ARTICLE I, SECTION 8 — COMMERCE CLAUSE — TOWN'S FLOW CONTROL ORDINANCE DISCRIMINATES AGAINST INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE — *C & A Carbone, Inc. v. Town of Clarkstown*, 62 U.S.L.W. 4315 (U.S. May 16, 1994).

The Supreme Court of the United States recently held that a local ordinance, requiring that all solid waste within a municipality be processed at a particular transfer station, regulates interstate commerce and, as such, violates the Commerce Clause. *C & A Carbone, Inc. v. Town of Clarkstown*, 62 U.S.L.W. 4315 (U.S. May 16, 1994). In so holding, the Court reasoned that a regulation of interstate commerce is discriminatory when it deprives out-of-state as well as in-state businesses the opportunity to compete in a local market, favoring a single proprietor. *Id.* at 4317. The Court concluded that discriminating against interstate commerce is permissible only in a narrow group of instances where the municipality can prove that it cannot advance a legitimate local interest by less restrictive means. *Id.* at 4318 (citing *Maine v. Taylor*, 477 U.S. 131 (1986)).

In 1989, respondents, town of Clarkstown, New York, allowed a local, private contractor to construct a solid waste transfer station that would receive and ship solid waste. *Id.* at 4316. The contractor agreed to operate the facility for five years, and at the close of five years, the town agreed to purchase the station for one dollar. *Id.* Additionally, the town agreed to supply the contractor a minimum waste flow of 120,000 tons of waste per year, on which the contractor could charge a tipping fee. *Id.*

To satisfy the yearly tonnage guarantee, the town passed a flow control ordinance, providing that all nonhazardous solid waste located within the town be deposited at the new facility. *Id.* This waste included waste generated within the town as well as waste brought in from outside sources. *Id.* (citing Clarkstown, New York, Local Law No. 9, § 3.C & § 5.A (1990) ("Local Law 9")). While Local Law 9 allowed recycling centers within the town to receive solid waste, the ordinance required that any nonrecyclable residue from the waste be brought to the transfer station. *Id.* The recycling plant of the petitioner, C & A Carbone, Inc., was placed under surveillance, and in March 1991, the Clarkstown police discovered that one of Carbone's trucks was transporting waste from its plant to various out-of-state sites in violation of Local Law 9. *Id.* at 4317.

Respondents sought injunctive relief in the New York Supreme Court to compel Carbone to send all nonrecyclable residue to the transfer facility. *Id.* Petitioners subsequently sued in the United States District Court for the Southern District of New York, seeking to enjoin Local Law 9. *Id.* The district court granted Carbone's injunction, noting a sufficient likelihood that Local Law 9 violated the Commerce Clause. *Id.* Four days later, the New York Supreme Court found that Local Law 9 was constitutional and,

accordingly, granted summary judgment in favor of the town. *Id.* As a result of the trial court's decision, the district court dissolved petitioners' previous injunction. *Id.*

The New York Supreme Court's decision was affirmed by the appellate division, which held that Local Law 9 did not discriminate against interstate commerce. *Id.* The appellate division reasoned that Local Law 9 was applied in the same manner to all solid waste within the town, regardless of the waste's origin. *Id.*

Petitioners then filed a motion for leave to appeal in the New York Court of Appeals, which subsequently was denied. *Id.* The Supreme Court of the United States granted *certiorari* to consider whether Local Law 9 regulated interstate commerce in violation of the Commerce Clause. *Id.*

Writing for the majority, Justice Kennedy first addressed whether Local Law 9 regulated interstate commerce. *Id.* In considering the economic effects of Local Law 9 upon interstate commerce, the Court looked beyond the immediate effects of directing all nonrecyclable waste to the transfer station. *Id.* The Court rejected the town's contention that the ordinance only extended to waste within the city limits. *Id.* The majority reasoned that the requirement of transporting all nonrecyclable waste to the transfer facility at an additional price would drive up costs for out-of-state businesses seeking to dispose of their waste. *Id.* Additionally, the Court asserted that preventing all but a single proprietor from completing the initial processing step deprived out-of-state firms access to the local market. *Id.* Accordingly, the majority found that the economic effects of Local Law 9 impeded the free flow of interstate commerce and, thus, violated the Commerce Clause. *Id.* (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937)).

Furthermore, the Court considered whether Local Law 9 was valid despite its impact upon interstate commerce. *Id.* at 4317-18. In this regard, the majority determined whether Local Law 9 discriminated against interstate commerce. *Id.* at 4317 (citing *Philadelphia v. New Jersey*, 437 U.S. 617 (1978)). While recognizing the town's contention that Local Law 9 did not create a barrier to the free flow of solid waste, the Court indicated that the article of commerce was a service, handling and disposing of waste, and not the waste itself. *Id.*

Noting that the transfer station was given the sole authority to process waste in Clarkstown, the majority found that Local Law 9 was discriminatory, even though the prohibition covered in-state as well as out-of-state processors. *Id.* (citing *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951)). The Court distinguished the case at bar from its previous Commerce Clause cases, observing that Local Law 9 favored a single operator, while regulations the Court previously addressed favored a group of in-state businesses. *Id.* at 4318 (citations omitted). The majority, however, found that this difference actually expanded the protectionist effect of Local Law 9 because the

ordinance eliminated all competition in the industry, leaving no possibility for outside investment. *Id.*

The Court next noted that this type of discrimination against interstate commerce is permissible only in a narrow group of cases where the municipality can prove that it lacks other means of advancing a legitimate local interest. *Id.* (citing *Maine v. Taylor*, 477 U.S. 131 (1986)). The majority found that Local Law 9 was not within this narrow class of cases. *Id.* Rejecting that flow control was a necessary safety measure for handling and treating solid waste, the Court favored nondiscriminatory alternatives, such as safety regulations. *Id.* Additionally, the majority rejected the petitioners' contention that flow control was a valid means of routing solid waste outside the local jurisdiction, explaining that it was an unjustified extension of the town's police power. *Id.* (citing *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935)).

Finally, the Court acknowledged that the "protectionist" measure served a legitimate state interest by ensuring that the town-sponsored facility was profitable. *Id.* Nevertheless, the Court found that the financing measure, by itself, was not a valid justification for discriminating against interstate commerce. *Id.* Similar to its previous reasoning, the majority explained that the financing agreement, which Clarkstown claimed was necessary to ensure the facility's long-term survival, was not the only means by which the town could generate revenue. *Id.* The Court explained that the town could generate revenue through municipal bonds and general taxes rather than through discriminatory regulation. *Id.* (citing *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988)). The Court concluded that although Local Law 9 did not regulate interstate commerce on its face, the town ordinance did discriminate "by its practical effect and design." *Id.* Accordingly, the Court struck down Local Law 9 as a regulation of interstate commerce which, through its discriminatory effect, violated the "negative" or "dormant" aspect of the Commerce Clause. *Id.* at 4316.

Justice O'Connor concurred in the judgment, but wrote separately, contending that the ordinance was unconstitutional due to its excessive burden upon interstate commerce and not its discriminatory effect. *Id.* at 4320 (O'Connor, J., concurring). The Justice distinguished Local Law 9 from earlier cases involving discrimination against interstate commerce. *Id.* The Justice further suggested that the flow control ordinance did not discriminate on the basis of geographic origin nor did the ordinance favor the local business group over out-of-town or out-of-state economic interests. *Id.* at 4321 (O'Connor, J., concurring) (citations omitted). The Justice explained that Local Law 9 evenhandedly discriminated against all potential interests by treating in-town processors, such as Carbone, and non-local processors equally. *Id.*

Although Local Law 9 did not discriminate against interstate commerce, Justice O'Connor noted, the law nonetheless could be found impermissible if its burden upon interstate trade outweighed any local benefit conferred. *Id.* at 4321-22 (O'Connor, J., concurring) (citing *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Justice O'Connor agreed with the majority's contention that the town's purpose, to generate revenue, could be achieved through less burdensome means. *Id.* at 4322 (O'Connor, J., concurring). Further, the Justice noted that Local Law 9 could create conflicts with flow control ordinances of other states. *Id.* (citing *Wyoming v. Oklahoma*, 502 U.S. 437 (1992)). As a result, the Justice found the burden imposed upon interstate commerce by Local Law 9 was excessive as compared to the town's interest in financing the transfer station. *Id.*

Next, Justice O'Connor considered whether Local Law 9 was authorized by Congress. *Id.* The Justice stated that Congress must be "unmistakably clear" in its approval of a regulation which normally would violate the Commerce Clause before the Court will infer such an approval. *Id.* (quoting *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984) (plurality opinion)). The Justice opined that while Congress may have indicated in isolated references that it expected local governments to institute some type of flow control, the ordinance did not rise to the unmistakably clear standard articulated in *South Central Timber*. *Id.* at 4322-23 (O'Connor, J., concurring).

Justice Souter, joined by Chief Justice Rehnquist and Justice Blackmun, dissented. *Id.* at 4323 (Souter, J., dissenting). Asserting that Local Law 9 did not violate the Commerce Clause, the dissent found that no harm resulted to out-of-state businesses and no effect was realized on the interstate movement of trash. *Id.*

First, Justice Souter criticized the majority for failing to contrast Local Law 9, which favors a single processor, with regulations in earlier local processing cases such as *Dean Milk*, which benefitted a group of local private actors. *Id.* at 4323-24 (Souter, J., dissenting). In so finding, the dissent reasoned that most of the regulations in these earlier cases discriminated against out-of-state interests. *Id.* at 4324 (Souter, J., dissenting). Considering that Clarkstown, as an investor, was subjected to the same prohibition, the Justice viewed the exclusion of outside capital as part of a broader exclusion of private capital rather than discrimination. *Id.* at 4325 (Souter, J., dissenting) (citing *Lewis v. BT Investment Managers, Inc.*, 477 U.S. 27 (1980)). Justice Souter also opined that Local Law 9 did not produce the same type of protectionist effect that would normally be subject to review under a Commerce Clause analysis. *Id.* (citing *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74 (1988)).

Finding further fault with the majority, the Justice highlighted the majority's failure to distinguish public enterprises, such as the transfer facility, from private businesses. *Id.* at 4326 (Souter, J., dissenting). In explaining this contrast, Justice Souter added that while private businesses primarily seek to further the interests of their proprietors, local governments seek to serve the public interest of local citizens. *Id.* Consequently, the Justice proffered that economic protectionism is more likely to be prevalent where a private interest is involved than where a public facility, such as the transfer station, is concerned. *Id.*

Accordingly, the dissent concluded that the effects of Local Law 9 justified a lower standard of review than the standard set forth in *Pike*. *Id.* In so concluding, Justice Souter first reasoned that Local Law 9 did not raise the cost of servicing the waste once the service entered the national market. *Id.* at 4327. Additionally, the Justice noted that the transfer station was partially financed by the Clarkstown taxpayers, who were also required by Local Law 9 to pay for all trash which they generated. *Id.* at 4327-28 (Souter, J., dissenting). While conceding that Carbone's facility lost profits in Clarkstown due to its higher fees, the Justice noted that this lost business, resulting from the ordinance, could not be considered a burden which violated the Commerce Clause. *Id.* at 4328-29 (Souter, J., dissenting).

Analysis

Carbone suggests the Supreme Court's trend toward expanding the reach of the "negative" or "dormant" aspect of the Commerce Clause. By its decision, the majority demonstrated an increasingly diminished tolerance for state action that interferes with interstate commerce. The Court took this opportunity to extend the rationale it had applied in previous decisions, which concerned legislation favoring a group of businesses, rather than a single operator.

While interpreting precedent to find that Local Law 9 discriminated against out-of-town and out-of-state businesses, the majority concluded that this difference added to the "protectionist effect" of the ordinance. *Id.* at 4318. Perhaps such a consequence would be conceivable if the quantity of businesses hindered as a result of Local Law 9 was more significant. Most importantly, the Court's analysis represented the first Commerce Clause violation where only one business interest was benefitted.

While arriving at the same result as the majority, Justice O'Connor chose to apply the "excessive burden" test passed over by the majority. *Id.* at 4321-22 (O'Connor, J., dissenting). Justice O'Connor's approach seems more appropriate than the majority's. The impediment that Local Law 9 placed on the free flow of interstate commerce did not truly reach the point of discrimination. Unlike the discrimination which occurred in earlier commerce

clause cases, no particular geographic region benefitted more than another. No true discrimination took place as Local Law 9 applied evenhandedly to all groups other than the single operator of the facility.

Writing for the dissent, Justice Souter demonstrated his view of the transfer station by focusing on the differences between the circumstances surrounding prior violations of the Commerce Clause and those concerning Local Law 9. The dissenting Justice demonstrated that the facility represented a valid public enterprise which afforded utility to the public by providing for safe waste disposal. *Id.* at 4326 (Souter, J., dissenting). The dissenting Justice, however, failed to reconcile that out-of-town and out-of-state interests would likely not receive such a benefit and could only be burdened by the provisions of Local Law 9.

In future cases where a single operator is favored, the Court should follow Justice O'Connor's reasoning and apply the "excessive burden" test rather than find the regulation discriminatory. While the Court, in the interest of justice, has previously found it necessary to manipulate precedent and create new law, the facts in *Carbone* do not call for such maneuvers. The majority has unnecessarily muddled Commerce Clause jurisprudence and initiated an alarming trend of regulatory expansion through the use of the Commerce Clause. By patently prohibiting states and localities from organizing their own facilities to meet local needs without utilizing the "excessive burden" analysis, the Court has precluded a wider spectrum of state action. In choosing to ignore the well-established precedent set forth in *Pike* and *Philadelphia*, the majority has created a slippery slope for future Commerce Clause analysis.

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