UNITED HAULERS ASSOCIATION v. ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY

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The Supreme Court, in a 6-3 decision in *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*,[1] upheld two counties' flow control ordinances that require trash haulers to deliver waste to government-owned processing facilities.[2] The Court determined that the Commerce Clause[3] is not violated by laws that favor state or local government entities but treat all private entities equally.[4]

This case is a natural consequence of the Court's decision in *C & A Carbone v. Clarkstown*.[5] In *Carbone*, the Court struck down a city's flow control ordinance as violating the dormant Commerce Clause because it compelled trash haulers to use a specific private processing facility. In *Carbone*, a local private contractor agreed to build a waste processing facility at no cost to the town in return for five years of guaranteed minimum waste flow (120,000 tons per year) through the facility and the ability to charge above-market tipping fees[6] for processing the trash.[7] To ensure that the newly-created facility would receive the minimum waste required by the agreement, the town enacted a flow-control ordinance, requiring any trash within the town to be processed at this facility.[8] After five years of operating the

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1. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (*United Haulers*), 127 S. Ct. 1786 (2007).
2. *Id.* at 1790.
3. U.S. CONST. art. I, § 8, cl. 3.
4. *United Haulers*, 127 S. Ct. at 1790.
5. C & A Carbone v. Clarkstown, 511 U.S. 383 (1994).
6. Tipping fees are charges to haulers when depositing waste at processing facilities. *United Haulers*, 127 S. Ct. at 1791 n.1.
7. *Carbone*, 511 U.S. at 387 (1994).
8. *Id.*

facility, the private contractor would sell the facility to the town for one dollar.[9]

United Haulers presented a very similar situation, except for one significant difference. In 1990, two New York counties enacted municipal ordinances requiring that all solid waste and recyclable materials generated within the counties be processed at one of several waste processing facilities, each of which was owned by the Oneida-Herkimer Solid Waste Management Authority, a municipal public-benefit corporation.[10] The municipal corporation, like the private contractor in *Carbone*, charged a higher-than-market tipping fee to process this waste than did local privately-held waste processing facilities.[11] The Court stated that the only "salient difference" between this case and *Carbone* was that the law required trash haulers to bring their trash to a state-owned facility, instead of a privately-owned facility.[12] The Second Circuit held that even if the counties' ordinances burdened interstate commerce, the burden was not "clearly excessive" in relation to the local benefits generated.[13] Therefore, the ordinances did not violate the Commerce Clause. In a case with similar facts, the Sixth Circuit took a contrary position and held that a flow control ordinance that favored a local government entity violated the Commerce Clause.[14] The Supreme Court granted certiorari in this case to resolve the circuit split.

The Court held that the municipal flow control ordinances enacted by Oneida and Herkimer Counties did not violate the dormant Commerce Clause, which prevents states from enacting legislation that would impinge on interstate commerce, notwithstanding congressional inaction.[15] The majority opinion distinguished this case, which involved a publicly-owned facility, from

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9. *Id.*

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

11. The petitioners submitted evidence that the market price for disposing of the trash would be between $37–$55 per ton, whereas the state entity was charging $86. *United Haulers*, 127 S. Ct. at 1792.

12. *Id.* at 1790.

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

14. *See Nat'l Solid Wastes Mgmt. Ass'n v. Daviess County*, 434 F.3d 898, 902 (6th Cir. 2006) ("[T]he Ordinance was facially discriminatory against interstate commerce. The Ordinance, in practical terms, is no different than other local laws struck down by the Supreme Court and this Court as unconstitutional.").

15. *United Haulers*, 127 S. Ct. at 1790, 1797.

Carbone, which involved a private entity. The Court examined the text of its *Carbone* opinion and held that *Carbone* did not extend the dormant Commerce Clause to state-owned facilities.[16]

The Court stated that flow control ordinances that benefit a "clearly public facility" while treating all private facilities equally "do not discriminate against interstate commerce for purposes of the dormant Commerce Clause."[17] Because local governments have the responsibility to protect the "health, safety, and welfare of [their] citizens,"[18] laws favoring such government entities should be judged differently than laws favoring local private entities, which are often enacted out of "simple economic protectionism."[19]

The majority provided two additional reasons why the flow control ordinances did not violate the Commerce Clause. First, the majority considered waste disposal historically to be a local government function.[20] Because disposing of waste is a local function, the Court should be wary of using its Commerce Clause authority to interfere with local government efforts. Additionally, the ordinances are likely to lead to higher tipping fees only for those individuals who voted in favor of the laws.[21] Because the burden is not being shifted to others who did not have the power to vote for or against the legislation, the majority opinion insists that the Court should be reluctant to invalidate a local government decision.[22]

Lastly, a plurality[23] analyzed the local laws under the *Pike* test.[24] The Court found that the ordinances imposed little, if any, burden on interstate commerce, which is easily overcome by the public interest satisfied by the laws. The ordinances provide financing for the

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16. *See id.* at 1789 ("If the 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 . . . *Carbone* cannot be regarded as having decided the public-private question.").

17. *Id.* at 1795.

18. *Id.*

19. *Id.* at 1796.

20. *Id.*

21. *Id.* at 1797.

22. *See id.* at 1789 ("There is no reason to step in and hand local businesses a victory they could not obtain through the political process.").

23. Chief Justice Roberts and Justices Souter, Ginsburg, and Breyer comprised the plurality.

24. Pike v. Bruce Church, 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

counties, and they additionally offer health and environmental benefits. The majority contended that these ordinances were passed under the state's police power, and the Court—analogizing to *Lochner v. New York*[25]—should not "rigorously scrutinize economic legislation passed under the auspices of the police power."[26]

Justice Scalia concurred in part with the Court's decision. He rejected the expansion of the dormant Commerce Clause and was only willing to give *stare decisis* effect to the dormant Commerce Clause in two situations: "(1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by the Court."[27] Because private and public entities are not "similarly situated for Commerce Clause purposes", unequal treatment does not equate to discrimination.[28] Lastly, Scalia rejected the plurality opinion's *Pike* balancing because he believed Congress, rather than the Court, should engage in balancing under the Commerce Clause.

Justice Thomas, who concurred in the judgment, believed that dormant Commerce Clause jurisprudence is incompatible with the Constitution and should be overruled. Although he joined the Court's *Carbone* decision, he rejected this decision, writing "[t]he negative Commerce Clause has no basis in the Constitution and has proved unworkable in practice."[29] Under his view, the Constitution vests in Congress the right to choose between the free market and economic protectionism, and the Court cannot invalidate a state's power to regulate commerce without prior congressional action. Thomas viewed the majority's distinction between a law favoring the government and a law favoring an in-state business as "razor thin" and without basis.[30] Lastly, he analogized the majority's decision to *Lochner*, but he insisted that *Lochner's* "right of free contract" was as dubious and unwarranted as the negative Commerce Clause, which the Court refused to overrule as a doctrine.[31]

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25. Lochner v. New York, 198 U.S. 45 (1905).
26. *United Haulers*, 127 S. Ct. at 1798.
27. *Id.* (Scalia, J., concurring in part).
28. *Id.* at 1799.
29. *Id.* (Thomas, J., concurring in the judgment).
30. *Id.* at 1801–02.
31. *See id.* at 1802–03 ("[T]oday's decision does not repudiate that doctrinal error [the dormant Commerce Clause]. Rather, it further propagates the error by narrowing the negative

Justice Alito wrote a dissenting opinion, with which Justices Stevens and Kennedy joined, insisting that *Carbone* was indistinguishable from this case. The dissent believed that the counties' flow control ordinances discriminated against interstate commerce and thus could only be sustainable if they "serve[] a legitimate local purpose that could not be served as well by nondiscriminatory means."[32]

The dissent disputed the majority opinion's conclusion that the waste-processing facility in *Carbone* was indeed private. In *Carbone*, the Court repeatedly referred to the facility as the "town's" transfer station, and the town enacted ordinances to guarantee the facility a minimum income stream.[33] In addition, the town purchased the facility five years after operations commenced for one dollar. In considering form over substance, the dissent insisted that the Court understood the facility in *Carbone* to be a municipal facility, and thus *Carbone* presents the same facts as the current case.[34]

Even if *Carbone* did not deal with a municipal facility, the dissent maintained that strict scrutiny should apply regardless of whether legislation discriminates in favor of a privately-owned or state-owned facility.[35] The market-participant doctrine allows states to discriminate if they are acting solely as market participants rather than as market regulators.[36] Because the state is regulating the market by requiring all trash to be processed in specific facilities, the dissent contended it should not be allowed to discriminate against interstate commerce.[37]

Alito then attacked the majority's justifications for its ultimate decision. First, he insisted that "[d]iscrimination in favor of an in-state government facility serves 'local economic interests.'"[38] He cited

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Commerce Clause for policy reasons—reasons that later majorities of this Court may find to be entirely illegitimate.").

32. *Id.* at 1803 (Alito, J., dissenting).

33. *Id.* at 1804–05.

34. *See id.* ("The Court exalts form over substance in adopting a test that turns on this technical distinction, particularly since . . . the transaction in *Carbone* could have been restructured to provide for the passage of title at the beginning, rather than the end, of the 5-year period.").

35. *See id.* at 1805–06 ("The Court has long subjected discriminatory legislation to strict scrutiny, and has never, until today, recognized an exception for discrimination in favor of a state-owned entity.").

36. South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 93 (1984).

37. *United Haulers*, 127 S. Ct. at 1806–07 .

38. *Id.* at 1807 (quoting *Carbone,* 511 U.S. at 404).

several examples of local economic interests served by the ordinances, including the economic benefits to local residents employed by the facility as well as the local businesses supplying the facility.[39] The dissent contended that the law should be subject to strict scrutiny if the legislative means are discriminatory, irrespective of the legitimacy of the goals. Because the goals could be achieved by nondiscriminatory means, the ordinances would fail strict scrutiny. Second, Alito insisted that "the Court is simply mistaken in concluding that waste disposal is 'typically' a local government function," and cited statistics demonstrating that "most of the garbage produced in this country is still managed by the private sector."[40]

This decision ensures that the Court will continue to adhere to its dormant Commerce Clause doctrine and jurisprudence. Seven justices[41] agree that the dormant Commerce Clause applied to this case, although they disagreed whether the *Carbone* precedent dictated the decision. Though its composition has changed in recent years, a strong majority of the Court maintains that the dormant Commerce Clause prohibits states from enacting legislation that discriminates against interstate commerce, even in the absence of congressional legislation.

This decision does not definitively address the dissent's public/private concerns, which must be resolved in future Court decisions. The majority opinion regards the *Carbone* decision as controlling for legislation favoring a private facility, whereas the *United Haulers* decision controls for legislation favoring a public facility. Litigation will likely arise in the future in situations that do not obviously fit into either category, such as if a town that owns the facility leases it to a private entity, and subsequently passes a flow control ordinance. Until such a case arises, the Court's decisions in *Carbone* and *United Haulers* provide municipalities with ample guidance to determine whether legislation will discriminate against interstate commerce for purposes of the dormant Commerce Clause.

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39. *Id.* at 1807–08.

40. *Id.* at 1811.

41. The only two judges who wish to invalidate the dormant Commerce Clause doctrine, either in whole or in part, are Justices Scalia and Thomas. *Id.* at 1798–1803.