relied on *General Motors Corp. v. Tracy,* which reasoned, "[c]onceptually, of course, any notion of discrimination

384. *See Carbone*, 511 U.S. at 424–25 (Souter, J., dissenting); Lochner v. New York, 198 U.S. 45 (1905); Heinzerling, *supra* note 75, at 230–31, 268–70 (comparing *Carbone* to *Lochner* in an effort to promote markets); Mank, *supra* note 7, at 178 (same); McCauliff, *supra* note 75, at 661–64, 673–85 (criticizing *Carbone*'s market-based discrimination test); Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191, 1230–37 (1998) (arguing Supreme Court's DCCD cases are similar to free market approach in *Lochner*).

385. *Lochner*, 198 U.S. at 58–64 (1905).

386. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (*United Haulers*), 550 U.S. 330, 347 (2007) (citing *Lochner*).

387. *Id.*

388. *Id.*

389. Kenneth L. Karst, *From Carbone to United Haulers: The Advocates' Tales*, 2007 SUP. CT. REV. 237, 266–67 (2007) (arguing *United Haulers* decision adopted position of judicial modesty in part because Congress had encouraged local governments to manage waste).

390. *Id.*

assumes a comparison of substantially similar entities."[391] As is discussed below, the *Tracy* Court treated public utilities as distinct from private marketers. In doing so, the *Tracy* decision foreshadowed the public-private distinction in *United Haulers*.

In *Tracy*, the Court held that Ohio's differential treatment of public utilities and independent marketers regarding the taxing of natural gas sales did not violate the DCCD.[392] Under Ohio law, sales of natural gas by state-regulated local public utilities, which are known as Local Distribution Companies ("LDCs"), were exempt from the state's general sales and use taxes, which applied to sales of natural gas by other in-state and out-of-state sellers.[393] General Motors Corporation ("GMC"), which bought its natural gas from excluded independent, out-of-state marketers, argued Ohio's tax scheme favored in-state utility companies and, therefore, that Ohio discriminated against out-of-state commerce.[394] Although the tax scheme did not expressly differentiate between in-state and out-of-state firms, GMC argued the scheme was discriminatory in violation of the DCCD because "by granting the tax exemption solely to LDC's, which are in fact all located in Ohio, the State has 'favor[ed] some in-state commerce while disfavoring all out-of-state commerce.'"[395]

The *Tracy* Court found that state and local franchised utilities sold a heavily regulated "bundled" gas product to residential consumers, thereby guaranteeing price stability and that the gas supply would not be terminated during cold winters to indigent consumers who could not afford to pay.[396] Conversely, many commercial firms like GMC bought unbundled gas from independent marketers who priced gas according to the fluctuations in the free market.[397] The Court determined that LDCs and independent marketers served different markets, as "natural gas marketers did not serve the Ohio LDCs' core market of small, captive users, typified by

391. *United Haulers*, 550 U.S. at 342 (quoting Gen. Motors Corp. v. Tracy, 519 U.S. 278, 298 (1997)).

392. Gen. Motors Corp. v. Tracy, 519 U.S. 278, 298 (1997).

393. *Id.* at 281–86.

394. *Id.* at 284–89; Day, *supra* note 75, at 32; Sara Sachse, Comment, *United We Stand-But for How Long? Justice Scalia and New Developments of the Dormant Commerce Clause*, 43 St. Louis U. L.J. 695, 708 (1999).

395. *Tracy*, 519 U.S. at 288 (quoting Brief for Petitioner 33).

396. *Id.* at 288–98, 301–02.

397. *Id.*

residential consumers who want and need the bundled product."[398] The Court explained, "[t]hese are buyers who live on sufficiently tight budgets to make the stability of rate important, and who cannot readily bear the risk of losing a fuel supply in harsh natural or economic weather."[399]

The *Tracy* decision relied on health and public welfare arguments for treating state-regulated public utilities differently under the DCCD from private marketers. The Court stated, "[t]he continuing importance of the States' interest in protecting the captive market from the effects of competition for the largest consumers is underscored by the common sense of our traditional recognition of the need to accommodate state health and safety regulation in applying dormant Commerce Clause principles."[400] The *Tracy* decision's willingness to interpret the DCCD in light of legitimate health and safety goals is similar to the *United Haulers* decision's use of health and safety factors in differentiating public waste facilities from private waste disposers.[401] The *Tracy* Court opined:

> We have consistently recognized the legitimate state pursuit of such interests as compatible with the Commerce Clause, which was "'never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.'". . . Just so may health and safety considerations be weighed in the process of deciding the threshold question whether the conditions entailing application of the dormant Commerce Clause are present.[402]

In a footnote, the Court qualified its statement that it would consider the health and safety benefits of challenged state laws in applying the DCCD by observing that "if a State discriminates against out-of-state interests by drawing geographical distinctions between entities that are otherwise similarly situated, such facial discrimination will be subject to a high level of judicial scrutiny even

398. *Id.* at 301.

399. *Id.* at 301–02.

400. *Id.* at 306.

401. *See supra* Part III.C.4.

402. *Tracy*, 519 U.S. at 306–07 (quoting Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 443–44 (1960)).

if it is directed toward a legitimate health and safety goal."[403] Thus, the *Tracy* decision declared that courts will give significant deference to state or local laws establishing a public monopoly for the public health or welfare as long as a challenged law does not discriminate between similarly situated entities such as local and out-of-state private firms on a geographic basis. Because the Counties' flow control ordinances did not discriminate between local and out-of-state private firms, the *United Haulers* decision appropriately relied upon *Tracy* as precedent to support its public-private distinction.

The *United Haulers* decision presented strong arguments for treating public waste facilities as functionally different from private facilities. The *United Haulers* Court demonstrated that public waste facilities provided different services or functions than private facilities through promoting a broad range of recycling, composting and household hazardous waste disposal services that would be more costly or impossible to achieve if, in the alternative, the Counties sought to regulate private firms to achieve the same goals.[404] Public waste facilities are different because they incorporate health and environmental goals, such as broad recycling mandates, which are different from the profit-making goals of private waste firms.[405] Thus, *United Haulers* was able to demonstrate that public waste facilities served different functions in the waste market than private firms, and therefore they were not similarly situated. The *Tracy* Court made a similar distinction between Ohio public utilities advancing the public interest by providing resident customers a fixed price, guaranteeing service during winter months, and regulating profits, and independent marketers providing free market natural gas to the noncaptive market.[406]

C. Justice Souter's *Davis* Opinion Explains the Traditional-Nontraditional Distinction

Chief Justice Roberts' majority opinion in *United Haulers* emphasized that it was inappropriate for the Court to invalidate local control of waste disposal operations because waste disposal was a

403. *Id.* at 307 n.15 (citing Philadelphia v. New Jersey, 437 U.S. 617, 626–28 (1978); Dean Milk Co. v. Madison, 340 U.S. 349, 353–54 (1951)).

404. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (*United Haulers*), 550 U.S. 330, 346 (1994).

405. *Id.*; Mank, *supra* note 7, at 166–68; McCauliff, *supra* note 75, at 656.

406. *See Tracy*, 519 U.S. at 298–310.

traditional government function.[407] Although he made a strong argument that waste disposal is a traditional government function that should pass muster under the DCCD, Roberts' use of a traditional-nontraditional distinction was likely to cause problems for the Court in future cases where it may not be so obvious whether a function is traditional or nontraditional. Justice Alito's dissenting opinion, on the other hand, made a persuasive argument that the Court failed in the past to develop a workable test for what constitutes "traditional" state or local government functions.[408]

In *National League of Cities*, the Court held Congress could not use the Commerce Clause to regulate the employment conditions of state or local employees performing integral operations in traditional government functions.[409] It did not provide a precise definition of what constitutes a traditional government function, but offered the following nonexclusive list of examples: "fire prevention, police protection, sanitation, public health, and parks and recreation."[410] The "sanitation" example was likely intended to include waste disposal and would thus support Chief Justice Roberts' view that the waste disposal services in *United Haulers* were a traditional government function.[411]

The *Garcia* court, however, overruled *National League of Cities* because it concluded that the traditional versus nontraditional distinction was unworkable, as the functions of states have evolved over time.[412] For example, the *Garcia* Court pointed out that education had once been a private function, but then became a public one: "The most obvious defect of a historical approach to state immunity is that it prevents a court from accommodating changes in the historical functions of States, changes that have resulted in a number of once-private functions like education being assumed by the States and their subdivisions."[413] The *Garcia* Court also observed the *National League of Cities* decision had treated public parks as a traditional government function serving the purpose of public

407. *United Haulers*, 550 U.S. at 334, 343–47.

408. *Id.* at 1810–11 (Alito, J., dissenting).

409. Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976), *overruled by* Garcia v. San Antonio Metro. Auth., 469 U.S. 528 (1985).

410. *Id.* at 851.

411. *See supra* Part III.C.3.

412. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 543–44 (1985).

413. *Id.* at 543–44.

recreation.[414] *Garcia* demonstrated the *National League of Cities* decision misunderstood the history of public parks by quoting an 1893 Court decision which explained that city commons originally were provided not for recreation, but for grazing domestic animals 'in common,' and that "[in] the memory of men now living, a proposition to take private property [by eminent domain] for a public park . . . would have been regarded as a novel exercise of legislative power."[415] Because state government functions have continually evolved over time, the *Garcia* Court reasoned there was no principled standard for how ancient or how long-standing a practice must be in order to be considered traditional.[416] The Court observed, "[r]eliance on history as an organizing principle results in line-drawing of the most arbitrary sort; the genesis of state governmental functions stretches over a historical continuum from before the Revolution to the present, and courts would have to decide by fiat precisely how longstanding a pattern of state involvement had to be for federal regulatory authority to be defeated."[417] The *Garcia* decision provided a convincing rationale for why a traditional versus nontraditional test is unworkable for classifying government functions.

In his dissenting opinion in *Davis*, Justice Kennedy criticized the majority's, as well as the *United Haulers* decision's, use of the "traditional government function" category to relax scrutiny under the DCCD.[418] He observed, "[t]he Court defends the Kentucky law by explaining that it serves a traditional government function and concerns the 'cardinal civic responsibilities' of protecting health, safety, and welfare."[419] He rejected the majority's approach by arguing that "[t]his is but a reformulation of the phrase 'police power,' long abandoned as a mere tautology." [420] Justice Kennedy explained, "[a] law may contravene a provision of the Constitution even if enacted for a beneficial purpose."[421] He argued that even a

414. *Id.* at 544 n.9.

415. *Id.* (quoting Shoemaker v. United States, 147 U.S. 282, 297 (1893)).

416. *Id.* at 544.

417. *Id.*

418. Dep't of Revenue of Ky. v. Davis, 128 S. Ct. 1801, 1824 (2008) (Kennedy, J., dissenting).

419. *Id.*

420. *Id.*

421. *Id.*

law serving a valid public purpose is subject to the Commerce Clause's discrimination analysis.[422]

In a footnote in *Davis*, Justice Souter explained Roberts' traditional-nontraditional distinction and offered a better approach. In response to Justice Kennedy's criticism, Justice Souter asserted he had misunderstood the *United Haulers'* decision because "[t]he point of asking whether the challenged governmental preference operated to support a traditional public function was not to draw fine distinctions among governmental functions, but to find out whether the preference was for the benefit of a government fulfilling governmental obligations or for the benefit of private interests, favored because they were local."[423] Justice Souter explained, "[u]nder *United Haulers,* governmental public preference is constitutionally different from commercial private preference, and we make the governmental responsibility enquiry to identify the beneficiary as one or the other."[424] He continued, "[b]ecause this is the distinction at which the enquiry about traditional governmental activity is aimed, it entails neither tautology nor the hopeless effort to pick and choose among legitimate governmental activity that led to *Garcia*," in which a distinction between traditional and nontraditional government functions was rejected as unworkable.[425] Justice Souter's footnote not only responded to Justice Kennedy's dissenting opinion in *Davis*, but also addressed questions raised by Justice Alito's dissent in *United Haulers*, which Chief Justice Roberts' majority opinion in that case failed to answer.

Justice Souter's footnote does not completely explain how the Court would apply the traditional versus nontraditional distinction in a way that avoids the definitional issues which led to its rejection in *Garcia.* Nevertheless, he suggests the key to the problem in the context of the DCCD is for a court to ask whether a provision serves genuine public purposes or is a mere subterfuge for assisting local businesses at the expense of out-of-state competitors. Implicitly, he suggests that the Court looks at whether an activity is a "traditional" government function not to measure how many years governments have engaged in such activities, but to aid the court in determining if the government is acting for a genuine public purpose. If a

422. *Id.*

423. *Id.* at 1810 n.9 (majority opinion).

424. *Id.*

425. *Id.* (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)).

municipality is engaging in a traditional activity such as waste collection, it is more likely its goals are public in nature. Conversely, if a municipality is engaging in a nontraditional activity such as running the hypothetical public hamburger monopoly discussed in *United Haulers*,[426] it may be more likely that it is a subterfuge for improper purposes like promoting local business interests. If a court simply uses the traditional versus nontraditional dichotomy as a helpful factor in understanding whether a law has a legitimate or illegitimate purpose under the DCCD, it can minimize the definitional problems raised in *Garcia*. A court that uses tradition as a limited factor in its decision about whether a public monopoly serves a legitimate public purpose does not have to resolve all of the historical line drawing issues raised in *Garcia*. Souter's footnote only provides a brief description of how courts should address the question of which government activities are entitled to be reviewed under the more generous *Pike* test rather than the more stringent per se standard. Nevertheless, future courts should expand upon his analysis to develop a more complete methodology for deciding whether a public monopoly is legitimate under the DCCD. Souter's footnote offers a better starting point for that analysis than simply asking whether an activity is traditional or nontraditional in the historic sense.

Conclusion

In *Carbone*, the Court adopted a "market access" interpretation of the DCCD, placing free market economics above federalist principles which preserve state and local authority to use police power to protect the health and welfare of their citizens.[427] The *Carbone* decision failed to appreciate that the environmental benefits of the Clarkstown flow control scheme could not be easily replicated through the alternative measures of regulation, bonds, or additional taxes it suggested as a substitute.[428] Although they gave Congress the authority to remove trade barriers between states, the Framers of the Constitution did not intend to elevate free market principles over all other provisions in the Constitution, including its federalist

426. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (*United Haulers*), 550 U.S. 330, 345 n.7 (2007).

427. *See supra* Parts II.A, II.D.

428. *See supra* Parts II.C–D.

structure.[429] The *Carbone* decision's expansive market access interpretation of the DCCD threatened to invalidate any state or local law that might impede in some way the operation of private business, even if there was no geographical discrimination between local and out-of-state firms.[430] Like the discredited *Lochner* decision, the *Carbone* Court's free market approach to the DCCD was inconsistent with the Constitution's federalist structure and the essential police power responsibilities of states and local governments to protect the health and welfare of their citizens.[431]

The *United Haulers* decision corrected the excesses of the *Carbone* decision. *United Haulers* correctly distinguished between laws that create a public monopoly, but treat all private firms the same regardless of their geographical location, from laws favoring local businesses at the expense of out-of-state firms.[432] The Court appropriately concluded the former type of law is not per se discrimination and should be reviewed by courts pursuant to the more lenient *Pike* test.[433] The Court observed that the purpose of public monopolies is often to serve important public interests, and concluded the challenged ordinances in fact served environmental goals such as recycling and waste minimization.[434] Furthermore, the decision properly emphasized that the law imposed most of its costs on local residents and had only theoretical impacts on interstate commerce.[435]

One aspect of the *United Haulers* decision was potentially troubling for future DCCD decisions. Chief Justice Roberts' majority opinion suggested that courts should apply a more lenient review of the challenged ordinances because waste disposal is a traditional local government function.[436] In his dissenting opinion, Justice Alito argued that the Court had twice adopted a distinction between traditional and nontraditional local government functions, but then overruled both decisions because it was unable to develop a workable test to distinguish between what is traditional and what is

429. *See supra* Parts I.A, II.D.
430. *See supra* Parts II.C–D.
431. *See supra* Parts II.C–D.
432. *See supra* Parts III.C.3, V.A.
433. *See supra* Part III.C.4.
434. *See supra* Part III.C.4.
435. *See supra* Part III.C.4.
436. *See supra* Part III.C.3.

nontraditional.[437] Chief Justice Roberts' majority opinion failed to respond to Alito's criticism. In *Davis*, Justice Kennedy's dissenting opinion criticized the majority in part with an argument similar to Justice Alito's dissenting opinion in *United Haulers*, that a local government's use of "traditional" police power authority should not exempt it from review under the DCCD.[438] In a footnote in *Davis*, Justice Souter explained that *United Haulers'* distinction between traditional and nontraditional local government functions was not intended to require courts to draw arbitrary historical lines. Rather, its purpose was to distinguish between laws that create a public monopoly for legitimate public goals while treating all private firms the same, regardless of geographical location, from laws favoring local businesses at the expense of out-of-state firms.[439]

One possible interpretation of Souter's brief footnote is that whether a practice is traditional or nontraditional is just a starting point for the central inquiry of whether a law is intended to serve the public interest without geographical discrimination, or whether it is alternatively intended to favor local businesses at the expense of out-of-state firms.[440] A law involving a traditional government function such as waste disposal may be more likely to serve nondiscriminatory purposes than a nontraditional law establishing a public monopoly of hamburger stands, since the latter law is more likely to act as a mask for an illegitimate purpose, such as favoring one private interest at the expense of others.[441] Souter's *Davis* footnote should be helpful in future DCCD cases involving public monopolies. With Souter's clarification, the *United Haulers* decision strikes the appropriate balance in DCCD cases between respect for the police power of state and local governments, and the doctrine's central purpose of invalidating local laws which discriminate geographically between local private businesses and out-of-state firms.

437. *See supra* Part III.E.4.
438. *See supra* Part IV.B.
439. *See supra* Part V.C.
440. *See supra* Part V.C.
441. *See supra* Part V.C.