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THE DORMANT COMMERCE CLAUSE AND *UNITED HAULERS*— A CONSTITUTIONAL DOCTRINE ON TERMINAL LIFE SUPPORT?

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At the end of April, the Supreme Court announced its decision in *United Haulers Assoc., Inc. v. Oenida-Herkimer Solid Waste Management Authority*, 550 U.S. ___, 127 S. Ct. 1786 (2007) (*United Haulers*). This case was expected to yield little more than another footnote in a series of somewhat obscure cases dealing with the rights of local municipalities to regulate the flow of trash inside their particular jurisdictions via so-called "flow control" ordinances. The Court's prior view of such regulations, issued more than a decade ago in *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) (*Carbone*), hardly made news and was probably of more concern to the update editors of the Gunther constitutional law treatise than most readers of constitutional jurisprudence. Mirable dictu! The Supreme Court's opinion in *United Haulers* places the validity of the "dormant Commerce Clause" on the limited list of those constitutional doctrines on terminal life support, with a strong indication from at least two of the Justices that the doctrine should be abandoned altogether. This reading of the "dormant" Commerce Clause has major implications for both municipalities and states struggling to design not just waste hauling ordinances but potentially many other potential "public" services while avoiding constitutional constraints.

The Dormant Commerce Clause and Its Prior Application to Municipal Regulation of Waste Hauling Within Their Jurisdiction

Most everyone agrees that the Founders intended the Commerce Clause to be a *grant* of power to the Congress to regulate those items that fell within the purview of "interstate" commerce. U.S. CONST., Art. I, § 8, cl. 3. However, the Supreme Court has long interpreted this clause to have a collateral, albeit unwritten, implication that limited states from "discriminating" against interstate commerce in favor of "local" purveyors of goods or services. *See Gibbons v. Ogden*, 22 U.S. 1 (1824). As Justice Jackson observed for a unanimous Court in 1949: "Perhaps even more than by interpretation of its [the Commerce Clause's] written words, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these *great silences of the Constitution*." *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 535 (1949) (emphasis added). Once a state statute or county or city ordinance was classified as "discriminating" against out of state economic interests, then the inquiry was over—the ordinance was subject to a "virtual[ly] *per se* rule of invalidity." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

The tough question, of course, is in the classification of a state statute or local ordinance as "discriminatory." In some instances, the statute appeared on its face to favor the private local in-state purveyors. *See, e.g., South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984) (Alaskan regulation favoring Alaskan timber interests); *Pike v. Bruce Church, Inc.*, 397 U.S.

127 (1970) (Arizona regulation favoring in-state packers of cantaloupes). Even in the somewhat "dirty" area of municipal solid waste (or trash by any other name), the Court had held that a New York municipality's ordinance supporting its efforts to have a private waste hauler build and operate for the first five years a waste transfer station (an intermediate facility on the way toward final disposal in a landfill) was invalid based upon the "dormant" Commerce Clause. *Carbone*, 511 U.S. at 387-392. At least some of the courts of appeal, including the Third and Sixth Circuits, then applied the dormant Commerce Clause to invalidate various "flow-control" ordinances similar to the one at issue in *United Haulers*. *See, e.g., Waste Management., Inc. v. Metro Government*, 130 F.3d 731 (6th Cir. 1997); *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707 (6th Cir. 2000); *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701 (3d Cir. 1995).

While one might question how the Supreme Court could interpret a constitutional provision that originally granted power to Congress to also grant power to the Court to strike down municipal ordinances it determined were "discriminatory," there was at least a superficial line of consistency in these cases. A local regulator could not favor local (in-state) private enterprise and "discriminate" against other in-state haulers who might select other waste disposal facilities. This was the case in *Carbone*, even though it was clear in the facts of that case that after five years the favored private waste hauler would then turn the new transfer station facility over to the town of Clarkstown. 511 U.S. at 387.

The *United Haulers* Case and Its Troubling Commerce Clause Implications

The *United Haulers* case involves a relatively simple set of facts: The State of New York granted two upstate counties, Oneida and Herkimer, the power to set up a joint "solid waste management authority" (SWM Authority) with powers to regulate the collection, processing, and disposal of municipal solid waste within their combined jurisdiction. The SWM Authority then proceeded to impose higher fees for trash disposal in exchange for purportedly better services. The fees charged were nearly triple the amount that haulers were paying at competing landfills. Both counties backed the SWM Authority, and each of them enacted "flow-control" ordinances requiring that all trash in their respective jurisdictions was to go ("flow") to the processing system and designated SWM Authority disposal facilities—either transfer stations or, later, a new landfill. Outside waste disposal operators were not allowed to offer competing services, although the record indicated that the fees charged by the new joint authority "significantly exceeded" those of competing disposal facilities.

Based upon the earlier *Carbone* decision, an industry group filed suit challenging the ordinances under the "dormant Commerce Clause." The district court agreed, finding that the two county ordinances were virtually identical to those previously banned in *Carbone* and enjoining enforcement of the two related "flow control" ordinances. The Second Circuit disagreed, and the Supreme Court granted review.

Although the Supreme Court's opinion appears to be a 6-3 decision, with only Justices Stevens, Kennedy, and Alito dissenting, it is in fact a far more fractured opinion in terms of the applicability of the "dormant" Commerce Clause. Only the three dissenting Justices would apply the dormant Commerce Clause in its traditional sense and invalidate the two flow control ordinances as "discriminatory" against non-local businesses. 127 S. Ct. at 1803-1812 (Justice Alito, dissenting, with whom Stevens and Kennedy, JJ., join). Chief Justice Roberts and Justices Souter, Ginsburg, and Breyer would limit the dormant Commerce Clause substantially and apply it only in those cases where the municipality does *not* own the local favored business. 127 S. Ct. at 1790-1798. The two remaining Justices, Justices Scalia and Thomas, cast doubts on the dormant Commerce Clause altogether. Justice Scalia declared that he will vote to apply that constitutional principle only in cases that are squarely within the limits that the Court's prior cases have set. 127 S. Ct. at 1798-99 (Scalia, J., partially concurring in opinion). Justice Thomas concurred only in the judgment, because he now believes that the dormant Commerce Clause is neither founded in the Constitutional text nor

an appropriate area for the Court to implement its "own" policy decisions. 127 S. Ct. at 1799-1803 (Thomas, J., concurring in judgment only).

Thus, scoring the Justices' votes in terms of the dormant Commerce Clause, one has a 3-4-2 split in the Court. This vote suggests that the dormant Commerce Clause is in the "intensive care" ward of judicial doctrine, if not ready for a series of code blue emergency alerts.

To be sure, the Chief Justice, together with Justices Souter, Ginsburg, and Breyer, did not describe their votes as a major shift in doctrinal view. Rather, for them *Carbone* was a case limited to its facts—a municipal grant in favor of a private enterprise. When, however, the municipal grant of discrimination was in favor of a publicly-owned entity (the SWM Authority), then things were different. *United Haulers*, 127 S. Ct. at 1793-96. For the majority (including, at this juncture, Justice Scalia), a government-run business was fundamentally different than a favored privately run business.

Why is this public/private distinction important, and what difference does it make for dormant Commerce Clause purposes? For Chief Justice Roberts and four of his colleagues, laws that "favor" government-owned entities may be directed to "any number of legitimate goals unrelated to protectionism." 127 S. Ct. at 1796. Thus, subjecting a publicly-owned entity that is favored by municipal ordinance to the same "*per se* invalidity" test as a private entity is not warranted, according to the Court majority. *Id*.

For Justice Thomas, this public-private distinction was "razor thin" and simply inconsistent with the Court's prior pronouncements in other cases. 127 S. Ct. at 1802 (Thomas, J., concurring in judgment). Moreover, it was a policy-driven choice that, for Justice Thomas, is simply not within the Supreme Court's prerogatives 127 S. Ct. at 1802. As Justice Thomas put it: "Whatever the reason, the choice is not the Court's to make. Like all of the Court's previous negative Commerce Clause cases, today's decision leaves the future of state and local regulation of commerce to the whim of the Federal Judiciary." *Id*.

The three dissenting Justices, in a dissent authored by Justice Alito, concluded that the majority's "public versus private" distinction is less than razor-thin; it's downright untenable. As Justice Alito put it on behalf of the dissenters: "I see no basis for 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.' Discrimination in favor of an in-state government facility serves 'local economic interests . . . .'" 127 S. Ct. at 1807 (quoting *Carbone*, 511 U.S. at 404 (O'Connor, J., concurring in judgment)). Indeed, Justice Alito cited to "examples in other countries," notably China, of public discrimination in favor of state-owned businesses for the precise purpose of protecting local economic interests. 127 S. Ct. at 1808 and n.2.

The economic data would seem to support the dissenters, together with Justice Thomas: The tipping charges imposed by the SWM Authority on a per-ton basis for waste suggests a significant ($30-$50 per ton) cost premium over disposal costs for the same wastes were sent to non-county facilities. 127 S. Ct. 1792. Although the majority suggested that the fees "allowed the [SWM] Authority to do more than the average private waste disposer," 127 S. Ct. at 1791, there is no documentation in the record cited by the majority that supports such a significant price differential. In addition, the dissent rejoined that deference to a "public" owned facility in the waste disposal field based upon the Chief Justice's efforts to characterize such regulations as a "traditional" local governmental function is an invitation to unworkable policy distinctions. Justice Alito also observed that this "traditional function" distinction is just factually incorrect, because a majority of local waste responsibility is handled by private industry. 127 S. Ct. at 1810-11.

Finally, the newly emphasized "public versus private" distinction in the dormant Commerce Clause threatens (as Justices Scalia and Thomas would hope) to evisercate any further cases under the dormant Commerce Clause. The Commerce Clause savvy local enterpreneur will now suggest to his or her county supervisors (or city council) that a new "publicly owned" (but privately run) hamburger stand has to be created in order to ensure that only the most healthy (local) beef is served

and to improve the overall health and well-being of the citizens of the Oneida and Herkimer counties. When McDonald's and Burger King challenges this new enterprise, which will be by ordinance the only hamburger stand in either county, they will face the "public versus private" wall erected in *United Haulers*. As Justice Alito wrote: "[T]he Court sends a bold and enticing message to local governments throughout the United States: Protectionist legislation is now permissible, so long as the enacting government excludes all private-sector participants from the affected local market." 127 S. Ct. at 1808 n.3 (Alito, J., dissenting with whom Justices Stephens and Kennedy join). Four of the Justices (the Chief Justice and Justices Souter, Ginsburg and Breyer) sought to distinguish this possibility of local regulation on the grounds that "major in-state interests" might mitigate against such local regulation or, alternatively, that Congress might step in and overrule such regulations. 127 S. Ct. at 1797 n.7. Perhaps there are regional political hurdles to local governments turning themselves into hamburger monopolies, but after this decision, there are certainly no *constitutional* obstacles to such local ventures.

Ultimately, the majority of municipal lawmakers may resist the urge to get into the hamburger business and to wall out McDonald's. Nevertheless, the status of the "dormant" Commerce Clause is now mortally impaired. If one can avoid the Clause simply by having a commercial enterprise receive the blessing and enactment of a public authority or agency, then what is really left of the original doctrine?

For two Justices, Scalia and Thomas, it would essentially be a matter of good riddance to an outmoded doctrine. For the rest of the Court, we will not know until the next case. However, what environmental lawyers, however, can take away from the *United Haulers* case is that environmental regulation that favors county or city-owed facilities (as opposed to ordinances favoring purely private entities), is now extremely difficult to challenge under the dormant Commerce Clause.

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