SUPREME COURT OF THE UNITED STATES

No. 92–1402

C & A CARBONE, INC., ET AL., PETITIONERS *v.* TOWN OF CLARKSTOWN, NEW YORK

ON WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, SECOND JUDICIAL DEPT.

[May 16, 1994]

JUSTICE O'CONNOR, concurring in the judgment.

The town of Clarkstown's flow control ordinance requires all "acceptable waste" generated or collected in the town to be disposed of only at the town's solid waste facility. town of Clarkstown, Local Law 9, §§3(C)—(D) (1990) (Local Law 9). The Court holds today that this ordinance violates the Commerce Clause because it discriminates against interstate commerce. *Ante*, at 5. I agree with the majority's ultimate conclusion that the ordinance violates the dormant Commerce Clause. In my view, however, the town's ordinance is unconstitutional not because of facial or effective discrimination against interstate commerce, but rather because it imposes an excessive burden on interstate commerce. I also write separately to address the contention that flow control ordinances of this sort have been expressly authorized by Congress, and are thus outside the purview of the dormant Commerce Clause.

I

The scope of the dormant Commerce Clause is a judicial creation. On its face, the Clause provides only that "[t]he Congress shall have Power . . . To regulate Commerce . . . among the several States . . ." U. S. Const., Art. I, §8, cl. 3. This Court long ago concluded, however, that the Clause not only empowers Congress to regulate interstate commerce, but also imposes limitations on the States in the absence of congressional action:

> "This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. . . . [W]hat is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation." *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 537–538 (1949) (internal quotation marks and citations omitted).

Our decisions therefore hold that the dormant Commerce Clause forbids States and their subdivisions from regulating interstate commerce.

We have generally distinguished between two types of impermissible regulations. A facially nondiscriminatory regulation supported by a legitimate state interest which incidentally burdens interstate commerce is constitutional unless the burden on interstate trade is clearly excessive in relation to the local benefits. See *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. 573, 579 (1986); *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970). Where, however, a regulation "affirmatively" or "clearly" discriminates against interstate commerce on its face or in practical effect, it violates the Constitution unless the discrimination is demonstrably justified by a valid factor unrelated to protectionism. See *Wyoming* v. *Oklahoma*, 502 U. S. ___ (1992) (slip op., at 15–16); *Maine* v. *Taylor*, 477 U. S. 131, 138 (1986). Of course, there is no clear line separating these categories. "In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman Distillers*, *supra*, at 579.

Local Law 9 prohibits anyone except the town-authorized transfer station operator from processing discarded waste and shipping it out of town. In

effect, the town has given a waste processing monopoly to the transfer station. The majority concludes that this processing monopoly facially discriminates against interstate commerce. *Ante*, at 6–7. In support of this conclusion, the majority cites previous decisions of this Court striking down regulatory enactments requiring that a particular economic activity be performed within the jurisdiction. See, *e.g.*, *Dean Milk Co.* v. *Madison*, 340 U. S. 349 (1951) (unconstitutional for city to require milk to be pasteurized within five miles of the city); *Minnesota* v. *Barber*, 136 U. S. 313 (1890) (unconstitutional for State to require meat sold within the State to be examined by state inspector); *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1 (1928) (unconstitutional for State to require that shrimp heads and hulls must be removed before shrimp can be removed from the State); *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U. S. 82 (1984) (unconstitutional for State to require all timber to be processed within the State prior to export).

Local Law 9, however, lacks an important feature common to the regulations at issue in these cases—namely, discrimination on the basis of geographic origin. In each of the cited cases, 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—be it a State *(Pike)*, a county *(Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dept. of Natural Resources*, 504 U. S. ___ (1992)*)*, or a city *(Dean Milk)*—drew a line around itself and treated those inside the line more favorably than those outside the line. Thus, in *Pike*, the Court held that an Arizona law requiring that Arizona cantaloupes be packaged in Arizona before being shipped out of state facially discriminated against interstate commerce: the benefits of the discriminatory scheme benefited the Arizona packaging industry, at the expense of its

competition in California. Similarly, in *Dean Milk*, on which the majority heavily relies, the city of Madison drew a line around its perimeter and required that all milk sold in the City be pasteurized only by dairies located inside the line. This type of geographic distinction, which confers an economic advantage on local interests in general, is common to all the local processing cases cited by the majority. And the Court has, I believe, correctly concluded that these arrangements are protectionist either in purpose or practical effect, and thus amount to virtually per se discrimination.

In my view, the majority fails to come to terms with a significant distinction between the laws in the local processing cases discussed above and Local Law 9. Unlike the regulations we have previously struck down, Local Law 9 does not give more favorable treatment to local interests as a group as compared to out-of-state or out-of-town economic interests. Rather, the garbage sorting monopoly is achieved at the expense of all competitors, be they local or nonlocal. That the ordinance does not discriminate on the basis of geographic origin is vividly illustrated by the identity of the plaintiff in this very action: petitioner is a *local* recycler, physically located *in Clarkstown*, that desires to process waste itself, and thus bypass the town's designated transfer facility. Because in-town processors—like petitioner—and out-of-town processors are treated equally, I cannot agree that Local Law 9 "discriminates" against interstate commerce. Rather, Local Law 9 "discriminates" evenhandedly against all potential participants in the waste processing business, while benefiting only the chosen operator of the transfer facility.

I believe this distinction has more doctrinal significance than the majority acknowledges. In considering state health and safety regulations such as Local Law 9, we have consistently recognized that the fact that interests within the regulating

jurisdiction are equally affected by the challenged enactment counsels against a finding of discrimination. And for good reason. The existence of substantial in-state interests harmed by a regulation is "a powerful safeguard" against legislative discrimination. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 473, n. 17 (1981). The Court generally defers to health and safety regulations because "their burden usually falls on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations." *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U. S. 429, 444, n. 18 (1978). See also *Kassel* v. *Consolidated Freightways Corp. of Del.*, 450 U. S. 662, 675 (1981) (same). Thus, while there is no bright line separating those enactments which are virtually per se invalid and those which are not, the fact that in-town competitors of the transfer facility are equally burdened by Local Law 9 leads me to conclude that Local Law 9 does not discriminate against interstate commerce.

II

That the ordinance does not discriminate against interstate commerce does not, however, end the Commerce Clause inquiry. Even a nondiscriminatory regulation may nonetheless impose an excessive burden on interstate trade when considered in relation to the local benefits conferred. See *Brown-Forman Distillers*, 476 U. S., at 579. Indeed, we have long recognized that "a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to . . . the people of the State enacting such statute." *Brimmer* v. *Rebman*, 138 U. S. 78, 83 (1891) (internal quotation marks and citation omitted). Moreover, "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." *Pike*, 397 U. S., at 142. Judged against these standards, Local Law 9 fails.

The local interest in proper disposal of waste is obviously significant. But this interest could be achieved by simply requiring that all waste disposed of in the town be properly processed *somewhere*. For example, the town could ensure proper processing by setting specific standards with which all town processors must comply.

In fact, however, the town's purpose is narrower than merely ensuring proper disposal. Local Law 9 is intended to ensure the financial viability of the transfer facility. I agree with the majority that this purpose can be achieved by other means that would have a less dramatic impact on the flow of goods. For example, the town could finance the project by imposing taxes, by issuing municipal bonds, or even by lowering its price for processing to a level competitive with other waste processing facilities. But by requiring that all waste be processed at the town's facility, the ordinance "squelches competition in the waste-processing service altogether, leaving no room for investment from outside." *Ante*, at 8.

In addition, "[t]he practical effect of [Local Law 9] must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of the other States and what effect would arise if not one, but many or every, [jurisdiction] adopted similar legislation." *Wyoming* v. *Oklahoma*, 502 U. S., at ___ (slip op., at 15) (quoting *Healy* v. *Beer Institute,* 491 U. S. 324, 336 (1989)). This is not a hypothetical inquiry. Over 20 states have enacted statutes authorizing local governments to adopt flow control laws.[1] If the localities in these

[1]Colo. Rev. Stat. §30–20–107 (Supp. 1993); Conn. Gen.

States impose the type of restriction on the movement of waste that Clarkstown has adopted, the free movement of solid waste in the stream of commerce will be severely impaired. Indeed, pervasive flow control would result in the type of balkanization the Clause is primarily intended to prevent. See *H. P. Hood & Sons*, 336 U. S., at 537–538.

Given that many jurisdictions are contemplating or enacting flow control, the potential for conflicts is high. For example, in the State of New Jersey, just south of Clarkstown, local waste may be removed from the State for the sorting of recyclables "as long as the residual solid waste is returned to New Jersey." Brief for New Jersey at Amicus Curiae 5. Under Local Law 9, however, if petitioners bring waste from New Jersey for recycling at their Clarkstown operation, the residual waste may not be returned to New Jersey, but must be transported to Clarkstown's transfer facility. As a consequence, operations like petitioners' cannot comply with the requirements of both jurisdictions. Nondiscriminatory state or local laws which actually conflict with the enactments of other States

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Stat. §22a–220a (1993); Del. Code Ann. Tit. 7, §6406(31) (1991); Fla. Stat. §403.713 (1991); Haw. Rev. Stat. §340A—3(a) (1985); Ind. Code §§36–9–31–3 and-4 (1993); Iowa Code §28G.4 (1987); La. Rev. Stat. Ann. §30:2307(9) (West 1989); Me. Rev. Stat. Ann., Tit. 38, §1304–B(2) (1964); Minn. Stat. §115A.80 (1992); Miss. Code Ann. §17–17–319 (Supp. 1993); Mo. Rev. Stat. §260.202 (Supp. 1993); N. J. Stat. Ann. §§13.1E—22, 48:13A—5 (West 1991 and Supp. 1993); N.C. Gen. Stat. §130A-294 (1992); N. D. Cent. Code, §§23–29–06(6) and (8) (Supp. 1993); Ore. Rev. Stat. §§268.317(3) and (4) (1991); Pa. Stat. Ann., Tit. 53, §4000.303(e) (Purdon Supp. 1993); R.I. Gen. Laws §23–19–10(40) (1956); Tenn. Code Ann. §68–211–814 (Supp. 1993); Vt. Stat. Ann., Tit. 24, §2203b (1992); Va. Code Ann. §15.1–28.01 (Supp. 1993).

are constitutionally infirm if they burden interstate commerce. See *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U. S. 520, 526–530 (1959) (unconstitutional for Illinois to require truck mudguards when that requirement conflicts with the requirements of other States); *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 773–774 (1945) (same). The increasing number of flow control regimes virtually ensures some inconsistency between jurisdictions, with the effect of eliminating the movement of waste between jurisdictions. I therefore conclude that the burden Local Law 9 imposes on interstate commerce is excessive in relation to Clarkstown's interest in ensuring a fixed supply of waste to supply its project.

III

Although this Court can—and often does—enforce the dormant aspect of the Commerce Clause, the Clause is primarily a grant of congressional authority to regulate commerce among the States. *Amicus* National Association of Bond Lawyers (NABL) argues that the flow control ordinance in this case has been authorized by Congress. Given the residual nature of our authority under the Clause, and because the argument that Congress has in fact authorized flow control is substantial, I think it appropriate to address it directly.

Congress must be "unmistakably clear" before we will conclude that it intended to permit state regulation which would otherwise violate the dormant Commerce Clause. *South-Central Timber*, 467 U. S., at 91 (plurality opinion). See also *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U. S. 941, 960 (1982) (finding consent only where "Congress' intent and policy to sustain state legislation from attack under the Commerce Clause was expressly stated") (citations and internal quotation marks omitted). The State or locality has the burden of demonstrating this intent. *Wyoming* v. *Oklahoma*, 502 U. S., at ___ (slip

op., at 19).

Amicus NABL argues that Subchapter IV of the Resource Conservation and Recovery Act of 1976 (RCRA), 90 Stat. 2813, as amended, 42 U. S. C. §6941 *et seq.*, and its amendments, remove the constitutional constraints on local implementation of flow control. RCRA is a sweeping statute intended to regulate solid waste from cradle to grave. In addition to providing specific federal standards for the management of solid waste, RCRA Subchapter IV governs "State or Regional Solid Waste Plans." Among the objectives of the subchapter is to "assist in developing and encouraging methods for the disposal of solid waste which are environmentally sound"; this is to be accomplished by federal "assistance to States or regional authorities for comprehensive planning pursuant to Federal guidelines." §6941.

Under the Act, States are to submit solid waste management plans that "prohibit the establishment of new open dumps within the State," and ensure that solid waste will be "utilized for resource recovery or . . . disposed of in sanitary landfills . . . or otherwise disposed of in an environmentally sound manner." §6943(a)(2). The plans must also ensure that state and local governments not be "prohibited under State or local law from negotiating and entering into long-term contracts for the supply of solid waste to resource recovery facilities [or] from entering into long-term contracts for the operation of such facilities." §6943(a)(5).

Amicus also points to a statement in a House Report addressing §6943(a)(5), a statement evincing some concern with flow control:

> "This prohibition [on state or local laws prohibiting longterm contracts] is not to be construed to affect state planning *which may require all discarded materials to be transported to a particular location*. . . ."

H. R. Rep. No. 94–-1491, p. 34 (1976) (emphasis added). Finally, in the Solid Waste Disposal Act Amendments of 1980, Congress authorized EPA to "provide technical assistance to States [and local governments] to assist in the removal or modification of legal, institutional, and economic impediments which have the effect of impeding the development of systems and facilities [for resource recovery]." §6948(d)(3). Among the obstacles to effective resource recovery are "impediments to institutional arrangements necessary to undertake projects . . . *including the creation of special districts, authorities, or corporations where necessary having the power to secure the supply of waste of a project*." §6948(d)(3)(C) (emphasis added).

I agree with *amicus* NABL that these references indicate that Congress expected local governments to implement some form of flow control. Nonetheless, they neither individually nor cumulatively rise to the level of the "explicit" authorization required by our dormant Commerce Clause decisions. First, the primary focus of the references is on legal impediments imposed as a result of state—not federal—law. In addition, the reference to local authority to "secure the supply of waste," is contained in §6948(d)(3)(C), which is a delegation not to the States but to *EPA* of authority to assist local government in solving waste supply problems. EPA has stated in its implementing regulations that the "State plan should provide for substate cooperation and policies for free and unrestricted movement of solid and hazardous waste across State and local boundaries." 40 CFR §256.42(h) (1993). And while the House Report seems to contemplate that municipalities may require waste to be brought to a particular location, this stronger language is not reflected in the text of the statute. Cf. *United States* v. *Nordic Village Inc.*, 503 U. S. ___ (1992) (slip. op., at

7) (for waiver of sovereign immunity, "[i]f clarity does not exist [in the text], it cannot be supplied by a committee report"); *Dellmuth* v. *Muth*, 491 U. S. 223, 230 (1989) (same). In short, these isolated references do not satisfy our requirement of an explicit statutory authorization.

It is within Congress' power to authorize local imposition of flow control. Should Congress revisit this area, and enact legislation providing a clear indication that it intends States and localities to implement flow control, we will, of course, defer to that legislative judgment. Until then, however, Local Law 9 cannot survive constitutional scrutiny. Accordingly, I concur in the judgment of the Court.