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 SOUTER, with whom THE CHIEF JUSTICE and JUSTICE BLACKMUN join, dissenting.

The majority may invoke "well-settled principles of our Commerce Clause jurisprudence," *ante,* at 1, but it does so to strike down an ordinance unlike anything this Court has ever invalidated. Previous cases have held that the "negative" or "dormant" aspect of the Commerce Clause renders state or local legislation unconstitutional when it discriminates against out-of-state or out-of-town businesses such as those that pasteurize milk, hull shrimp, or mill lumber, and the majority relies on these cases because of what they have in common with this one: out-of-state processors are excluded from the local market (here, from the market for trash processing services). What the majority ignores, however, are the differences between our local processing cases and this one: the exclusion worked by Clarkstown's Local Law 9 bestows no benefit on a class of local private actors, but instead directly aids the government in satisfying a traditional governmental responsibility. The law does not differentiate between all local and all out-of-town providers of a service, but instead between the one entity responsible for ensuring that the job gets done and all other enterprises, regardless of their location. The ordinance thus falls outside that class of tariff or protectionist measures that the Commerce Clause has traditionally been thought to bar States from enacting against each other, and when the majority subsumes the ordinance within the class of

laws this Court has struck down as facially discriminatory (and so avails itself of our “virtually *per se* rule” against such statutes, see *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978)), the majority is in fact greatly extending the Clause's dormant reach.

There are, however, good and sufficient reasons against expanding the Commerce Clause's inherent capacity to trump exercises of state authority such as the ordinance at issue here. There is no indication in the record that any out-of-state trash processor has been harmed, or that the interstate movement or disposition of trash will be affected one whit. To the degree Local Law 9 affects the market for trash processing services, it does so only by subjecting Clarkstown residents and businesses to burdens far different from the burdens of local favoritism that dormant Commerce Clause jurisprudence seeks to root out. The town has found a way to finance a public improvement, not by transferring its cost to out-of-state economic interests, but by spreading it among the local generators of trash, an equitable result with tendencies that should not disturb the Commerce Clause and should not be disturbed by us.

Prior to the 1970's, getting rid of the trash in Clarkstown was just a matter of taking it to the local dump. But over the course of that decade, state regulators cited the town for dumping in violation of environmental laws, and in August 1989 the town entered into a consent decree with the New York State Department of Environmental Conservation, promising to close the landfill, clean up the environmental damage, and make new arrangements to dispose of the town's solid waste. Clarkstown agreed to build a "transfer station" where the town's trash would be brought for sorting out recyclable material and baling the nonrecyclable residue for loading into long-haul trucks bound for out-of-state disposal sites.

Instead of building the transfer station itself, Clarkstown contracted with a private company to build the station and run it for five years, after which the town could buy it for $1. The town based the size

of the facility on its best estimate of the amount of trash local residents would generate and undertook to deliver that amount to the transfer station each year, or to pay a substantial penalty to compensate for any shortfall. This "put or pay" contract, together with the right to charge an $81 "tipping" fee for each ton of waste collected at the transfer station, was meant to assure the company its return on investment.

Local Law 9, the ordinance at issue here, is an integral part of this financing scheme. It prohibits individual trash-generators within the town from evading payment of the $81 tipping fee by requiring that all residential, commercial, and industrial waste generated or collected within the town be delivered to the transfer station. While Clarkstown residents may dump their waste at another locally licensed recycling center, once such a private recycler culls out the recyclable materials, it must dispose of any residue the same way other Clarkstown residents do, by taking it to the town's transfer station. Local Law 9, §§3C, 3D (1990).[1] If out-of-towners wish to dispose of their waste in Clarkstown or recycle it there, they enter the town subject to the same restrictions as Clarkstown residents, in being required to use only the town-operated transfer station or a licensed recycling center. §5A.

Petitioner C & A Carbone, Inc., operated a recycling center in Clarkstown, according to a state permit authorizing it to collect waste, separate out the recyclables for sale, and dispose of the rest. In violation of Local Law 9, Carbone failed to bring this nonrecyclable residue to the town transfer station, but took it directly to out-of-state incinerators and

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[1]The ordinance has exceptions not at issue here for hazardous waste, pathological waste, and sludge, and for source-separated recyclables, which can be disposed of within or outside the town. Local Law 9, §§1, 3C (1990).

landfills, including some of the very same ones to which the Clarkstown transfer station sends its trash. Apparently, Carbone bypassed the Clarkstown facility on account of the $81 tipping fee, saving Carbone money, but costing the town thousands in lost revenue daily. In this resulting legal action, Carbone's complaint is one that any Clarkstown trash generator could have made: the town has created a monopoly on trash processing services, and residents are no longer free to provide these services for themselves or to contract for them with others at a mutually agreeable price.

We are not called upon to judge the ultimate wisdom of creating this local monopoly, but we are asked to say whether Clarkstown's monopoly violates the Commerce Clause, as long read by this Court to limit the power of state and local governments to discriminate against interstate commerce:

> "[The] `negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down, unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy Co. of Indiana* v. *Limbach*, 486 U. S. 269, 273–274 (1988) (citations omitted).

This limitation on the state and local power has been seen implicit in the Commerce Clause because, as the majority recognizes, the Framers sought to dampen regional jealousies in general and, in particular, to eliminate retaliatory tariffs, which had poisoned commercial relations under the Articles of Confederation. *Ante,* at 5. Laws that hoard for local businesses the right to serve local markets or develop local

resources work to isolate States from each other and to incite retaliation, since no State would stand by while another advanced the economic interests of its own business classes at the expense of its neighbors.

The majority argues that resolution of the issue before us is controlled by a line of cases in which we have struck down state or local laws that discriminate against out-of state or out-of-town providers of processing services. See *ante,* at 6–7. With perhaps one exception,[2] the laws invalidated in those cases were patently discriminatory, differentiating by their very terms between in-state and out-of-state (or local and nonlocal) processors. One ordinance, for example, forbad selling pasteurized milk "`unless the same shall have been pasteurized and bottled . . . within a radius of five miles from the central portion of the City of Madison . . . .'"[3] *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 350, n. 1 (1951) (quoting General Ordinances of the City of Madison §7.21

[2]The arguable exception is *Pike* v. *Bruce Church, Inc.,* 397 U. S. 137 (1970), where the Court invalidated an administrative order issued pursuant to a facially neutral statute. While the order discriminated on its face, prohibiting the interstate shipment of respondent's cantaloupes unless they were first packaged locally, the statute it sought to enforce merely required that Arizona-grown cantaloupes advertise their State of origin on each package. In Part III, I discuss the line of cases in which we have struck down statutes that, although lacking explicit geographical sorting mechanisms, are discriminatory in practical effect.

[3]The area encompassed by this provision included all of Madison except the runways of the municipal airport, plus a small amount of unincorporated land. See The Madison and Wisconsin Foundation, "Map of the City of Madison" (1951).

(1949)). The other laws expressly discriminated against commerce crossing state lines, placing these local processing cases squarely within the larger class of cases in which this Court has invalidated facially discriminatory legislation.[4]

As the majority recognizes, Local Law 9 shares two features with these local processing cases. It regulates a processing service available in interstate commerce, *i.e.*, the sorting and baling of solid waste for disposal. And it does so in a fashion that excludes out-of-town trash processors by its very terms. These parallels between Local Law 9 and the statutes previously invalidated confer initial plausibility on the majority's classification of this case with those earlier ones on processing, and they even bring this one within the most general language of some of the earlier cases, abhorring the tendency of such statutes "to impose an artificial rigidity on the economic pattern of the industry," *Toomer* v. *Witsell*, 334 U. S. 385, 404–405 (1948).

There are, however, both analytical and practical

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[4]See, *e.g.*, *Chemical Waste Management, Inc.* v. *Hunt,* 504 U. S. ___ (1992) (Alabama statute taxing hazardous waste not originating in State); *Wyoming* v. *Oklahoma*, 502 U. S. ___ (1992) (Oklahoma statute requiring power plants to burn at least 10 percent Oklahoma-mined coal); *New Energy Co. of Indiana* v. *Limbach*, 486 U. S. 269 (1988) (Ohio statute awarding tax credit for sales of ethanol only if it is produced in Ohio or in a State that awards similar tax breaks for Ohio-produced ethanol); *New England Power Co.* v. *New Hampshire*, 455 U. S. 331 (1982) (New Hampshire statute prohibiting hydroelectric power from being sold out of State without permission from the State's Public Utilities Commission); *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979) (Oklahoma law forbidding out-of-state sale of natural minnows).

differences between this and the earlier processing cases, differences the majority underestimates or overlooks but which, if given their due, should prevent this case from being decided the same way. First, the terms of Clarkstown's ordinance favor a single processor, not the class of all such businesses located in Clarkstown. Second, the one proprietor so favored is essentially an agent of the municipal government, which (unlike Carbone or other private trash processors) must ensure the removal of waste according to acceptable standards of public health. Any discrimination worked by Local Law 9 thus fails to produce the sort of entrepreneurial favoritism we have previously defined and condemned as protectionist.

The outstanding feature of the statutes reviewed in the local processing cases is their distinction between two classes of private economic actors according to location, favoring shrimp hullers within Louisiana, milk pasteurizers within five miles of the center of Madison, and so on. See *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1 (1928); *Dean Milk Co.* v. *Madison*, *supra*. Since nothing in these local processing laws prevented a proliferation of local businesses within the State or town, the out-of-town processors were not excluded as part and parcel of a general exclusion of private firms from the market, but as a result of discrimination among such firms according to geography alone. It was because of that discrimination in favor of local businesses, preferred at the expense of their out-of-town or out-of-state competitors, that the Court struck down those local processing laws[5] as classic examples of the economic

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[5]See *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U. S. 82, 92 (1984) (quoting *South Carolina State Highway Dept.* v. *Barnwell Brothers, Inc.*, 303 U. S. 177,

protectionism the dormant Commerce Clause jurisprudence aims to prevent. In the words of one commentator summarizing our case law, it is laws "adopted for the purpose of improving the competitive position of local economic actors, just because they are local, vis-à-vis their foreign competitors" that offend the Commerce Clause. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091, 1138 (1986). The Commerce Clause does not otherwise protect access to local markets. *Id.*, at 1128.[6]

185, n. 2 (1938)) (danger lies in regulation whose "`burden falls principally upon those without the state'"); *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 354 (1951) (in "erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce. This it cannot do . . . "); *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 13 (1928) (statute unconstitutional because it "favor[s] the canning of the meat and the manufacture of bran in Louisiana" instead of Biloxi); *Minnesota* v. *Barber*, 136 U. S. 313, 323 (1890) (statute infirm because its necessary result is "discrimination against the products and business of other States in favor of the products and business of Minnesota"). See also *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dept. of Natural Resources*, 504 U. S. ___, ___ (1992) (slip op., at 7) (statute infirm because it protects "local waste producers . . . from competition from out-of-state waste producers who seek to use local waste disposal areas"); *Philadelphia* v. *New Jersey*, 437 U. S. 617, 626–627 (1978) (New Jersey "may not . . . discriminat[e] against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently").

[6]See also Smith, State Discriminations Against Interstate Commerce, 74 Cal. L. Rev. 1203, 1204 (1986) ("The nub of

The majority recognizes, but discounts, this difference between laws favoring all local actors and this law favoring a single municipal one. According to the majority, "this difference just makes the protectionist effect of the ordinance more acute" because outside investors cannot even build competing facilities within Clarkstown. *Ante,* at 8. But of course Clarkstown investors face the same prohibition, which is to say that Local Law 9's exclusion of outside capital is part of a broader exclusion of private capital, not a discrimination against out-of-state investors as such.[7] Cf. *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27 (1980) (striking down statute prohibiting businesses owned by out-of-state banks, bank holding companies, or trust companies from providing investment advisory services). Thus, while these differences may underscore the ordinance's anticompetitive effect, they substantially mitigate any protectionist effect, for subjecting out-of-town investors and facilities to the same constraints as local ones is not economic protectionism. See *New Energy Co. of Indiana* v. *Limbach*, 486 U. S., at 273–274.[8]

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the matter is that discriminatory regulations are almost invariably invalid, whereas nondiscriminatory regulations are much more likely to survive"; "[a] regulation is discriminatory if it imposes greater economic burdens on those outside the state, to the economic advantage of those within"); L. Tribe, American Constitutional Law 417 (2d ed. 1988) ("[T]he negative implications of the commerce clause derive principally from a *political* theory of union, not from an *economic* theory of free trade. The function of the clause is to ensure national solidarity, not economic efficiency").

[7]The record does not indicate whether local or out-of-state investors own the private firm that built Clarkstown's transfer station for the municipality.

[8]In a potentially related argument, the majority says our

Nor is the monopolist created by Local Law 9 just another private company successfully enlisting local government to protect the jobs and profits of local citizens. While our previous local processing cases have barred discrimination in markets served by private companies, Clarkstown's transfer station is essentially a municipal facility, built and operated under a contract with the municipality and soon to

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case law supports the proposition that an "ordinance is no less discriminatory because in-state or in-town processors are also covered by [its] prohibition." *Ante,* at 6. If this statement is understood as doing away with the distinction between laws that discriminate based on geography and those that do not, authority for it is lacking. The majority supports its statement by citing from a footnote in *Dean Milk*, that "[i]t is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce," 340 U. S., at 354, n. 4, but that observation merely recognized that our dormant Commerce Clause jurisprudence extends to municipalities as well as to States and invalidates geographical restrictions phrased in miles as well as in terms of political boundaries. This reading is confirmed by the fact that the *Dean Milk* Court's only explanation for its statement was to cite a case striking down a statute forbidding the selling of "`any fresh meats . . . slaughtered one hundred miles or over from the place at which it is offered for sale, until and except it has been inspected'" at a cost to its owner of a penny per pound. *Brimmer* v. *Rebman*, 138 U. S. 78, 80 (1891), (quoting Acts of Va. 1889–1890, p. 63, ch. 80). That the majority here cites also to *Fort Gratiot Landfill* v. *Michigan Dept. of Natural Resources, supra,* may indicate that it reads *Dean Milk* the same way I do, but then it cannot use the case to stand for the more radical proposition I quoted above.

revert entirely to municipal ownership.[9] This, of course, is no mere coincidence, since the facility performs a municipal function that tradition as well as state and federal law recognize as the domain of local government. Throughout 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,[10] and today 78 percent of landfills receiving

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[9]At the end of a 5-year term, during which the private contractor receives profits sufficient to induce it to provide the plant in the first place, the town will presumably step into the contractor's shoes for the nominal dollar. Such contracts, enlisting a private company to build, operate, and then transfer to local government an expensive public improvement, enable municipalities to acquire public facilities without resorting to municipal funds or credit.

[10]For example, in 1764 the South Carolina Legislature established a street commission for Charleston with the power "to remove all filth and rubbish, to such proper place or places, in or near the said town, as they . . . shall allot . . . ." Act of Aug. 10, 1764, ¶1. In New Amsterdam a century earlier, "[t]he burgomasters and *schepens* ordained that all such refuse be brought to dumping-grounds near the City Hall and the gallows or to other designated places." M. Goodwin, Dutch and English on the Hudson 105 (1977 ed.).

Indeed, some communities have employed flow control ordinances is pursuit of these goals, ordinances this Court has twice upheld against constitutional attack. See *California Reduction Company* 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). It is not mere

municipal solid waste are owned by local governments. See U. S. Environmental Protection Agency, Resource Conservation and Recovery Act, Subtitle D Study: Phase 1 Report, table 4–2, p. 4–7 (Oct. 1986). The National Government provides "technical and financial assistance to States or regional authorities for comprehensive planning" with regard to the disposal of solid waste, 42 U. S. C. §6941, and the State of New York authorizes local governments to prepare such management plans for the proper disposal of all solid waste generated within their jurisdictions, N. Y. Envir. Conserv. Law §27–0107 (McKinney Supp. 1994). These general provisions underlie Clarkstown's more specific obligation (under its consent decree with the New York State Department of Environmental Conservation) to establish a transfer station in place of the old town dump, and it is to finance this transfer station that Local Law 9 was passed.

The majority ignores this distinction between public and private enterprise, equating Local Law 9's "hoard[ing]" of solid waste for the municipal transfer station with the design and effect of ordinances that restrict access to local markets for the benefit of local private firms. *Ante,* at 7. But private businesses, whether local or out of State, first serve the private interests of their owners, and there is therefore only rarely a reason other than economic protectionism for favoring local businesses over their out-of-town competitors. The local government itself occupies a very different market position, however, being the one entity that enters the market to serve the public

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inattention that has left these fine old cases free from subsequent aspersion, for they illustrate that even at the height of the *Lochner* era the Court recognized that for municipalities struggling to abate their garbage problems, the Constitution did not require unimpeded private enterprise.

interest of local citizens quite apart from private interest in private gain. Reasons other than economic protectionism are accordingly more likely to explain the design and effect of an ordinance that favors a public facility. The facility as constructed might, for example, be one that private economic actors, left to their own devices, would not have built, but which the locality needs in order to abate (or guarantee against creating) a public nuisance. There is some evidence in this case that this is so, as the New York State Department of Environmental Conservation would have had no reason to insist that Clarkstown build its own transfer station if the private market had furnished adequate processing capacity to meet Clarkstown's needs. An ordinance that favors a municipal facility, in any event, is one that favors the public sector, and if "we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position," *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 556 (1985), then surely this Court's dormant Commerce Clause jurisprudence must itself see that favoring state-sponsored facilities differs from discriminating among private economic actors, and is much less likely to be protectionist.

Having established that Local Law 9 does not serve the competitive class identified in previous local processing cases and that Clarkstown differs correspondingly from other local processors, we must ask whether these differences justify a standard of dormant Commerce Clause review that differs from the virtually fatal scrutiny imposed in those earlier cases. I believe they do. The justification for subjecting the local processing laws and the broader class of clearly discriminatory commercial regulation

to near-fatal scrutiny is the virtual certainty that such laws, at least in their discriminatory aspect, serve no legitimate, nonprotectionist purpose. See *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978) ("[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected").[11] Whether we find the "the evil of protectionism," *id.*, at 626, in the clear import of specific statutory provisions or in the legislature's ultimate purpose, the discriminatory scheme is almost always designed either to favor local industry, as such, or to achieve some other goal while exporting a disproportionate share of the burden of attaining it, which is merely a subtler form of local favoritism. *Id.*, at 626–628.

On the other hand, in a market served by a municipal facility, a law that favors that single facility over all others is a law that favors the public sector over all private-sector processors, whether local or out of State. Because the favor does not go to local private competitors of out-of-state firms, out-of-state governments will at the least lack a motive to favor their own firms in order to equalize the positions of private competitors. While a preference in favor of the government may incidentally function as local favoritism as well, a more particularized enquiry is necessary before a court can say whether such a law does in fact smack too strongly of economic protectionism. If Local Law 9 is to be struck down, in other words, it must be under that test most readily identified with *Pike* v. *Bruce Church, Inc.,* 397 U. S.

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[11]For the rare occasion when discriminatory laws are the best vehicle for furthering a legitimate state interest, *Maine* v. *Taylor*, 477 U. S. 131 (1986), provides an exception, but we need not address that exception here because this ordinance is not subject to the presumption of unconstitutionality appropriate for protectionist legislation.

137 (1970).

We have said that when legislation that does not facially discriminate "comes into conflict with the Commerce Clause's overriding requirement of a national `common market,' we are confronted with the task of effecting an accommodation of the competing national and local interests." *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333, 350 (1977). Although this analysis of competing interests has sometimes been called a "balancing test," it is not so much an open-ended weighing of an ordinance's pros and cons, as an assessment of whether an ordinance discriminates in practice or otherwise unjustifiably operates to isolate a State's economy from the national common market. If a statute or local ordinance serves a legitimate local interest and does not patently discriminate, "it will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc., supra,* at 142. The analysis is similar to, but softer around the edges than,[12] the test we employ in cases of overt discrimination. "[T]he question be-

[12]Where discrimination is not patent on the face of a statute, the party challenging its constitutionality has a more difficult task, but appropriately so because the danger posed by such laws is generally smaller. Discrimination that is not patent or purposeful but "in effect may be substantially less likely to provoke retaliation by other states . . . . In the words of Justice Holmes, `even a dog distinguishes between being stumbled over and being kicked.'" Smith, 74 Cal. L. Rev., at 1251 (quoting O. W. Holmes, The Common Law 3 (1881)). See also Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091, 1133–1134 (1986).

comes one of degree," and its answer depends on the nature of the burden on interstate commerce, the nature of the local interest, and the availability of alternative methods for advancing the local interest without hindering the national one. *Id*., at 142, 145.

The primary burden Carbone attributes to flow control ordinances such as Local Law 9 is that they "prevent trash from being sent to the most cost-effective disposal facilities, and insulate the designated facility from all price competition." Brief for Petitioner 32. In this case, customers must pay $11 per ton more for dumping trash at the Clarkstown transfer station than they would pay at Carbone's facility, although this dollar figure presumably overstates the burden by disguising some differences between the two: according to its state permit, 90 percent of Carbone's waste stream comprises recyclable cardboard, while the Clarkstown facility takes all manner of less valuable waste, which it treats with state-of-the-art environmental technology not employed at Carbone's more rudimentary plant.

Fortunately, the dollar cost of the burden need not be pinpointed, its nature being more significant than its economic extent. When we look to its nature, it should be clear that the monopolistic character of Local Law 9's effects is not itself suspicious for purposes of the Commerce Clause. Although the right to compete is a hallmark of the American economy and local monopolies are subject to challenge under the century-old Sherman Act,[13] the

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[13]See 15 U. S. C. §§1 and 2. Indeed, other flow control ordinances have been challenged under the Sherman Act, although without success where municipal defendants have availed themselves of the state action exception to the antitrust laws. See *Hybud Equipment Corp.* v. *Akron*, 742 F. 2d 949 (CA6 1984); *Central Iowa Refuse Systems, Inc.* v. *Des Moines Metropolitan Solid Waste Agency*, 715 F.

bar to monopolies (or, rather, the authority to dismember and penalize them) arises from a statutory, not a constitutional, mandate. No more than the Fourteenth Amendment, the Commerce Clause "does not enact Mr. Herbert Spencer's Social Statics . . . [or] embody a particular economic theory, whether of paternalism . . . or of *laissez faire*." *Lochner* v. *New York*, 198 U. S. 45, 75 (1905) (Holmes, J., dissenting). The dormant Commerce Clause does not "protec[t] the particular structure or methods of operation in a[ny] . . . market." *Exxon Corp.* v. *Governor of Md.*, 437 U. S. 117, 127 (1978). The only right to compete that it protects is the right to compete on terms independent of one's location.

While the monopolistic nature of the burden may be disregarded, any geographically discriminatory elements must be assessed with care. We have already observed that there is no geographically based selection among private firms, and it is clear from the face of the ordinance that nothing hinges on the source of trash that enters Clarkstown or upon the destination of the processed waste that leaves the transfer station. There is, to be sure, an incidental local economic benefit, for the need to process Clarkstown's trash in Clarkstown will create local jobs. But this local boon is mitigated by another feature of the ordinance, in that it finances whatever benefits it confers on the town from the pockets of the very citizens who passed it into law. On the reasonable assumption that no one can avoid producing some trash, every resident of Clarkstown must bear a portion of the burden Local Law 9 imposes to support the municipal monopoly, an uncharacteristic feature of statutes claimed to violate the Commerce

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2d 419 (CA8 1983). That the State of New York's Holland-Gromack Law, 1991 N. Y. Laws, ch. 569 (McKinney), authorizes Clarkstown's flow control ordinance may explain why no Sherman Act claim was made here.

Clause.

By way of contrast, most of the local processing statutes we have previously invalidated imposed requirements that made local goods more expensive as they headed into the national market, so that out-of-state economies bore the bulk of any burden. Requiring that Alaskan timber be milled in that State prior to export would add the value of the milling service to the Alaskan economy at the expense of some other State, but would not burden the Alaskans who adopted such a law. Cf. *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U. S. 82, 92 (1984). Similarly, South Carolinians would retain the financial benefit of a local processing requirement for shrimp without paying anything more themselves. Cf. *Toomer* v. *Witsell*, 334 U. S., at 403.[14] And in *Philadelphia* v. *New Jersey*, 437 U. S., at 628, the State attempted to export the burden of conserving its scarce landfill space by barring the importation of out-of-state waste. See also *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. 573, 580 (1986) (price reduction for in-state consumers of alcoholic beverages procured at the expense of out-of-state consumers). Courts step in through the dormant Commerce Clause to prevent such exports because legislative action imposing a burden "`principally upon those without the state . . . is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.'" *South-Central Timber, supra,* at 92 (quoting *South Carolina State Highway Dept.* v. *Barnwell Brothers, Inc.*, 303

[14] I recognize that the economics differ if a State does not enjoy a significant price advantage over its neighbors and thus cannot pass along the added costs associated with its local processing requirement, but such States are unlikely to adopt local processing requirements for precisely that reason.

U. S. 177, 185, n. 2 (1938)); see also *Southern Pacific Co.* v. *Arizona ex rel. Sullivan,* 325 U. S. 761, 767–768, n. 2 (1945). Here, in contrast, every voter in Clarkstown pays to fund the benefits of flow control, however high the tipping fee is set. Since, indeed, the mandate to use the town facility will only make a difference when the tipping fee raises the cost of using the facility above what the market would otherwise set, the Clarkstown voters are funding their benefit by assessing themselves and paying an economic penalty. Any whiff of economic protectionism is far from obvious.[15]

An examination of the record confirms skepticism that enforcement of the ordinance portends a Commerce Clause violation, for it shows that the burden falls entirely on Clarkstown residents. If the record contained evidence that Clarkstown's ordinance burdened out-of-town providers of garbage sorting and baling services, rather than just the local business that is a party in this case, that fact might be significant. But petitioner has presented no evidence that there are transfer stations outside Clarkstown capable of handling the town's business, and the record is devoid of evidence that such enterprises have lost business as a result of this ordinance. Cf. *Pike* v. *Bruce Church, Inc.*, 397 U. S., at 145 ("The nature of th[e] burden is, constitutionally, more significant than its extent" and the danger to be avoided is that of laws that hoard business for local residents). Similarly, if the record supported an inference that above-market pricing at the Clarkstown

[15]This argument does not alone foreclose the possibility of economic protectionism in this case, as the ordinance could burden, in addition to the residents of Clarkstown, out-of-town trash processors who would have sought Clarkstown's business in the absence of flow control. But as we will see, the absence of evidence of injury to such processors eliminates that argument here.

transfer station caused less trash to flow to out-of-state landfills and incinerators, that, too, might have constitutional significance. There is, however, no evidence of any disruption in the flow of trash from curbsides in Clarkstown to landfills in Florida and Ohio.[16] Here we can confidently say that the only business lost as a result of this ordinance is business lost in Clarkstown, as customers who had used Carbone's

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[16]In this context, note that the conflict JUSTICE O'CONNOR hypothesizes between multiple flow control laws is not one that occurs in this case. If Carbone was processing trash from New Jersey, it was making no attempt to return the nonrecycled residue there. And theoretically, Carbone could have complied with both flow control ordinances, as Clarkstown's law required local processing, while New Jersey's required only that any postprocessing residue be returned to the State. But more fundamentally, even if a nondiscriminatory ordinance conflicts with the law of some other jurisdiction, that fact would not, in itself, lead to its invalidation. In the cases JUSTICE O'CONNOR cites, the statutes at issue served no legitimate state interest that weighed against the burden on interstate commerce their conflicts created. See *Bibb* v. *Navaho Freight Lines, Inc.,* 359 U. S. 520, 525 (1959) (mudguards Illinois required on trucks possess no safety advantage but create new hazards); *Southern Pacific Co.* v. *Arizona ex rel. Sullivan,* 325 U. S. 761, 779 (1945) (Arizona statute limiting length of trains "affords at most slight and dubious advantage, if any" with respect to safety). Here, in contrast, we will see that the municipality's interests are substantial and that the alternative means for advancing them are less desirable and potentially as disruptive of interstate commerce. Finally, in any conflict between flow control that reaches only waste within its jurisdiction and flow control that reaches beyond (requiring waste originating locally to be returned after processing elsewhere), it may be the latter that should give way for regulating conduct occuring wholly out of State. See *Brown-Forman Distillers*

facility drift away in response to any higher fees Carbone may have to institute to afford its share of city services; but business lost in Clarkstown as a result of a Clarkstown ordinance is not a burden that offends the Constitution.

This skepticism that protectionism is afoot here is confirmed again when we examine the governmental interests apparently served by the local law. As mentioned already, the State and its municipalities need prompt, sanitary trash processing, which is imperative whether or not the private market sees fit to serve this need at an affordable price and to continue doing so dependably into the future. The state and local governments also have a substantial interest in the flow-control feature to minimize the risk of financing this service, for while there may be an element of exaggeration in the statement that "[r]esource recovery facilities cannot be built unless they are guaranteed a supply of discarded material," H. R. Rep. No. 94–1491, p. 10 (1976), there is no question that a "put or pay" contract of the type Clarkstown signed will be a significant inducement to accept municipal responsibility to guarantee efficiency and sanitation in trash processing. Waste disposal with minimal environmental damage requires serious capital investment, *id.*, at 34, and there are limits on any municipality's ability to incur debt or to finance facilities out of tax revenues. Protection of the public fisc is a legitimate local benefit directly advanced by the ordinance and quite unlike the generalized advantage to local businesses that we have condemned as protectionist in the past. See Regan, 84 Mich. L. Rev. at 1120 ("raising revenue for the state treasury is a federally cognizable benefit"; protectionism is not); cf. *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dept. of Natural Re-*

Corp. v. *New York State Liquor Authority*, 476 U. S. 573, 580–582 (1986).

sources, 504 U. S. ___, ___ (1992) (slip op., at 3) (law protects private, not publicly owned, waste disposal capacity for domestic use); *Philadelphia* v. *New Jersey,* 476 U. S., at 627, n. 6 (expressing no opinion about State's power to favor its own residents in granting access to state-owned resources).[17]

Moreover, flow control offers an additional benefit that could not be gained by financing through a subsidy derived from general tax revenues, in spreading the cost of the facility among all Clarkstown residents who generate trash. The ordinance does, of course, protect taxpayers, including those who already support the transfer station by patronizing it, from ending up with the tab for making provision for large-volume trash producers like Carbone, who would rely on the municipal facility when that was advantageous but opt out whenever the transfer station's price rose above the market price. In 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. And in any event it is far from clear that the alternative to flow control (*i.e.*, subsidies from general tax revenues or municipal bonds) would be less disruptive of interstate commerce than flow control, since a subsidized competitor can effectively squelch competition by underbidding it.

There is, in short, no evidence that Local Law 9 causes discrimination against out-of-town processors,

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[17]The Court did strike down California's depression-era ban on the “importation” of indigent laborers despite the State's protestations that the statute protected the public fisc from the strain of additional outlays for poor relief, but the Court stressed the statute's direct effect on immigrants instead of relying on any indirect effects on the public purse. See *Edwards* v. *California*, 314 U. S. 160, 174 (1941).

because there is no evidence in the record that such processors have lost business as a result of it. Instead, we know only that the ordinance causes the local residents who adopted it to pay more for trash disposal services. But local burdens are not the focus of the dormant Commerce Clause, and this imposition is in any event readily justified by the ordinance's legitimate benefits in reliable and sanitary trash processing.

* * *

The Commerce Clause was not passed to save the citizens of Clarkstown from themselves. It should not be wielded to prevent them from attacking their local garbage problems with an ordinance that does not discriminate between local and out-of-town participants in the private market for trash disposal services and that is not protectionist in its purpose or effect. Local Law 9 conveys a privilege on the municipal government alone, the only market participant that bears responsibility for ensuring that adequate trash processing services continue to be available to Clarkstown residents. Because the Court's decision today is neither compelled by our local processing cases nor consistent with this Court's reason for inferring a dormant or negative aspect to the Commerce Clause in the first place, I respectfully dissent.